

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT 379/2024

In the matter between:

**SOUTH AFRICAN RIDING FOR THE DISABLED ASSOCIATION** Applicant

and

**THE REGIONAL LAND CLAIMS COMMISSION:  
WESTERN CAPE** First Respondent

**MAGHERDIEN SADIEN N.O.**  
(on behalf of the Imam Dout Sadien Family Trust  
(IT 746/2014)) Second Respondent

**THE ABDURAGHMAAN SADIEN FAMILY TRUST**  
(IT 20909/2014) Third Respondent

**MOHAMED ALLIE EBRAHIM N.O.**  
(on behalf of the Bapa Sadien Family Trust  
(IT 202039/2014)) Fourth Respondent

**MAGHERDIEN SADIEN N.O.**  
(on behalf of the Boeta Toyer Sadien Family Trust  
(IT 020531/2014)) Fifth Respondent

**THE BOETA OMAR FAMILY TRUST**  
(IT 201155/2014) Sixth Respondent

**SEDICK SADIEN** Seventh Respondent

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**NOTICE OF OPPOSITION IN TERMS OF RULE 19(4)(a)**

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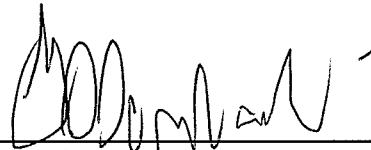
**BE PLEASED TO TAKE NOTICE THAT** the first respondent hereby gives notice of its intention to oppose SARDA's application for leave to appeal.

BE PLEASED TO TAKE NOTICE FURTHER THAT the affidavit of **MS TANYA LOMBARD**, attached hereto, will be used in support thereof.

DATED AT CAPE TOWN ON THIS THE <sup>4<sup>th</sup></sup> DAY OF FEBRUARY 2025.

**STATE ATTORNEY, CAPE TOWN**

Per:



**Ms Tanya Lombard**  
**Attorneys for first respondent**

Fourth Floor  
Liberty Life Centre  
22 Long Street  
CAPE TOWN  
Tel: (021) 441 9200  
Email: [TLombard@justice.gov.za](mailto:TLombard@justice.gov.za)

**c/o STATE ATTORNEY, JOHANNESBURG**

North State Building  
85 Albertina Sisulu Road  
Kensington  
JOHANNESBURG  
Tel: (011) 330 7600

**TO: THE REGISTRAR**  
Constitutional Court  
Constitutional Hill  
RANDBURG  
Tel: (011) 359 7400  
Email: [generaloffice@concourt.co.za](mailto:generaloffice@concourt.co.za)

**AND TO: MICHAEL WAGENER**  
**Attorneys for applicant**  
Pepper Street Chambers  
10 Pepper Street  
CAPE TOWN  
Att: Mr W Wagener  
Tel: 083 998 0091  
Email: [michael@charterpartycases.com](mailto:michael@charterpartycases.com)  
c/o Primero  
135 Daisy Street

SANDTON  
Att: N Araujo  
Tell: 079 491 1615

**AND TO: IGHSAAN SADIEN ATTORNEYS**  
**Attorneys for third to sixth respondents**  
76 South Road  
WYNBERG  
Att: Mr I Sadien  
Tel: (021) 797 5827  
Email: [ighsaan@isadienlaw.co.za](mailto:ighsaan@isadienlaw.co.za)

**AND TO: MSK ATTORNEYS**  
**Attorneys for seventh respondent**  
10<sup>th</sup> Floor  
Thibault Square  
Long Street  
CAPE TOWN  
Att: D Macgregor  
Tel: (021) 421 3838  
Email: [david@macgregs.co.za](mailto:david@macgregs.co.za)

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(IT 201155/2014) Sixth Respondent

**SEDICK SADIEN** Seventh Respondent

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**NOTICE OF APPLICATION FOR CONDONATION**

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**BE PLEASED TO TAKE NOTICE THAT** the first respondent, The Regional Land Claims Commission, Western Cape hereby applies for an order in the following terms:

1. Condonation for the late filing of its answering affidavit.

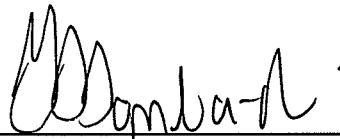
2. Costs in the event of this application for condonation being opposed.

**TAKE NOTICE FURTHER THAT** the affidavit of **TANYA LOUISE LOMBARD** will be used in support of this application annexed hereto.

DATED AT CAPE TOWN ON THIS THE <sup>4<sup>th</sup></sup> DAY OF FEBRUARY 2025.

**STATE ATTORNEY, CAPE TOWN**

Per:



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**Ms Tanya Lombard**  
**Attorneys for first respondent**  
Fourth Floor  
Liberty Life Centre  
22 Long Street  
CAPE TOWN  
Tel: (021) 441 9200  
Email: [TLombard@justice.gov.za](mailto:TLombard@justice.gov.za)

**c/o STATE ATTORNEY, JOHANNESBURG**  
North State Building  
85 Albertina Sisulu Road  
Kensington  
JOHANNESBURG  
Tel: (011) 330 7600

**TO: THE REGISTRAR**  
Constitutional Court  
Constitutional Hill  
RANDBURG  
Tel: (011) 359 7400  
Email: [generaloffice@concourt.co.za](mailto:generaloffice@concourt.co.za)

**AND TO: MICHAEL WAGENER**  
**Attorneys for applicant**  
Pepper Street Chambers  
10 Pepper Street  
CAPE TOWN  
Att: Mr W Wagener  
Tel: 083 998 0091

Email: [michael@charterpartycases.com](mailto:michael@charterpartycases.com)  
c/o Primero  
135 Daisy Street  
SANDTON  
Att: N Araujo  
Tell: 079 491 1615

**AND TO: IGHSAAN SADIEN ATTORNEYS**  
**Attorneys for third to sixth respondents**  
76 South Road  
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Att: Mr I Sadien  
Tel: (021) 797 5827  
Email: [ighsaan@isadienlaw.co.za](mailto:ighsaan@isadienlaw.co.za)

**AND TO: MSK ATTORNEYS**  
**Attorneys for seventh respondent**  
10<sup>th</sup> Floor  
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(IT 201155/2014) Sixth Respondent

**SEDICK SADIEN** Seventh Respondent

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**ANSWERING AFFIDAVIT**

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I, the undersigned

**TANYA LOUISE LOMBARD**

do hereby make oath and state that:



1. I am an adult female attorney and I am employed as a Senior State Attorney with the office of the State Attorney at 22 Long Street, Cape Town, with email address [tlombard@justice.gov.za](mailto:tlombard@justice.gov.za).
2. I am the attorney of record for the first respondent, the Regional Land Claims Commission: Western Cape ("the Commission").
3. As the attorney of record for the Commission :
  - 3.1 I have been intimately involved in the conduct of the litigation between the applicant, the South African Riding for the Disabled Association ("SARDA") and the Sadien family, in which the Commission is involved;
  - 3.2 I am duly authorised to depose to this affidavit on behalf of the Commission.
4. The facts are within my personal knowledge, unless the contrary appears from the context and are true and correct.
5. I have read the application for leave to appeal dated 20 December 2024 and the founding affidavit deposed to by SARDA's attorney, Michael Wagener, in support of the application. SARDA's application has been indexed and paginated; therefore reference to its application will be to the paginated page numbers. The allegations contained therein are contested for the reasons that follow. I do not deal with each and every allegation contained in SARDA's affidavit, however, I request that my failure to do so, should not be construed

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as an admission of such allegations but should be recorded as a denial thereof.

## **Introduction**

### ***Condonation and Service***

6. On 20 December 2024 whilst I am away on annual leave, I received a telephone call from Candice Newman, who is a secretary at our office but who is not my secretary. She advised that Michael Wagener had telephoned her and explained to know if he could serve an application via email on her. He explained that he had attempted to email it to me at 12:39 on 20 December 2024, but that his email had "bounced back " as undelivered to him as I had set my out-of-office function for all emails from 17 December 2024 to 8 January 2024.
7. I instructed Ms Newman that I did not consent to accept service electronically from Mr Wagener. She informed Mr Wagener of this.
8. Mr. Wagener then proceeded to email to Ms Newman a Notice of Application for Leave to Appeal in the Constitutional Court with a copy of an affidavit that he had deposed to. There was no page 39 in the affidavit. The Notice was not issued by the Constitutional Court and had no case number or stamp attached to it.
9. Three days later, on 23 December 2024, Mr Wagener sent another email which would similarly have bounced off from my email address. He copied Ms Newman again and attached the Court Stamped Front page of the Notice with

A handwritten signature in black ink, appearing to be 'S. A. [unclear]', located at the bottom right of the page.

a stamp from the Constitutional Court Registrar dated 23 December 2024 and which has the case number CCT 379124 handwritten at the top of the front page.

10. I returned to the office on 8 January 2025. However, it was only on 20 January 2025 that I became aware that Mr Wagener had forwarded copies of the application for leave to appeal to Ms Newman. After 21 January 2025, Ms Newman made me aware of the emails she had received from Mr Wagener. I also had regard to emails which Mr Wagener had attempted to send to me but which had bounced back.
11. The following emails were exchanged on 20 December 2024:
  - 11.1. On 20 December 2024 at 11:58am Mr Wagener attempted to email me; this email bounced back and was not received;
  - 11.2. On the same day, 20 December 2024 at 12:39 Mr Wagener similarly attempted to email me; this email similarly was not received as it bounced back;
  - 11.3. Thereafter, on 20 December 2024 at 12:55 Mr Wagener dispatched an email to Ms Newman. The thread of the emails on 20 December 2024 is attached marked "A".
12. Further, on 20 December 2024 Ms Newman address an email, attached marked "B", in which she indicted to Mr Wagener that I was on leave and would only return to office on 8 January 2025. On 23 December 2024 at

Handwritten signature and initials, possibly 'DWA'.

12:15pm, Mr Wagener forwarded a further email to Ms Newman which annexed the Constitutional Court case number as well as the date of issue stamp of the Registrar of the Constitutional Court which indicated that the application for leave to appeal was lodged on 23 December 2024. This email is attached as "C".

13. On 20 January 2025, I received a letter by email, attached as "D", from Mr Wagener that refers to our Application to Compel SARDA to discovery which was set down for hearing on 27 January 2025 in the Land Court in Randburg. In the letter, he mentioned that his application for leave to appeal had the effect of staying the Land Claims Court's order of substitution of parties.
14. He telephoned me and enquired whether I had received the letter. I confirmed and asked him to forward the application to me and ask him on which attorney he had served it. He said he could not remember, but it was served on an attorney from our office.
15. He forwarded me the application in two parts. It became clear that it was not served on any attorney in and during December 2024.
16. I read his emails on 21 January 2025 and sent it on to counsel immediately. I first laid eyes on SARDA's application and affidavit to this court on 21 January 2025. Counsel therefore had to make themselves available to deal with the application in litigation which spans eleven (11) years and conducted in various Court applications.

A handwritten signature in black ink, consisting of a stylized 'S' followed by a more complex, cursive signature.

17. Mr Wagener emailed the application to me on 20 January 2025. I was only given notice of the application on 20 January 2025. However, I only perused the application on 21 January 2025. Therefore, the application was lodged on 23 December 2024 but notice was only given to Commission on 20 January 2025, after the lodging of the application. Notice was therefore not given in compliance with Rule 19(2) of the Constitutional Court Rules which requires notice before lodgement of the application.
18. If 20 January 2025 is regarded as the date upon which SARDA had given the Commission notice, then this answering affidavit had to be filed by 3 February 2025 in which event the application would be out of time by one day. I submit that no prejudice would be suffered by SARDA as a result of the late filing of this answering affidavit. I request that condonation be granted.

### **A short history of the litigation**

19. This matter has a long history commencing with a judgment and order of Mpshe AJ on 7 December 2012. That order was varied on 8 February 2013 to award Erf 142, Constantia to Mr Sedick Sadien.
20. An earlier appeal, brought by the appellants, Jazz Spirit 12 (Pty) Ltd, Yamiv (Pty) Ltd and Hein Badenhorst, which was directed solely at the issue of costs, was dismissed by the Supreme Court of Appeal. SARDA's application to the Supreme Court of Appeal for leave to intervene in the appeal and for the rescission of judgment of Mpshe AJ was struck off the roll with costs.



21. On 8 September 2014, SARDA brought an application for leave to intervene for the rescission of paragraph 3 of the order of 24 March 2010 and the whole judgment and order of 7 December 2012 as varied on 8 February 2013. This application for leave to intervene and rescission of the amended order was dismissed by Mpshe AJ on 11 September 2015.
22. SARDA applied for leave to appeal on 30 July 2014 which was dismissed by the Supreme Court of Appeal.
23. SARDA then, in turn, applied to the Constitutional Court by way of an application dated 22 July 2016. I attach hereto as “E” SARDA’s application and affidavit in the proceedings in this Court under case no: CCT 172/16, that application was upheld. This Court issued a judgment on 23 February 2017 in this matter which is reported as **SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others 2017(5) SA 1 (CC)** (“the SARDA judgment”). The effect of the SARDA judgment was that this Court ordered that the Land Claims Court order be set aside and SARDA was *“allowed to intervene for the purpose of determining compensation payable to the Association”*; the matter was remitted to the Land Claims Court *“solely”* for the determination of compensation payable to SARDA. For ease of reference, a copy is attached hereto marked “F”.
24. The Regional Land Claims Commissioner was ordered to pay the costs in the Land Claims Court and in this court.



25. The matter was referred for mediation, however, that process yielded no positive results. Instead, the matter found its way back to the Land Claims Court.
26. The Sadien family brought an application to substitute Sedick Sadien by five trusts to represent the four branches of the originally dispossessed Sadien family:
- 26.1. MAGHERDIEN SADIEN N.O. (*On behalf of the Imam Dout Sadien Family Trust (IT 746/2014)*)
- 26.2. MOGAMMAD YUSUF HOOSEN N.O. (*On behalf of the Abduraghmaan Sadien Family Committee*)
- 26.3. MOHAMED ALI EBRAHIM N.O. Third Applicant/Intervening Party (*On behalf of the Bapa (Ismail) Sadien Family Trust (IT 202039/2014)* and
- 26.4. MAGHERDIEN SADIEN N.O. Fourth Applicant/Intervening Party (*On behalf of the Boeta Toyer Sadien Family Trust IT 020531/2014*)
- 26.5. THE BOETA OMAR FAMILY TRUST (IT201155/2014).
27. In parallel with the substitution application brought by the trusts, SARDA instituted an application aimed at, once again, seeking to amend or rescind the order issued by Mpshe AJ on 8 February 2013. The effect of this application was to remove the subject property, Erf 142, from the order issued by Mpshe AJ on 8 February 2013.



28. Ms Justice Cowen, sitting in the Land Court on 1 November 2024, granted an order that Sedick and Ebrahim Sadien as cited in the proceedings under case number LCC 26/2010, be substituted as the representatives of the Sadien family.<sup>1</sup>
29. Sedick Sadien and Ebrahim Sadien were substituted by the intervening parties including the second respondent, as second, third, fourth, fifth, and sixth applicants under the aforementioned case number.

**Nature, competency and basis of relief sought**

30. SARDA does not agree with the decision of this court delivered on 23 February 2017 that SARDA's interest in these proceedings is limited "*solely for the purpose of determining compensation*" and that SARDA has no direct and substantial interest in the property in question.
31. The judgment delivered by Ms Justice Cowen records the contention that "*SARDA has, in turn, made it clear in these proceedings that it does not agree with the Constitutional Court's decision*".<sup>2</sup>
32. Ms Justice Cowen remarked that in the face of the Constitutional Court's decision of 23 February 2017 ". . . *it is both puzzling and somewhat troubling that SARDA both sought to oppose the intervening parties' application and*

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<sup>1</sup> See judgment by Cowen J, p. 57 of the record

<sup>2</sup> See para 6 of the judgment by Cowen, p. 53 of the record



*considered itself entitled to bring its application to amend or rescind the order of Mpshe AJ.”<sup>3</sup>*

33. The SARDA judgment of this Court defined conclusively SARDA’s interest in the subject property; it held the following:

33.1. in relation to an alleged interest in the property that *“Section 35(9) [of the Restitution Act 22 of 1994] authorises transfer of state land to a claimant without the involvement of the lawful occupier of the land in question”* (emphasis supplied)<sup>4</sup>

33.2. with reference to SARDA’s contended interest in Erf 142:

*“[18] The Association was therefore entitled to intervene and enforce its right to compensation. It is in this limited sense that it had a direct and substantial interest in the proceedings. This interest does not include the question whether Erf 142 must be transferred to the Sadiens. Its interest is restricted to the entitlement to just and equitable compensation which must be determined by agreement or by the Land Claims Court.*

*[19] It is apparent from the papers that the Association misconceived the extent of its interest and sought the rescission of the varied order. As shown here it had no legal*

<sup>3</sup> See para 6 of the judgment by Cowen, p. 53 of the record

<sup>4</sup> See SARDA judgment: para [17]

*interest in the transfer of the land. Therefore the Land Claims Court was right in holding that the Association had no direct and substantial interest in the property in question. But that court was in error when it overlooked the statutory right to compensation conferred on a lawful occupier like the Association and that the transfer of the property was subject to the determination of just and equitable compensation. It follows that it was not necessary to rescind the varied order. What was required was to allow the Association to intervene solely for the purpose of determining compensation."<sup>5</sup>*

(emphasis supplied)

34. In the face of these conclusive findings of this Court in the SARDA judgment delivered on 23 February 2017 that SARDA's interest in the property was limited "*solely*" to the issue of compensation, SARDA nonetheless sought to relitigate the issue of the award of the land to the Sadiens and the rescission and variation of the order issued by Mpshe AJ as long ago as 8 February 2013, some 12 years ago. This Court has held conclusively in *Zuma v Secretary of the Judicial Commission of Inquiry*<sup>6</sup> that:

*"The law of rescission is clear: one cannot seek to invoke the powers of rescission to obtain a re-hearing on the merits."*

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<sup>5</sup> See SARDA judgment paras [18] and [19]

<sup>6</sup> 2021 (11) BCLR 1263 (CC) at 1283 H – I, para [68]



35. The present application for leave to appeal does not concern a constitutional issue. It concerns an order made by Cowen J to substitute Sedick Sadien with the trusts.
36. Mindful of the fact that it had no interest in the award of the property to the Sadiens and the express finding of this Court that SARDA had "*misconceived the extent of its interest and sought the rescission of the varied order and had no legal interest in the transfer of the land*", SARDA contended that the judgment of this Court delivered on 27 February 2017 is wrong.<sup>7</sup>
37. It is contended by SARDA that "*the Restitution Act makes no provision for family claims*".<sup>8</sup> It is established jurisprudence in the Land Claims Court for a claimant to act in the interests of family and members of the claimant.
38. In *Jacobs v the Department of Land Affairs* dealt with "*in the interests of the descendants Abraham and Elizabeth September, who owned land in the then area of Gordonia*".<sup>9</sup> The claimant in that matter acted "*in his own interest and also in the interests of the descendants of the Abraham and Elizabeth September who owned land in the area of Gordonia.*" In the Statement of Claim there were 393 names listed as the September family descendants.
39. The court upheld the claim and awarded an amount of R10 million in compensation.<sup>10</sup>

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<sup>7</sup> See para 70, p. 33

<sup>8</sup> See para 26.3, p. 12 of record and para 26.8

<sup>9</sup> *Jacobs v The Department of Land Affairs* 2016(2) SA 382 LCC at 385 A - G

<sup>10</sup> See p. 413 C - D



40. *Isaacs v The Government of the Republic of South Africa & Others*<sup>11</sup> dealt with the Isaacs family who were living on a farm Arries situated in Gordonia area of the Northern Cape who were disastrously affected by the decision of Prime Minister Louis Botha in 1914 to invade German South West Africa.<sup>12</sup> The court then upheld the claim for restitution and ordered the payment of the sum of R1.5 million for the loss of two erven in Keimoes in which Mr Ian Jacobie Isaacs was substituted as the plaintiff on the latter's death who was acting "*on behalf of a group or class of persons, being descendants of Caroline Regina Isaacs, Joseph Johannes Isaacs junior and John Donald Isaacs as joint owners of the properties that were in issue in the above claim.*" He acted on his own behalf as a direct descendant and part of the order was that it should:

40.1. contain a family tree so that the surviving descendants may be identified together with their *pro rata* portion of the proceeds then explained; and

40.2. explain how the *pro rata* portion of each surviving descendant is relied on for identifying each beneficiary entitled to participate and how the distribution is to be effected when a deceased estate is involved.

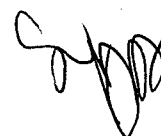
41. In *Pillay N.O. v The Government of the Republic of South Africa & Others*<sup>13</sup> the plaintiff, Mr Pillay who had been substituted for the original land claimant, Mrs Annie Francis Hambridge instituted a claim on the basis that she was widow

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<sup>11</sup> (LCC 2018/206) [2023] ZALCC 30 (4 October 2023)

<sup>12</sup> See paras 1 – 3 of the judgment.

<sup>13</sup> (LCC 2019/42) [2022] ZALCC 21 (8 August 2022)



of James Hambridge who had lost a right in land which she had "*shared with him*"<sup>14</sup>

42. Mrs Hambridge left a will and her executor was duly substituted *nomine officio* as the claimant by order of the Land Claims Court in October 2014 who is Mr Gregory James Pillay, the plaintiff in the matter.
43. The claim dealt with loss of a property in the area of Fairview in Port Elizabeth (Gqeberha), when the area was declared a White Group area on 11 June 1965 pursuant to the Group Areas Act No. 77 of 1957. Because Mr Hambridge was classified as a member of the so-called "*coloured group*" he was forced to sell the property to the Community Development Board which was a statutory body. The court concluded that the expropriation was to further racially discriminatory legislation. One of the two main issues in the matter were the extent to which Mr Pillay, the claimant, could claim full compensation on behalf of the Hambridge estate since the Bellairs family (who shared the dispossessed property with the Hambridge, one home) also had an interest in the compensation.
44. The court was concerned as to who the beneficiaries were insofar as the Bellairs descendants which the court directed that 50% of the compensation due to the claimant in the matter to the descendants of Gertrude Bellairs is entitled to such proceeds.<sup>15</sup> The order set forth the determination of whether the descendants were entitled to such proceeds as those falling into the

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<sup>14</sup> See para 2 of the judgment

<sup>15</sup> See para 5 of the award and para 68 of the Order



category of persons who were the direct descendants of Gertrude Bellairs how the proceeds were to be determined. The entitlement of the proceeds "*arises because they (the Bellairs descendants) are beneficiaries in terms of Mrs Annie Francis Hambridge's will in which case the descendants . . . shall be entitled to participate in the proceeds.*"

Ad paragraph 27 of SARDA's application for leave to appeal affidavit

45. SARDA contends that the finding that Sedick Sadien was cited as "*the representatives of the Sadien family, is bad in law*". There is no merit in this contention insofar as the court may order that the orders be issued to clarify the issues between the parties i.e. in the *Isaacs* and *Pillay* matter to identify the family beneficiaries of the land claimant.
46. It is submitted that the Land Court was perfectly entitled to accept that the land claim for restoration was in favour of "*members of the Sadien family*".<sup>16</sup>

Ad paragraph 28

47. There is no proper reason why the trusts cannot be regarded as the beneficiaries of the land claim as when any particular beneficiaries of any particular trust were to pass on, after obtaining title it would not be necessary to bring an application to change the title deed of the restituted land.
48. Section 35 (4) of the Restitution Act reads as follows – "*The court's power to order restitution of a right in land or to grant a right in alternative state-owned*

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<sup>16</sup> See para 30.3, p. 17 of the record



*land shall include the power to adjust the nature of the right previously held by the claimant, and to determine the form of title under which the right may be held in future.*"

49. This entitled the Land Court to "*adjust the nature of the right previously held by the claimant, and to determine the form of title under which the right may be held in future.*" This empowered the court to adjust the nature of the right previously held by the claimant and to determine the form of title under which the right may be held in future.
50. The Land Claims Court was entitled to adjust the award to one person on behalf of the family to divide it up into various branches of the family, who had come to a settlement of their differences amongst themselves, by agreeing to the order granted by the Land Claims Court, which is under appeal in this matter.

### **Inquisitorial powers**

#### **Ad paragraphs 30.4 and 30.5**

51. SARDA raises in the present application that Mpshe AJ had exercised his inquisitorial powers and that he was not entitled to do so. The issue of the exercise of inquisitorial powers was previously argued by SARDA in the earlier legal proceedings including in this Court under case no. CCT 172/16 and which culminated in the SARDA judgment. That contention did not find favour with this Court in the earlier legal proceedings.



52. In any event, there is no merit in this contention because the Land Claims Court was entitled to use the inquisitorial powers provided by section 32 (3)(b) of the Restitution Act which reads as follows:

(3) *Notwithstanding anything to the contrary in this Act or in the Rules contemplated in subsection (1)-*

(a) . . .

(b) *the Court may conduct any part of any proceedings on an informal or inquisitorial basis.”*

53. It is respectfully submitted that Mpshe AJ was entitled to use its inquisitorial powers.

### **Administrative action**

#### **Ad paragraphs 31 to 38**

54. SARDA contends that the designation of alternative state land is an administrative function in terms of the Promotion of Administrative Justice Act “PAJA”,<sup>17</sup> and contends that there is nothing in the Restitution Act which empowers the court to perform an administrative function.

55. Furthermore, SARDA’s contention that the designation of alternative land is an administrative function in terms of the Promotion of Administrative Justice Act and that SARDA was not given notice of the designation of Erf 142 as

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<sup>17</sup> See para 34, p. 19 of the application

alternative land, fails to take into account the entitlement of the court to use its inquisitorial powers.

56. This court in the SARDA judgment<sup>18</sup> held that SARDA is only entitled to “*intervene solely for the purpose of determining compensation and SARDA is bound by that finding*” and that SARDA had no interest in the award of Erf 142. (emphasis supplied)

**Whether the decision of this court dated 23 February 2017 was interlocutory alternatively final**

Ad paragraphs 62 to 74

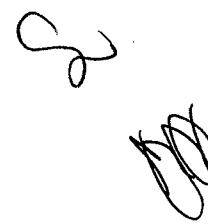
57. SARDA submits that this Court’s decision in the SARDA judgment was interlocutory. It is respectfully submitted that SARDA’s contention has no merit.
58. The SARDA judgment indicates that this Court’s orders were final. Crucially, this Court ordered that SARDA be granted leave to intervene for determination of its compensation. On SARDA’s argument, this order would be susceptible to reconsideration.
59. With reference to the case of *Zondi MEC, Tradition and Local Government Affairs*<sup>19</sup> referred to in paragraph 63 and *Bell v Bell*,<sup>20</sup> that court may be bound

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<sup>18</sup> SARDA judgment para [19]

<sup>19</sup> 2006(3) SA 1 (CC) at para [30]

<sup>20</sup> 1908 (TS) 877

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by interlocutory orders, this submission fails to appreciate that this court's decision in the SARDA judgment<sup>21</sup> is final in effect.

60. SARDA contends that this court's decision was wrong and should be rescinded some seven years later without explaining why leave to appeal against this court's decision was not sought immediately.

61. SARDA contends that in the event that it is found that the order "*limiting applicant's right to intervention to the question of compensation is a final order, it is submitted that such order was made per incuriam and therefore not binding on this court itself.*"

62. The applicant then contends that this court's decision is wrong for three reasons, which are dealt with below.

Ad paragraph 70.1

63. SARDA contends that section 35 (1)(b) of the Restitution Act does not empower the court to source alternative land – it is clear the court may order "*the state to grant claimants an appropriate right in alternative state owned land*" empowers the court to grant the claimant an appropriate right in alternative state owned land.

---

<sup>21</sup> SARDA judgment par [22]

Ad paragraph 70.2

64. With reference to the second portion of section 35 (1)(b) "*and where necessary, order the state to designate*" it is not applicable. It was not necessary because "*the court enquired as to the availability in state owned land*". The court was informed that three pieces of state owned land was vacant in the province of the Western Cape and these are:

64.1. Erf 142 Constantia;

64.2. Erf 3110 Constantia; and

64.3. Erf 1783 Constantia.

65. The court was entitled to use its inquisitorial powers as provided in section 32 (3) of the Restitution Act as recorded by Msphe AJ in paragraph 98 of his judgment, annexure "E" to the founding affidavit herein.<sup>22</sup>

Ad paragraph 70.3

66. SARDA's interest in continued possession in order to carry out its work in the public interest and for the public benefit is negated by the terms of the leases Annexure LT1 and LT2. Paragraph 4.1 of the 2007 lease provides that "*this lease shall terminate on 30 June 2007*".

---

<sup>22</sup> See p. 90 of the record



***Legitimate expectation***

67. SARDA claims in its affidavit that it has a "*legitimate expectation of the renewal of its lease over the four contiguous erven, one of which is erf 142*", the property in question in this matter.<sup>23</sup> This is refuted. The contention of a legitimate expectation is contested for the following reasons:

67.1. attached hereto marked annexure "**G**" is an agreement of lease between SARDA and the then Secretary of the School Board of the Cape whereby SARDA leased the properties including erf 142 Constantia.

67.2. the lease was entered into on 8 December 1981.

68. Paragraph 7 of the lease provides –

*"The lessee shall not make any alterations in or additions to the Leased Premises without Lessor's consent which may be given to such conditions as the Lessor may impose."*

69. It should be noted that the lease was valid for 20 years from July 1981.<sup>24</sup> In paragraph 1.2 "*all structures of whatever nature to be erected on the site will be subject to the prior approval of the provincial administration and such structures including the foundations must be removed by the SA Riding for the*

<sup>23</sup> See p. 22, para 40.7 of Mr Wagener's affidavit in support of the application for leave to appeal

<sup>24</sup> See para 1.1 of the lease

*Disabled Association: Cape Town branch at the expiry of this lease agreement and the lessee must make good where the land has been disturbed.*

70. Despite requests for the written approval of erection of any structures of whatever nature, SARDA has declined to provide. Thus, if any, an application to compel discovery of the "*prior approval*" of the Provincial Administration has been held in abeyance by this application to the Constitutional Court.
71. Furthermore SARDA entered into a lease agreement dated 1 February 2007, a copy of which is attached hereto marked "H". The property was leased for a period of one year from 1 July 2006 and shall terminate on 30 June 2007.
72. In particular, paragraph 6.7 provided that:

*"The tenant shall at no time be considered to have acquired any right or lawful claim to a grant of the leased premises by virtue of the lease agreement."*

73. Any promises by Robin Carlisle, the then Minister of Transport and Public Works of the Western Cape Provincial Government, were qualified by himself when he pointed out that the four erven belonged to National Government, Erf 142 was not transferred by National Government to the Provincial Government,<sup>25</sup> thus negating any undertaking given by the Western Cape Provincial Government (WCPG) to give the applicant "*a new 50 year lease*".

---

<sup>25</sup> See para 40.7.3 of Mr Wagener's affidavit



- "13.1 *If the Tenant wishes to affect structural changes or to place or erect advertisements or signs to or at the premises, the prior written approval of the Landlord must first be obtained.*
- 13.2 *If the Tenant wishes to affect structural changes to the leased premises reasonably required for the purpose of conducting business, the prior written approval of the Landlord must first be obtained.*
- ...
- 13.4 *If the Tenant does affect alterations, improvements or structural changes to the leased premises without the prior written approval of the Landlord, the tenant shall, if so required in writing by the Landlord, restore the leased premises to its former condition.*
- 13.5 *The Tenant shall not have any claim against the Landlord for compensation for any improvement to the leased premises, unless such improvements were made with the Landlord's prior written approval and an agreement to compensate the Tenant for such improvement. Such agreement with regard to the compensation shall be limited to the costs of the improvement.*
- 13.6 *The Tenant shall have no right of retention in respect of any of the improvements." (emphasis supplied)*



75. Paragraph 43 records that “*any statement by the Minister of Transport and Public Works of the Western Cape Provincial Government*” is diluted by an acknowledgement that the Western Cape Provincial Government has no control over the property. Mr Carlisle wrote: *To my extreme regret, investigation reveals that the even you are writing about are properties of National Public Works and not my Department.*”
76. SARDA has continued to occupy Erf 142, Constantia and is holding over without any lawful authority.
77. With regard to paragraph 67 of SARDA’s application referring to a “*legitimate expectation*” as quoted by Corbett CJ in *Administrator, Transvaal v Traub*<sup>26</sup> there can be no legitimate expectation in view of the leases referred to above.

### **Finality**

#### **Ad paragraphs 80 to 86**

78. SARDA contends that the delay in finalising the matter has been caused by flaws in the judgment delivered by Mpshe AJ on 7 December 2012.
79. In support of this contention, SARDA relies on:
- 79.1. an enquiry which Mpshe AJ had made to Adv Krige (p. 37; para 81);
- 79.2. the exercise of inquisitorial powers by Mpshe AJ (p. 37; para 82);

---

<sup>26</sup> 1989 (4) SA 731 (A) at 756

- 79.2. the exercise of inquisitorial powers by Mpshe AJ (p. 37; para 82);
- 79.3. the fact that the State Attorney previously represented both the Commission and the Sadien family (p. 38; para 82.3);
- 79.4. that there is no indication that the second respondent (Sedick Sadien) was consulting on the question of sharing (p. 38; para 82.5).
80. But these issues raised by SARDA as the bases why the matter cannot be finalised, have previously been raised in earlier legal proceedings, in particular the proceedings in this Court under case no: CCT 172/16.
81. The only reason why the Sadien matter has not been able to be finalised is because SARDA:
- 81.1. does not accept the judgments delivered by the various Courts, in particular, the SARDA judgment which was delivered by this Court as long ago as 23 February 2017;
- 81.2. has frustrated the finalisation of the Sadien matter; in this regard, Cowen J has concluded<sup>27</sup> on the issue of finality and whether costs should be awarded against SARDA that:
- “In the usual course, this Court does not grant costs orders save in special circumstances. I am of the view that special circumstances arise in this case in respect of SARDA’s application. At this juncture,*

---

<sup>27</sup> Cowen J judgment pp. 56 – 57, para 15

compensation claim. Given the circumstances in which the SARDA application was brought, it is difficult to view it as much more than a misguided effort to secure SARDA's incumbent position for as long as possible. The Constitutional Court has already spoken on the issues that SARDA effectively seeks to re-litigate. The issue of SARDA's compensation has been referred to mediation: that process must now be finalised."

82. In the circumstances, I submit that SARDA should not be allowed to delay finalisation of the Sadien claim by being granted leave to appeal to this Court.

### **Constitutional matter and direct appeal**

#### **Ad paragraphs 87 to 89**

83. As stated above, the present application and SARDA's proceedings before Cowen J do not involve a constitutional matter and this application should fail solely on that basis.
84. SARDA's contention<sup>28</sup> that a direct appeal is appropriate because this Court is asked to depart from its earlier decision under case no: CCT 172/16 is not competent as SARDA seeks a complete rehearing of the earlier judgment in case no: CCT 172/16. This application should fail on that ground as well.

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<sup>28</sup> P. 40 para 88



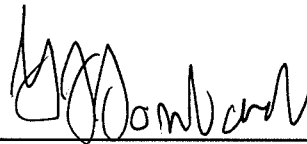
**Truncated procedural history**

Ad paragraph 90

85. I have already referred to the history of the matter and I request that my exposition be regarded in reply to the allegations contained this paragraph.

**Conclusion**

86. I request that SARDA's application to this court be dismissed with costs of suit.

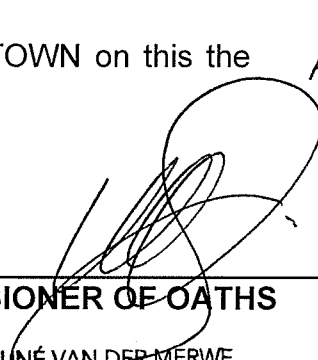


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**TANYA LOUISE LOMBARD**

I certify that the deponent acknowledged to me that she knows and understands the contents of this declaration, that she has no objection to taking the prescribed oath and considers it to be binding on her conscience.

Thus signed and sworn to before me at CAPE TOWN on this the <sup>4<sup>th</sup></sup> day of **FEBRUARY 2025.**



---

**COMMISSIONER OF OATHS**  
**Ex officio**

SUNÉ VAN DER MERWE  
COMMISSIONER OF OATHS  
PRACTISING ADVOCATE - RSA  
67 KEEROM STREET, HUGUENOT CHAMBERS  
CAPE TOWN

A

**Newman Candice**

---

**From:** Michael Wagener <michael@charterpartycases.com>  
**Sent:** Friday, 20 December 2024 12:55  
**To:** Newman Candice  
**Subject:** FW: South African Riding for the Disabled Association v RLCC and others  
**Attachments:** sarda - process application for leave appeal con court signed\_compressed.pdf

MICHAEL WAGENER  
PEPPER STREET CHAMBERS  
10 PEPPER ST  
CAPE TOWN  
083 998 0091

**From:** Michael Wagener <michael@charterpartycases.com>  
**Date:** Friday, 20 December 2024 at 12:39  
**To:** Lombard Tanya <TLombard@justice.gov.za>, Ighsaan Sadien <ighsaan@isadienlaw.co.za>, David MacGregor <David@macgregs.co.za>  
**Cc:** Ighsaan Sadien Attorneys <info@isadienlaw.co.za>, Andrietha van Zyl <Andrietha@macgregs.co.za>  
**Subject:** South African Riding for the Disabled Association v RLCC and others

Please find attached the Applicant's application for leave to appeal to the Constitutional Court.

Kindly acknowledge receipt

MICHAEL WAGENER  
PEPPER STREET CHAMBERS  
10 PEPPER ST  
CAPE TOWN  
083 998 0091

**From:** Front Sales | Zip Print <sales@zipprint.co.za>  
**Date:** Friday, 20 December 2024 at 12:20  
**To:** <michael@charterpartycases.com>



B

**Newman Candice**

---

**From:** Michael Wagener <michael@charterpartycases.com>  
**Sent:** Friday, 20 December 2024 14:46  
**To:** Newman Candice  
**Subject:** Re: South African Riding for the Disabled Association v RLCC and others

Thanks very much

MICHAEL WAGENER  
PEPPER STREET CHAMBERS  
10 PEPPER ST  
CAPE TOWN  
083 998 0091

---

**From:** Newman Candice <CNewman@justice.gov.za>  
**Date:** Friday, 20 December 2024 at 14:40  
**To:** Michael Wagener <michael@charterpartycases.com>  
**Subject:** RE: South African Riding for the Disabled Association v RLCC and others

Dear Sir

Ms Lombard who is dealing with this matter who is currently on leave and will return to office on 8 January 2025.

We hereby acknowledge receipt.

Kind regards

**Candice Newman**  
**Secretary to Leon Manuel & Ramona Naidoo**  
**Office of the State Attorney**  
**Cape Town**  
**Tel: 021 441 9203**



**From:** Michael Wagener <michael@charterpartycases.com>  
**Sent:** Friday, December 20, 2024 12:55 PM  
**To:** Newman Candice <CNewman@justice.gov.za>  
**Subject:** FW: South African Riding for the Disabled Association v RLCC and others

MICHAEL WAGENER  
PEPPER STREET CHAMBERS

C

**Newman Candice**

---

**From:** Michael Wagener <michael@charterpartycases.com>  
**Sent:** Monday, 23 December 2024 12:15  
**To:** Lombard Tanya; Ighsaan Sadien; David MacGregor  
**Cc:** Newman Candice  
**Subject:** FW: South African Riding for the Disabled Association v RLCC and others  
**Attachments:** doc034820241223120411.pdf

FYI

MICHAEL WAGENER  
PEPPER STREET CHAMBERS  
10 PEPPER ST  
CAPE TOWN  
083 998 0091



# CCT 379/24

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between:

REGISTRAR OF THE CONSTITUTIONAL COURT
PRIVATE BAG 1111 CONSTITUTIONAL HILL
<b>CASE NO:</b> 23 DEC 2024
BRAAMFONTEIN 2017
GRIFFIER VAN DIE KONSTITUSIONELE HOF

<b>SOUTH AFRICAN RIDING FOR THE DISABLED ASSOCIATION</b>	Applicant
and	
<b>THE REGIONAL LAND CLAIMS COMMISSION: WESTERN CAPE</b>	First Respondent
<b>MAGHERDIEN SADIEN N.O.</b> (on behalf of the Imam Dout Sadien Family Trust (IT 746/2014))	Second Respondent
<b>THE ABDURAGHMAAN SADIEN FAMILY TRUST</b> (IT 20909/2014)	Third Respondent
<b>MOHAMED ALLIE EBRAHIM N.O.</b> (on behalf of the Bapa Sadien Family Trust (IT 202039/2014))	Fourth Respondent
<b>MAGHERDIEN SADIEN N.O.</b> (on behalf of the Boeta Toyer Sadien Family Trust (IT 020531/2014))	Fifth Respondent
<b>THE BOETA OMAR FAMILY TRUST</b> (IT 201155/2014)	Sixth Respondent
<b>SEDIEK SADIEN</b>	Seventh Respondent

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**APPLICATION FOR LEAVE TO APPEAL – TABLE OF CONTENTS**

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:

In the matter between:

<b>SOUTH AFRICAN RIDING FOR THE DISABLED ASSOCIATION</b>	Applicant
and	
<b>THE REGIONAL LAND CLAIMS COMMISSION: WESTERN CAPE</b>	First Respondent
<b>MAGHERDIEN SADIEN N.O.</b> (on behalf of the Imam Dout Sadien Family Trust (IT 746/2014)	Second Respondent
<b>THE ABDURAGHMAAN SADIEN FAMILY TRUST</b> (IT 20909/2014)	Third Respondent
<b>MOHAMED ALLIE EBRAHIM N.O.</b> (on behalf of the Bapa Sadien Family Trust (IT 202039/2014)	Fourth Respondent
<b>MAGHERDIEN SADIEN N.O.</b> (on behalf of the Boeta Toyer Sadien Family Trust (IT 020531/2014)	Fifth Respondent
<b>THE BOETA OMAR FAMILY TRUST</b> (IT 201155/2014)	Sixth Respondent
<b>SEDIK SADIEN</b>	Seventh Respondent



---

**NOTICE OF APPLICATION FOR LEAVE TO APPEAL**

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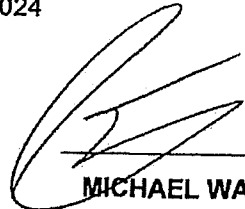
**BE PLEASED TO TAKE NOTICE** that SOUTH AFRICAN RIDING FOR THE DISABLED ASSOCIATION (hereinafter referred to as "the Applicant") hereby applies for an order in the following terms:

1. Condonation for the late filing of this application if necessary;
2. Granting the Applicant leave to appeal against the decision of the Land Court of 1 November 2024, published to the Applicant on 28 November 2024, under case number LCC 26/2010;
3. Directing that the costs of this application, including the costs of two counsel where employed, be costs in the appeal.

**TAKE NOTICE FURTHER** that the accompanying affidavit of MICHAEL WAGENER annexed hereto will be used in support of this application.

If you intend opposing this application you are required to lodge your affidavit in support of your opposition, after prior service on the Applicant, with the Registrar of this court within 10 days after service of this application on you.

DATED AT CAPE TOWN THIS 20<sup>th</sup> DECEMBER 2024



**MICHAEL WAGENER**

APPLICANT'S ATTORNEY  
PEPPER ST CHAMBERS  
10 PEPPER ST  
CAPE TOWN  
michael@charterpartycases.com  
Tel 083 998 0091  
c/o  
Primerio  
135 Daisy St  
Sandton  
Att: N Araujo  
Cell: 079 491 1615



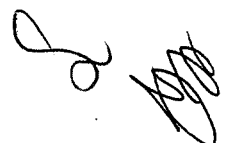
TO:

REGISTRAR  
CONSTITUTIONAL HILL  
BRAAMFONTEIN  
JOHANNESBURG  
TEL: 011 359 7400  
EMAIL: [generaloffice@concourt.co.za](mailto:generaloffice@concourt.co.za)

STATE ATTORNEY  
FIRST RESPONDENT'S ATTORNEY  
22 LONG ST  
CAPE TOWN  
ATT: T LOMBARD  
TEL: 021 441 9200  
EMAIL: [tlombard@justice.gov.za](mailto:tlombard@justice.gov.za)

IGHSAAN SADIEN ATTORNEYS  
THIRD TO SIXTH RESPONDENTS' ATTORNEY  
76 SOUTH RD  
WYNBERG  
CAPE TOWN  
ATT: I SADIEN  
TEL: 021 797 5827  
EMAIL: [ighsaan@isadienlaw.co.za](mailto:ighsaan@isadienlaw.co.za)

MSK ATTORNEYS  
SEVENTH RESPONDENT'S ATTORNEYS  
10<sup>TH</sup> FLOOR  
THIBAUT SQUARE  
LONG ST  
CAPE TOWN  
ATT: D MACGREGOR  
TEL: 021 421 3838  
EMAIL: [david@macgregs.co.za](mailto:david@macgregs.co.za)



D

**From:** Michael Wagener <michael@charterpartycases.com>  
**Sent:** Monday, 20 January 2025 11:58  
**To:** Lombard Tanya <TLombard@justice.gov.za>  
**Subject:** SARDA/RLCC/ MAGHERDIEN SADIEN NO AND OTHERS

Dear Ms Lombard

Please see letter attached for your urgent attention.

MICHAEL WAGENER  
PEPPER STREET CHAMBERS  
10 PEPPER ST  
CAPE TOWN  
083 998 0091

TL  
[Signature]

---

**MICHAEL WAGENER**

PEPPER ST CHAMBERS  
10 PEPPER ST  
CAPE TOWN  
[michael@charterpartyca  
ses.com](mailto:michael@charterpartyca<br/>ses.com)

20 January 2025

The State Attorney  
By email

Dear Ms Lombard

SARDA/RLCC/ MAGHERDIEN SADIEN NO AND OTHERS

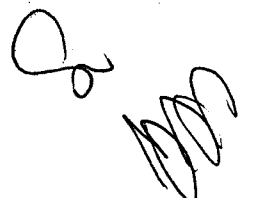
1. Your clients' application to compel set down for 27 January 2025 refers.
2. My client's application for leave to appeal has had the effect of staying the Land Court's order of substitution of parties.
3. In the premises, it is not feasible to continue with the mediation with the parties as they were before the successful application of Magherdien Sadien NO and others.
4. Please confirm by return that your clients' application will be removed from the roll.

Yours faithfully,



**MICHAEL WAGENER**

---



E  
F

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO:**

In the matter between:

**SOUTH AFRICAN RIDING FOR THE DISABLED ASSOCIATION**

**("SARDA")**

Applicant

and

**THE REGIONAL LAND CLAIMS COMMISSIONER**

First Respondent

**SEDICK SADIEN**

Second Respondent

**EBRAHIM SADIEN**

Third Respondent

---

**NOTICE OF MOTION**

---

**TAKE NOTICE** that the South African Riding for the Disabled Association ("SARDA") (hereinafter referred to as the "Applicant") intends to make application to this court for an order:

1. Granting it leave to appeal to this court against the judgment and order handed down by the Land Claims Court on 11 September 2015 in which the


Applicant's application for leave to intervene in Land Claims Court proceedings brought under case LCC 26/10 was dismissed with costs.

2. That costs of this application be costs in the appeal

And that the accompanying affidavit of **BELINDA JANE RITCHIE BAIN** will be used in support hereof.

**TAKE NOTICE FURTHER** that the Applicant has appointed the offices of Bowman Gilfillan, 165 West Street, Sandton, Johannesburg, 2119 as the address at which it will accept notice and service of all process in these proceedings.

**TAKE NOTICE FURTHER** that if you intend opposing this application, you may respond in writing within 10 (TEN) days indicating whether this application is being opposed and, if so, stating the grounds of such opposition.

DATED at CAPE TOWN this 22<sup>nd</sup> day of JULY 2016.

**BOWMAN GILFILLAN**

Per: 

Applicant's Attorneys

165 West Street

**SANDTON**

Johannesburg

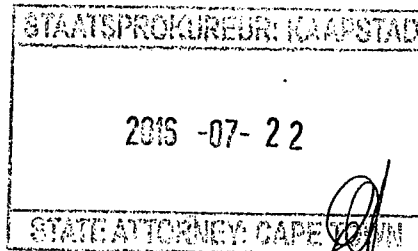
REF: M Wagener/ld/1164260



**TO: THE REGISTRAR CONSTITUTIONAL COURT**  
1 Hospital Court  
Constitutional Hill  
BRAAMFONTEIN

AND

**TO: THE STATE ATTORNEY**  
First Respondent's Attorneys  
4<sup>th</sup> Floor  
Liberty Centre  
22 Long Street  
CAPE TOWN  
REF: 0048/10/BG-Ms Chetty



AND

**TO: IGHSAAN SADIEN ATTORNEYS**  
Second and Third Respondents' Attorneys  
76 South Road  
WYNBERG  
c/o LIONEL MURRAY SCHWORMSTEDT & LOUW  
2<sup>nd</sup> Floor, General Building  
42 Burg Street  
CAPE TOWN

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO:**

In the matter between:

**SOUTH AFRICAN RIDING FOR THE DISABLED ASSOCIATION**

**("SARDA")**

**Applicant**

and

**THE REGIONAL LAND CLAIMS COMMISSIONER**

**First Respondent**

**SEDICK SADIEN**

**Second Respondent**

**EBRAHIM SADIEN**

**Third Respondent**

---

**AFFIDAVIT**

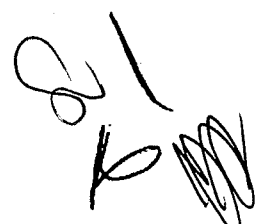
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I, the undersigned,

**BELINDA JANE RITCHIE BAIN**

do hereby make oath and state as follows:

1. I am the chairperson of the South African Riding for the Disabled Association (Cape Town branch), a public interest, non-profit organisation (hereinafter



5

referred to as "the Applicant").

2. I am duly authorised to bring this application pursuant to resolution annexed hereto and marked "A".
3. All the facts contained herein are true and correct and within my personal knowledge unless stated otherwise.
4. When I make legal submissions I do so on the advice of my attorneys.

### INTRODUCTION

5. This is an application for leave to appeal against a Land Claims Court decision not to allow the Applicant to intervene in proceedings with the object of applying for rescission of an amended order awarding State land to a land claimant.
6. Prior to the amended order, which was granted in its absence, the Applicant had lawfully occupied the land in question for 34 years.
7. The central issue in this application is whether a lawful occupier of State land has a right to heard where the land it occupies is earmarked for disposal to a land claimant pursuant to the Restitution of Land Rights Act 22 of 1994 ("the Restitution Act").
8. Applicant contends that despite being a precarious occupier of State land earmarked for disposal, its right to occupy such land may potentially outweigh the right of the successful land claimant to be awarded such land, where other State land is available to satisfy the claim. This potential gives it

S  
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the right to be heard when the decision is made identifying or designating such land.

9. Applicant's case is that the amended order awarding the land was irregular on a number of grounds, the most important being:

- (a) the value of the land granted was grossly disproportionate to the value of the claim;
- (b) the amended order was granted by the Land Claims Court acting beyond the powers granted to it by the Restitution Act; and
- (c) the amended order was made by the Land Claims Court after it had made its original order and was *functus officio*.

#### **CONSTITUTIONAL MATTER AND INTERESTS OF JUSTICE**

10. It is respectfully submitted that the matter raises a constitutional issue being the interpretation and application of the Restitution Act promulgated in response to the constitutional imperative set out in section 25(7) of the Constitution.

11. It is further submitted that it is in the interests of justice to grant leave to appeal by reason of the following factors which are developed more fully below:

11.1. the State land in question is worth R128 m. Its award therefore impacts upon public resources;

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- 11.2. the Applicant's prospects of success on appeal are favourable;
- 11.3. the Applicant is charitable institution whose operations are affected by the order sought to be appealed.
12. Accordingly, Applicant seeks an order granting it leave to intervene to apply for rescission of the amended order.

### PROCEDURAL HISTORY

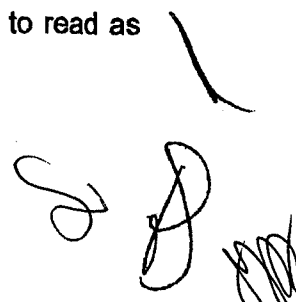
13. On 7 December 2012 the Land Claims Court handed down a judgment which incorporated the following order:

"Order

- a. *A portion of the property Erf 1783 Constantia in the Western Cape Province measuring 10 hectares in extent shall be transferred to the Second Applicant.*
- b. *The Department of Rural Development and Land Reform to designate the said property in favour of the Second Applicant.*
- c. *The interdict order granted on 23 February 2010 is hereby uplifted.*
- d. *There is no order as to costs."*

A copy of the judgment and order is annexed as "B".

14. On the 8<sup>th</sup> February 2013 the Land Claims Court varied the order to read as



follows:

*"Court order (a) that reads 'a portion of the property Erf 1783 Constantia in the Western Cape Province measuring 10 hectares in extent shall be transferred to the Second Applicant'*

*is amended to read*

*a a portion of the property Erf 142 Constantia (measuring 8.9 hectares) situated in the Western Cape Province shall be transferred to the Second Applicant."*

A copy of the amended order is annexed hereto marked "C".

15. On the 30<sup>th</sup> May 2013, one of the parties unaffected by the substance of the order, applied for and was granted, leave to appeal to the Supreme Court of Appeal against the costs order made.
16. The hearing of the appeal against the costs order was set down in the Supreme Court of Appeal for 27 August 2014.
17. On 17 July 2014 Applicant launched an application for rescission of the amended order of 8 February 2013 in the Land Claims Court.
18. Upon being advised that the import of section 35(11) of the Restitution Act was that the application for rescission needed to be brought in the Supreme Court of Appeal, that court seized with an appeal relating to the matter, the application for rescission was withdrawn.

*S*  
*D*  
*MD*

19. Application was made to the Supreme Court of Appeal for leave to intervene and for rescission of the amended order of the Land Claims Court.
20. The Supreme Court of Appeal dismissed the application for leave to intervene in those proceedings and struck the application for rescission from the roll. A copy of the Supreme Court of Appeal's judgment is annexed and marked "D".
21. On the 10<sup>th</sup> September 2014, the Applicant relaunched its application for rescission (preceded by an application for leave to intervene) in the Land Claims Court.
22. On 11 September 2015 the Land Claims Court dismissed the application for leave to intervene without deciding the application for rescission. Copies of the judgment and order of the Land Claims Court are annexed and marked "E1" and "E2".
23. On 31 March 2016, the Applicant applied to the Land Claims Court for leave to appeal to the Supreme Court of Appeal against the dismissal of its application. This application was dismissed by the Land Claims Court. Copies of the judgment and order are annexed as "F1" and "F2".
24. On 21 April 2016, the Applicant applied to the Supreme Court of Appeal for leave to appeal. This application was dismissed on 5 July 2016. A copy of the Supreme Court of Appeal's order is annexed and marked "G".
25. There is no other application besides this one pending for leave to appeal.

1  
S. D. [Signature]

### THE PARTIES TO THIS APPLICATION

26. The Applicant, described in paragraph 1 above, is a public interest, non-profit organisation providing therapeutic horse riding for disabled children operating from the SARDA Centre situated at 69 Brommersvlei Road, Constantia, Cape Town.
27. The First Respondent is the Regional Land Claims Commissioner, Western Cape Town, a functionary of the Commission on the Restitution of Land Rights established pursuant to section 4 of the Restitution Act, cited as "First Applicant" in the Land Claims Court.
28. The Second Respondent is Sedick Sadien, an adult male, resident of Cape Town, cited as "Second Applicant" in the Land Claims Court.
29. The Third Respondent is Ebrahim Sadien, an adult male, resident of Cape Town, cited as "Third Applicant" in the Land Claims Court. The Third Respondent's claim was not considered by the Land Claims Court as the claim of his forebear, Magmoed Sadien, through whom his claim was made, was not gazetted.

### GROUND FOR RESCISSION AND LEAVE TO INTERVENE

30. Section 35(11) of the Restitution Act is central to this application and reads as follows:

*"The court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order*

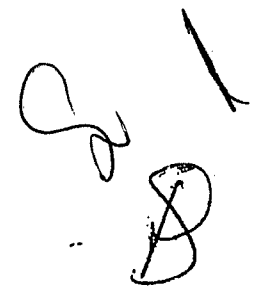


*or judgment granted by it –*

- a in the absence of the person against whom that order or judgment was granted;*
- b which was void from its inception or was obtained by fraud or mistake common to the parties;*
- c in respect of which no appeal lies; or*
- d in the circumstances contemplated in section 11(5): provided where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be."*

31. In its founding affidavit the Applicant alleged as follows:

*"66. The varied order awarding 'portion of the property erf 142 Constantia' to the Second Applicant was made in the absence of the owner of such property, namely, the Republic of South Africa. Although the court mentioned that it had had consultations pursuant to its 'inquisitorial powers' with the Department of Rural Development and Land Reform, the property in question was, and is, administered by the Department of Public Works. Neither one of these departments were cited as a party to the proceedings.*

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67. *The varied order was also made in the absence, and without the knowledge of SARDA.*

68. *SARDA received no notice whatsoever of the proceedings referred to above; no offer of compensation has been made for its extensive improvements to the land; and no offer has been made of alternative land on which to conduct its operations.*

69. *As the lawful occupier of Erf 142 Constantia for 34 years, SARDA is entitled, both in terms of the Common Law and the provisions of section 35(9) of the Act, to be compensated for any loss of possession of the land.*

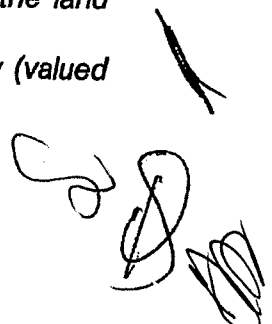
70. *Accordingly, SARDA is an interested party which should have been cited in the proceedings."*

32. Although there was delay in bringing the application for rescission, this was condoned by the Land Claims Court with the consent of the Respondents.

33. The Applicant explained its delay by inability to fund legal proceedings and efforts to have the National Government itself intervene.

34. In paragraph 85 of the founding affidavit, the Applicant alleged as follows:

*"85. At the outset SARDA had hoped that because of the flaws in the order, namely the mistaken supposition that the land was vacant and the vast disparity between the value of the land claim (one fifth of R563,333) and the SARDA property (valued*

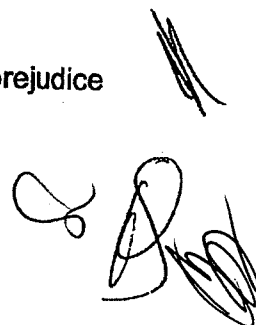


*at R210m), that the Land Claims Commissioner, the Cape Provincial Government and the National Government, individually or combined, would act to set aside the order.*

86. *On 28 May 2014 at the Department of Public Works, Customs House, Elaine Connell, Karen Basson and I [Fenella Powles] on behalf of SARDA met with Mr Michael Worsnip, Mr Johnson Poto, Mr Ben Mars and Koleka Martins on behalf of the Land Claims Commissioner and members of the Department of Public Works, including Mr Frederick Johnson (who came late). It was made clear that the Department of Public Works had resolved to abide the order.*

87. *After the meeting, SARDA formed the view that as the property had been expropriated initially for educational purposes, the National Government would be hard pressed to terminate SARDA's lease for reasons of commercial gain. It seemed reasonable to suppose that should the Second Applicant become owner of the property, he would wish to exploit it for commercial gain. From this perspective it is considered that SARDA would have a more powerful bargaining position in regard to its removal by the National Government than it would by Second Applicant who is given an unfettered right to the land."*

35. It was therefore implicit in the application that the Applicant alleged prejudice



both by reason of the fact that the court had not awarded it compensation for its improvements and that it was concerned that the effect of the order would be to dispossess it of the State land which it lawfully occupied.

36. It is respectfully submitted that the Applicant was therefore able to show that it was "affected" by the amended order as required by section 35(11) of the Restitution Act.
37. In the circumstances set out below, it was also able to show good cause for rescission as required by Rule 64 (2) of the Land Claims Court Rules.

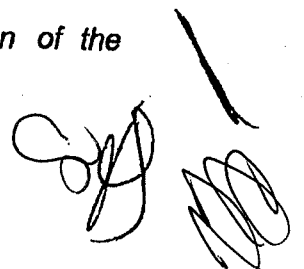
#### **THE LAND CLAIMS COURT'S JUDGMENT AND AMENDED ORDER**

38. As may be seen from the opening paragraphs of judgment, the claim was one for the restoration of land described as "*remainder erf 2274 Constantia in the Western Cape Province*" ("Erf 2274"), referred to in the judgment as "the property".
39. The important paragraphs in the judgment for the purposes of this application are set out verbatim:

*"[5] First Applicant is the Regional Land Claims Commissioner: Western Cape, with offices in Cape Town.*

*Second Applicant is Sedick Sadien he is the son to the deceased claimant Mogamat Rashad Sadien, who had lodged the claim with the First Applicant.*

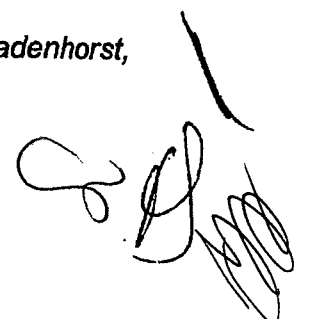
*Third Applicant is Ebrahim Sadien he is the son of the*



*deceased claimant Magmoed Sadien. Magmoed Sadien is the late son of the late Ismail Sadien. Third Applicant is thus the grandson of the late Ismail Sadien, co-owner of the property."*

*"[6] In 1902 Dawood (recorded as Doet or Dout) Sadien bought at least 3 portions of land from the subdivided Sillery Estate, one of which (erf 2274) became his family's home and source of livelihood. The family farmed on this property until they were allegedly dispossessed of the land. In 1921, after building and donating a Mosque to the local Muslim community, Doet died, leaving his wife (Fatima) a usufruct of the remainder of the family farm, which she continued to run. In 1956, Fatima (Doet's widow) died and the farm was purchased on auction by 5 of the Sadien brothers (Mogamet Toyer, Abdurahman, Omar, Imam Doet and Ismail). Ismail died after the purchase but before the transfer, and the land was transferred in 1958 into the names of the 4 surviving brothers and the deceased estate of the fifth brother Ismail. In 1961, some 5 years after the Group Areas inquiry, and simultaneously to the consideration of radical new powers for the Group Areas Board, vast tracts of Cape Town were declared White areas by Proclamation 34 of 1961, gazetted on Friday 10<sup>th</sup> February. [ to assist the Court, a simplified family tree is annexed as "H".]*

*[18] The property was sold on auction to JAJ Badenhorst,*





*grandfather to Third Respondent on 21<sup>st</sup> March 1962 for the amount of R13 550. [It was common cause that the property was thereafter transferred to the First Respondent in the Land Claims Court, Jazz Spirit 12 (Pty) Ltd].*

*[14] A total of 4 claims were lodged. This claim is C371 lodged on 29 December 1998 by Ismail Coenrad the grandson to Ismail Sadien. Claim S851 lodged by Magmoed Sadien on behalf of the dispossessed co-owner Doet Sadien. Claim S38 lodged by Mogamat Rashaad Sadien on the 14<sup>th</sup> September 1995. Claim S287 completed by Magmoed Sadien on the 13<sup>th</sup> September 1996.*

*[15] Only one of the above claims namely S38 was duly processed and gazetted on 1<sup>st</sup> April 1999 under notice 499 of 1999. It therefore means that only one claim is before this court. [emphasis added]*

*[86] It is common cause that the market value of the property at the time of dispossession in 1962 was R22 000. Further than an amount of R13 550 was paid as a purchase price at the time of dispossession. The purchase price cannot be regarded as an equitable compensation as contemplated in section 2(2) of the Act.*

*[87] Regarding restoration of the property as it is presently an*

*So*  

*evaluation of the property will have to be conducted. It was suggested that the property may be worth an amount in the region of R80 million to R140 million. I am aware of the strain on the finances of the Department. However, the claimants have always opted for alternative State land. The Commission informed the current owners that the claim was for alternative State land. The same Commission even informed the claimants that 'we do not regard the restoration of the land as feasible'.*

*[89] I come to the conclusion that restoration in the form of alternative State land or equal redress by means of financial compensation would be appropriate. [emphasis added]*

*[90] The subject property was co-owned by the 5 Sadien brothers each entitled to a one fifth undivided portion. Only one descendant (Mogamat Rashaad Sadien) lodged a restitution claim representing his forebear. [ This reinforces the point made in paragraph 15 of the judgment above].*

*[91] The right in land claimed given the interpretation of the statute would have to be awarded to the descendant who lodged a claim. This implies that the Second Applicant before court would be entitled to a one fifth undivided share of the subject property. The other descendants who have not lodged claims stand to benefit nothing.*

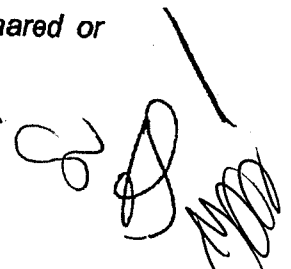


[92] *The question to be answered as to what then happens to the remaining four fifths of the subject property. Does this revert to the State or get retained by the current land owner?*

[93] *The Sadien family lived a communal life on the subject property they co-owned. The statute (the "Act") does not provide for a situation of descendants who have not lodged claims.*

[95] *It is trite that the purpose of the restitution provision in the Constitution and the Restitution Act is to remedy the injustice perpetrated by dispossession of the right in land. The claim of the descendants is not to make good the injustice suffered by the claimant but rather the injustice suffered by their parents. The fact that certain descendants did not lodge claims, in my mind, should not be interpreted as meaning that their forebears did not suffer injustice at the time of the dispossession. I am inclined to accept that the facts in casu justify the restoration of rights in land even to those who did not lodge claims when they qualified to but did not do so. It is the injustice caused by the dispossession that has to be addressed.*

[97] *It is desirable, given the fact the whole Sadien family led a communal life on the property that the land is restored to all the descendants. However, only one descendant has submitted a land claim and logically restoration is to be in his interests. I am of the opinion that the land to be restored be shared or*



*enjoyed accordingly by all those descendants who have not lodged a claim.*

*[98] In terms of section 32(3)(b) of the Restitution Act this court may conduct any part of any proceedings on an inquisitorial basis. Applying this inquisitorial power the court enquired as to the availability of Stated-owned land. The court was informed that three pieces of State-owned land were vacant in the Province of the Western Cape and these are*

*I erf 142 Constantia*

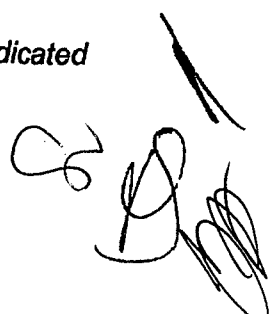
*II erf 3110 Constantia*

*III erf 1783 Constantia*

*The Department of Rural Development and Land Reform has confirmed the availability of the same. The Department also indicated that if a judgment was given regarding the restoration of any of the three properties to the claimant they would abide with such judgment.*

*[99] Erf 1783 was chosen taking into consideration the size of the dispossessed land. This was the closest in extent.*

*[100] I took the liberty of ascertaining the attitude of the Second Applicant to the enjoyment of the property with the rest of the Sadien family. Counsel for the Applicants, Mr Krige indicated*



*that it will be in accordance with the wishes of the family.*

*In the circumstances I am satisfied that the following order is appropriate:*

**ORDER**


- a. *A portion of the property Erf 1783 Constantia in the Western Cape Province measuring 10 hectares in extent shall be transferred to the Second Applicant.*
- b. *The Department of Rural Development and Land Reform to designate the said property in favour of the Second Applicant.*
- c. *The interdict order granted on 23 February 2010 is hereby uplifted.*
- d. *There is no order as to costs."*

40. On 8 February 2013, the Land Claims Court amended its order to read:

*"Court order (a) that reads 'a portion of the property Erf 1783 Constantia in the Western Cape Province measuring 10 hectares in extent shall be transferred to the Second Applicant'*

*is amended to read*

- (a) *A portion of the property Erf 142 Constantia (measuring 8.9 hectares) situated in the Western Cape Province shall be transferred to the Second Applicant." (See annexure "C")*



41. It is common cause that:
- 41.1. the Land Claims Court conducted the exercise of selecting alternative State land in the absence of the parties;
  - 41.2. there is no record other than the judgment itself of the court's exchanges with the Department of Rural Development and Land Reform; and
  - 41.3. the amended order was made by the Land Claims Court at the prompting of Second Applicant's current attorney in a private letter to the court which has not been disclosed.
42. During the proceedings of the Land Claims Court the Applicants (current Respondents) were all represented by the State Attorney. The Second Respondent's current attorney, Mr Ighsaan Sadien, who did not represent the Second Respondent during the proceedings in the Land Claims Court, has placed on record that after the order of the Land Claims Court was made on 7 December 2012 he addressed a letter to the court which contained the following:
- "1. I made reference to the court order dated 7 December 2012 awarding erf 1783 measuring 10 hectares in extent to be transferred to the Second Applicant;*
  - 2. I pointed out that the actual extent of erf 1783 was 2.5 instead of 10 hectares; and*



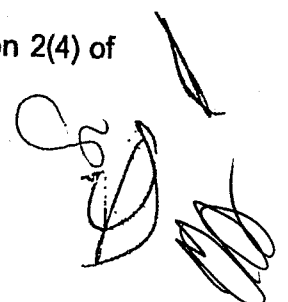
3. *sought clarification from the court in respect of the difference between the extent of the land awarded and the actual size of erf 1783."*

#### **FLAWS IN THE REASONING OF THE LAND CLAIMS COURT'S JUDGMENT**

43. It is respectfully submitted that having concluded that only one claim was before the court, that of Second Respondent, Mr Sedick Sadien, who was substituted for his forebear, Mogamat Rashaad Sadien (son of the original owner, Omar Sadien), who was entitled to a one fifth undivided share of the land dispossessed, erf 2274, and that it was appropriate to award "*alternative State land or equal redress by means of financial compensation*" [paragraph 89], that it was not open to award the Second Respondent full title to a significantly larger portion of land than that dispossessed.
44. Because the Second Respondent was only entitled to a one fifth undivided share, and not the full extent of the land dispossessed, the only logical and fair redress would have been appropriate financial compensation as the Land Claims Court itself recognised in paragraph 89.
45. As set out in paragraph 86 of the judgment, the dispossessed land was sold for R13 550 at a time when it was valued at R22,000.
46. In Mphela & Others v Haakdorringbult Boerdery CC & Others 2008 (4) SA 488 CC it was held that partial compensation at the time of dispossession is to be set off against the subsequent claim for restoration.

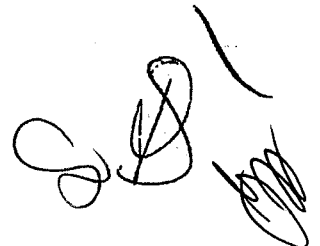


47. In Farias (Pty) Ltd v Minister of Agriculture & Land Affairs & Others 2013 (3) SA 263 SCA it was held that fairness requires that the compensation awarded be just and equitable not only to the land claimants but also to members of society who have an interest in the utilisation of public resources.
48. The claim of the five Sadien brothers who were collectively dispossessed of land should therefore have been valued at the present day value of the difference between R22 000 and R13 550 in 1962. This amounts to R563 333.
49. It was not in dispute:
- (a) that erf 2274 was 5.19 hectares in extent; and
  - (b) that erf 142 was 8.9 hectares in extent; and
  - (c) that the value of erf 142 was R128m (it had previously been estimated incorrectly at R210m).
50. Although the Respondents have sought to rely on the case in re Former Highlands Residents: Sonny & Others v Department of Land Affairs 2000 (2) SA 351 (LCC) as authority for the court's awarding an equivalent of the full extent of the dispossessed land, despite the claimant being entitled to only a one fifth undivided share thereof, it is respectfully submitted that this case is not authority for such a deviation from basic principles.
51. In Sonny, the Land Claims Court was concerned to interpret section 2(4) of

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the Restitution Act which provides: *"if there is more than one direct descendant who have lodged claims for and are entitled to restitution, the right or equitable redress in question shall be divided not according to the number of individuals but by lines of succession"*.

52. In Sonny, the Land Claims Court held that living descendants entitled to restitution but who did not lodge claims are not to be taken into account when equitable redress in the form of compensation is assessed or divided among direct descendants entitled to restitution and who have lodged claims. In Sonny, the forebear through whom the claims were made was the sole owner of the land disposed.
53. Applied to the facts of this case this would mean that if there were other living direct descendants eligible for Omar Sadien's one fifth undivided share, as there were, but who did not lodge claims, the full one fifth undivided share would be awarded to the claimant or claimants who did lodge a claim. The right in this case remains limited to a one fifth undivided share and cannot be translated to a right to the full extent of the property dispossessed.
54. In this case, there being five co-owners, there were five separate and distinct rights, only one of which could be considered by the court by reason of the circumstances described in paragraph 15 of the judgment. This was also the reason for the rejection of Third Respondent's claim.
55. The effect of the amended order is certain to give rise to dissension amongst



the members of the Sadien family who number more than 100. There are no structures in place to give effect to the court's directive that *"the land to be restored be shared or enjoyed accordingly by all the descendants who have not lodged a claim (paragraph 97 of the judgment)."*

**THE COURT EXCEEDED ITS POWERS**

56. It is respectfully submitted that in sourcing of its own accord, in terms of its inquisitorial powers (judgement paragraph 98), and then awarding specific State land, the court exceeded its powers under the Restitution Act.

57. In paragraph 56 of the founding affidavit the Applicant alleged as follows:

*"56. I have been advised that although the Land Claims Court was empowered to order the State to grant the claimant an appropriate right in alternative State-owned land and, where necessary, order the State to designate it (35(1)(b) of the Act), the court was not empowered to designate the land suo motu, and thereupon order the State to "designate" the land designated by the court itself."*

58. It is respectfully submitted that section 35(1)(b) of the Restitution Act does not empower the court to carry out an investigation into suitable alternative State land of its own accord as occurred in this case.

59. The fact that the court did so led to two errors: firstly, the court mistakenly thought that the extent of the land it was awarding, erf 1783 Constantia, was

*[Handwritten signatures and marks]*

10 hectares in extent (it is common cause that it was only 2.5 hectares) and secondly, the court mistakenly thought that erf 142, the land which it awarded by its amended order, was vacant.

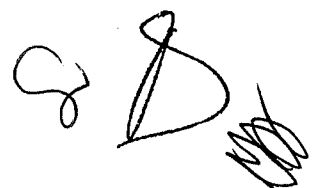
60. There is no record of any investigation into the attributes of the three eligible erven in paragraph 98 of the court's judgment: erf 142 Constantia, erf 3110 Constantia and erf 1783 Constantia.

### IRREGULAR PROCEEDINGS

61. It is respectfully submitted that once the Land Claims Court had made its order awarding erf 1783 Constantia to the Second Respondent, it became *functus officio*.
62. I refer to the wording of the amended order which is headed "*Variation of a court order in terms of Rule 64(1) of the Land Claims Court Rules ... in chambers*".
63. Rule 64 of the Land Claims Court Rules reads as follows:

"64. *Variation and rescission of orders.*

(1) *Subject to section 35(11) of the Restitution of Land Rights Act, the court may suspend, rescind or vary, of its own accord or upon the application of any party, any order, ruling or minutes of a conference which contains an ambiguity or a patent error or omission, in order to clarify the ambiguity or rectify the patent error or omission.*

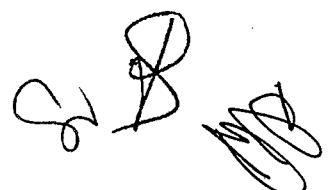


(2) *Any party seeking the rescission or variation of an order in terms of section 35(11) or (12) of the Restitution of Land Rights Act or in terms of sub-rule 1 may do so only upon –*

(a) *application delivered within 10 days from the date upon he or she becomes aware of the order; and*

(b) *good cause shown for the rescission or variation."*

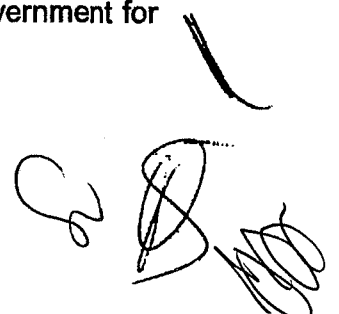
64. It is common cause that the amended order of 8 February 2014 was not preceded by an application in terms of Rule 64(2).
65. As set out above, the Land Claims Court amended its order at the prompting of a private letter sent by a legal practitioner who, at that stage of the proceedings, was not on record for any of the parties.
66. Nor can it be said that the court would have been entitled to amend its order of its own accord. The mistake regarding the extent of erf 1783 Constantia does not qualify as a "*patent error*" in terms of the Rule. This court is respectfully referred to Mostert N.O. v Old Mutual Life Assurance Co SA Ltd 2002 (1) SA 82 SA at 86 C-D. The court may alter its judgment *suo motu* to give effect to its true intention – the sense and substance of the order may not be altered. In this case, the Land Claims Court fully intended to award erf 1783 Constantia to the Second Respondent.
67. The only way to bring about an amendment to substitute erf 142 Constantia for erf 1783 Constantia would have been a proper application by one of the



parties on notice to the others. The private letter of Mr Ighsaan Sadien to the court does not meet with this requirement.

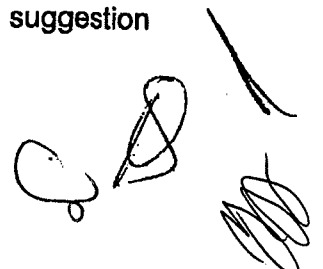
### **THE APPLICANT'S POSITION**

68. Currently the Applicant provides therapeutic riding for 180 disabled children from the Cape Peninsula. Most of these children are from 13 special needs schools. The schools which provide primarily for disabled, previously disadvantaged children from across the Western Cape include Alpha, Astra Bloulei, Bel Porto, the Dominican School for the Deaf, Eros, Fila, Glenbridge, Mary Harding, Molenbeek, Oasis School, St Josephs, Tembaletu, Vera and Vista Nova.
69. The Applicant is the only organisation of its kind in the Western Cape which offers therapy at no cost to autistic, cerebral palsy, down syndrome and other physically and mentally disabled school children.
70. The Applicant employs 3 full-time and 2 part-time staff. In addition there are 10 instructors and over 100 helpers who provide their services on a voluntary basis.
71. The Applicant operates from the SARDA Centre situated at 69 Brommervlei Road, Constantia. The property extends primarily over erf 142 Constantia which was let to the Applicant pursuant to a written 20 year lease with the School Board of the Cape Province dated 8 December 1981.
72. The property had been expropriated by the Cape Provincial Government for



educational purposes in 1966 and was later transferred to the National Government in 1990. The property is currently administered by the Department of Public Works.

73. After the initial lease expired on 30 June 2001 the lease was renewed on an annual basis and the last written lease expired on 30 June 2007.
74. Although the initial lease contained a provision that SARDA remove improvements on the expiry of the lease, these improvements remained and were existing when a series of annual leases was entered into the last of which expired on 30 June 2007.
75. The last written lease provided for compensation for improvements at cost provided these improvements were made with the consent of the landlord. Insofar as the improvements were in place at the commencement of the lease the landlord must have been taken to have consented to same and to have undertaken the obligation for compensation.
76. On 28 June 2007 the Applicant was informed by the Western Cape Provincial Government that its lease would not be renewed on its expiry on 30 June 2007. Thereafter there were negotiations with National Government to enter into a new written lease. These never came to fruition.
77. From February 2010, both the Western Cape Provincial Government and the National Government refused to accept rental from the Applicant. Thereafter the Applicant continued to pay rent into its attorney's trust account on notice to the Department of Public Works. There has never been any suggestion



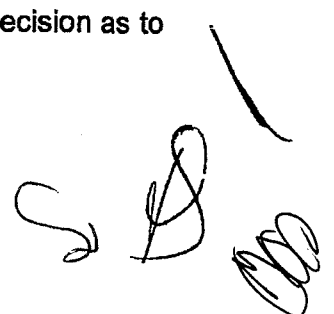
that the Applicant has been other than a lawful occupier of the land.

78. The most recent official communication which the Applicant received concerning its tenure of the land was from the Chief Land Claims Commissioner dated 5 March 2014 in which the following was stated "*It was previously agreed that the Regional Land Claims Commission: Western Cape would facilitate an urgent meeting between the National Department of Public Works and all stakeholders in order to find a solution to the problem [the amended order in this case]. In a meeting held between the Commission and the National Department of Public Works on 18 February 2014, it was agreed that the Commission would submit the request for the transfer of the land [erf 142] in favour of the claimants. The NDPW [National Department of Public Works] has agreed that on receipt of this request from the State Attorney, they will find a suitable solution regarding SARDA.*" A copy of the letter is annexed as "I".

79. On 8 July 2014 the Assistant Registrar of Deeds, Cape Town Mr Joseph Peter Dreyer confirmed in an email to Applicant's attorneys of record that no transfer documents had been lodged for the transfer of erf 142 to the Second Respondent. A copy of the email is annexed as "J".

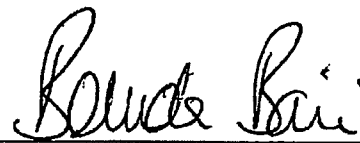
## CONCLUSION

80. It is respectfully submitted that even if it were to be found that the Second Respondent was entitled to the equivalent of the full extent of erf 2274 Constantia, that the Applicant has a right to be involved in the decision as to



the identity of the alternative State land to be awarded in satisfaction of such claim.

81. WHEREFORE I respectfully submit that an order should be granted in terms of the notice of motion.



**BELINDA JANE RITCHIE BAIN**

I certify that the abovementioned signature is the true signature of **BELINDA JANE RITCHIE BAIN** and that she acknowledged to me that she knows and understands the contents of the foregoing Affidavit which was signed and attested to at the undermentioned address on this 22 day of **JULY 2016** in accordance with the provisions of GN R1258 dated 21 July 1972 as amended by Regulation No. 1648 dated 19 August 1977, by GN R1428 of 11 July 1980 and by GN R744 of 23 April 1982.



**COMMISSIONER OF OATHS**

**TJAART JOHANNES KRIEL**  
**COMMISSIONER OF OATHS**  
PRACTISING ATTORNEY/CONVEYANCER RSA  
13th FLOOR, TOUCHSTONE HOUSE  
7 BREE STREET, CAPE TOWN



"A"

32.

Extract from the Minutes of a meeting of the Management Committee of South  
African Riding Association for the Disabled: Cape Town Branch

Present: Belinda Baln (chair)  
Michelle Hart (treasurer)  
Lisa Hare-McCullum  
DI Longmore  
Mel van der Spuy  
Hilary Lane  
Bee Lukey (secretary)

At: 5 Chantecler Lane, Constantia, 7806

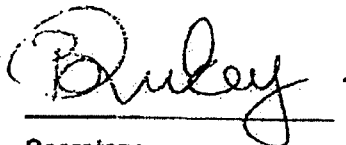
**RESOLVED:**

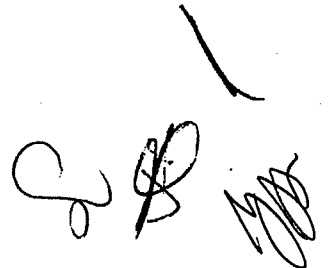
that **BELINDA JANE RITCHIE BAIN** be authorized to:

(a) instruct attorneys and/or counsel to represent and appear on behalf of SARDA in proceedings to bring about the setting aside and/or rescission of the order of the Land Claims Court dated 8 February 2013, including a petition for leave to appeal to the SCA and, if necessary, the Constitutional Court

(b) To sign all powers of attorney, affidavits or other documents which may be necessary to carry out the above.

Certified a true copy

  
Secretary



IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at CAPE TOWN  
Before Mpshe AJ  
Heard on: 19 – 23 March 2012

CASE NUMBER: LCC26/10

10 Decided on: 7 December 2012

In the case between:

THE REGIONAL LAND CLAIMS COMMISSIONER  
SEDICK SADIEN  
EBRAHIM SADIEN

1<sup>st</sup> Applicant  
2<sup>nd</sup> Applicant  
3<sup>rd</sup> Applicant

and

JAZZ SPIRIT 12 (PTY) LTD  
YAMIV (PTY) LTD  
HEIN R. BADENHORST  
THE REGISTRAR OF DEEDS

1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent  
3<sup>rd</sup> Respondent  
4<sup>th</sup> Respondent

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JUDGEMENT

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MPSHE AJ

Introduction

[1] This is a claim by Mogamat Rashaad Sadien for restitution of rights in land in the land described as Remainder Erf 2274 Constantia in the Western Cape Province (the property).

[2] This is a claim for physical restoration of the property. He claims in his capacity as a direct descendant of Omar Sadien, his father. It does not appear that he claims on behalf of all other descendants.

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[3] The claim is based on the alleged dispossession of the property under the Group Areas Act 77 of 1957. The property at the time of dispossession was co-owned by five brothers in

undivided shares. It is alleged that the property was forcibly sold and that just and equitable compensation was not paid.

[4] The claim is opposed by first to third respondents who contend that the property was not dispossessed in terms of the Restitution of Land Rights Act 22 of 1994 but was sold on auction due to financial distress.

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Parties

[5] First applicant is the Regional Land Claims Commissioner: Western Cape, with offices in Cape Town.

Second applicant is Sedick Sadien he is the son to the deceased claimant Mogamat Rashaad Sadien, who had lodged a claim with first applicant.

Third applicant Ebrahim Sadien is the son of the deceased claimant Magmoed Sadien. Magmoed Sadien is the late son of the late Ismael Sadien. Third applicant is thus the grandson of the late Ismael Sadien, a co-owner of the property.

20 First respondent is Jazz Spirit 12 (Pty) Ltd, a company duly registered according to the company laws of South Africa with offices in Constantia, Western Cape. First respondent not formed after the purchasing of the property by J.A.J. Badenhorst.

Second respondent is Yamiv (Pty) Ltd a company duly registered according to the to the company laws of South Africa. With its previous address at Sillery Farm, Silley Lane Constantia. Second respondent bought the property in 1981.

Third respondent is HEIN J. BADENHORST, an adult male businessman, of No. 1 Evergreen Avenue, Constantia. The third respondent was at all material times a director of the first respondent.

30 Fourth respondent is THE REGISTRAR OF DEEDS, a juristic person capable of being sued and cited in terms of the Deeds Registries Act 47 of 1937 with offices at Plein Street, Cape Town, and which is, *inter alia*, responsible for the sub-division of immovable property,

in *casu* the subdivision of the subject property (known as remainder of erf 2274 Constantia). The fourth respondent is cited herein because of its interest in the present application.

Background

10 [6] In 1902 Dawood (recorded as Doet or Dout) Sadien bought at least 3 portions of land from the subdivided Sillery Estate, one of which (erf 2274) became his family's home and source of livelihood. The family farmed on this property until they were allegedly dispossessed of the land. In 1921, after building and donating a mosque to the local Muslim community, Doet died, leaving his wife (Fatima) a usufruct of the remainder of the family farm, which she continued to run. In 1956, Fatima (Doet's widow) died, and the farm was purchased on auction by five of the Sadien brothers (Mogamet Toyer, Abdurahman, Omar, Inam Doet and Ismail). Ismail died after the purchase but before the transfer, and the land was transferred in March 1958 into the names of the four surviving brothers and deceased Estate of the fifth brother Ismail. In 1961, some five years after the Group Areas Inquiry, and simultaneously to the consideration of radical new powers for the Group Areas Board, vast tracts of Cape Town were declared White areas by proclamation 34 of 1961, gazetted on Friday 10<sup>th</sup> of February.

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[7] The claim form was completed by Mogamot Rashaad Sadien substituted by second applicant Sedick Sadien. The property before dispossession was co-owned by the five Sadien brothers. The property was later a subject of a forced sale.

[8] The property was sold on auction to J.A.J Badenhorst, grandfather to third respondent on 21<sup>st</sup> March 1962 for the amount of R13 550.00.

30 [9] A brief status of the subject property before and after dispossession is necessary. Prior to dispossession the property was a market garden on a farm in Constantia. It was basically agricultural. The claimants used the property and earned their living through fruit and vegetables business. Claimants made use of water from a river stream that ran through the property. The said stream is no longer in use as same has been shut down by the local authorities. This then renders the vegetable and fruit business impossible due to lack of water. Evidence of the applicants is to the effect that the family made a living from the land which was fertile and well watered. The family ran a farm stall and a hawking business. They also

grew seeds for a nursery. The family lived and enjoyed proceeds from the property. They basically were able to lead a competitive lifestyle befitting that period in time.

[10] On the 30 June 2005 the current owners obtained a Record of Decision. This basically grants the owner (respondents) permission to develop the property. This entailed the sale, rezoning, intention to sub-divide and develop the property as contemplated in section 11 (7) (aA) of the Act. The Record of Decision was obtained in terms of the Environmental Conservation Act 73 of 1989 granting permission for a change of land use from public open space to residential purposes.

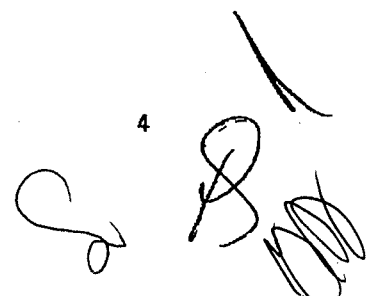
[11] The property owners have obtained permission to rezone the property from public open space to sub-divisional area. The decision was obtained from the Department of Environmental Affairs and Development Planning (DEA and DP) in terms of section 44 of the Land Use Planning Ordinance 15 of 1985 (LUPO).

[12] On approval by the DEA and DP in terms of section 44 LUPO to sub-divide the subject properties; the subject property has overcome change over a long period of time. It is currently a residential area and is unsuitable for market gardening and production of seeds. It is clear that for the subject property to revert to its former status much will have to be done.

[13] There is currently an official land use planning for the subject property in the form of a residential estate. I have not come across evidence from the applicants, given the change in the property, as to their intended use upon restoration. There is only evidence to the effect that claimants want the land to be restored.

#### Claims Lodged

[14] A total of four claims were lodged. This claim is C371 lodged on 29<sup>th</sup> December 1998 by Ismail Coenrad the grandson to Ismail Sadien. Claim S851 lodged by Mogmoed Sadien on behalf of the dispossessed co-owner Doet Sadien. Claim S38 lodged by Mogamat Rashaad Sadien on the 14<sup>th</sup> of December 1995. Claim S287 completed by Magmoed Sadien on the 13<sup>th</sup> of September 1996.



[15] Only one of the above claims namely S38 was duly processed and gazetted on 1<sup>st</sup> April 1999 under notice 499 of 1999. It therefore means that only one claim is before this court.

Facts not in Issue

By formal admission

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[16] The following issues are common cause:

[16.1] that the Sadien brothers purchased the property on 21 November 1956 in equal shares for £11 000 from the estate of the late Doet Sadien;

[16.2] that Ismail Sadien (one of the five Sadien brothers) passed away before registration of the transfer of ownership of the property on 6 March 1958 in favour of the Sadien brothers, with the result that his share was transferred in the name of Estate Late Ismail Sadien;

[16.3] that the ownership of the property was transferred in favour of the four living brothers and the estate late Ismail Sadien.

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[16.4] that the Group Areas Act (and its successors) and the Community Development Act (and its successors) were both Acts that have in the past discriminated on the basis of race as contemplated in terms of section 2(1) of the Restitution Act;

[16.5] that in terms of proclamation No. 34 of 10 February 1961 promulgated in terms of section 20 of the Group Areas Act (77 of 1957) the area in which the property is situated was declared an area for ownership and occupation of members of the White group;

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[16.6] that the Sadien brothers (including the estate late Ismail Sadien) were the registered owners as at date of the said 1961 proclamation;

[16.7] that the Sadien brothers on 14 March 1962 attempted to sell the property by way of a public auction and that the auctioneers accepted Mr. Jacob Adriaan

Jacobus Badenhorst's bid for R 12 700.00, the latter, who on the basis of his race group qualified to hold ownership of the property;

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[16.8] that the Sadien brothers rejected the bid and further negotiations between the parties ensued and which culminated in an agreement *inter parties* in terms of which J A J Badenhorst purchased the property for R 13 550.00 on 21 March 1962.

[16.9] that the Sadien family lived and enjoyed their livelihood on the property.

Facts in Issue

[17] The issues which this Court is required to decide are:

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[17.1] whether the Sadien Brothers were dispossessed of their rights in the property as a result of past racially discriminatory laws or practices when it was purchased by a Mr J A J Badenhorst on 21 March 1962; and if so,

[17.2] whether they were paid just and equitable compensation as contemplated in section 25(3) of the Constitution or any other consideration which is just and equitable; and if not,

[17.3] whether the second respondent's notice to the first applicant should be accepted as a notice complying with the provisions of section 11 (7) (aA) of the Restitution Act. Section 11 (7) (aA) provides:

“(7) Once a notice has been published in respect of any land –

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(aA) no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given in respect of –

(i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation,

lease, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit;

(ii) any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit;"

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SPECIAL PLEA

[18] Mr. Van der Westhuizen for the respondents submits that the claim for restoration of the property is a debt in terms of the prescription Act 68 of 1969, and that the claim has therefore prescribed, section 1f provides:

"The periods of prescription of debts shall be the following:

....

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

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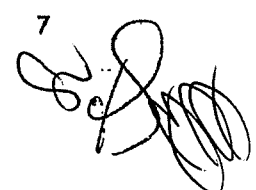
[19] It is indeed so that the word "debt" includes right in land for purposes of the Prescription Act 68 of 1969.

[20] In the case of *Barnett and Others v Minister of Land Affairs and Others*<sup>1</sup>, Brand AJ said the following:

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"In my view it is fair to say that the government was aware of the identities of the defendants and of the facts upon which its claims against them rely, more than three years before the present action was instituted. I am also prepared to accept that the vindicatory relief which the government seeks to enforce constitutes a 'debt' as contemplated by the Prescription Act. Though the Act does not define the term 'debt', it has been held that, for purposes of the Act, the term has a wide and general meaning and that it includes an obligation to do something or refrain from doing something (see e g *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344-G and *Desai NO v Desai and Others* 1996 (1) SA 141 (A) at 146H-J). Thus understood, I can see no reason why it would not include a claim for

<sup>1</sup> 2007 (6) SA 313 (SCA) at page 320 paragraph 19

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the enforcement of an owner's rights to property (see also e g *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F-G).<sup>2</sup>

[21] The dictionary meaning of the word "debt" is said to be "something owed or due which one person is under an obligation to pay or render to another..."<sup>2</sup>

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I further accept that the Prescription Act is binding on the state.

[22] Mr. Jacobs for the applicants submitted that the Prescription Act cannot be grafted onto the Restitution Act. He argued that the provisions of the Prescription Act are inconsistent with the Restitution Act. In support hereof he referred to section 16(1) of the Prescription Act. Section 16(1) reads:

Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.

20 [23] Mr. Jacobs submits that the Prescription Act is not applicable in the present case due to it, Prescription Act, being inconsistent with the Restitution of Land Rights Act 22 of 1994.

[24] It is necessary to embark on an enquiry as to the consistency or otherwise, of section 11 to the Prescription Act read with the provisions of section 2 (1) (a) and 2 (1) (e) to the Restitution Act.

Section 2 (1) (a) states that

"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 ...."

Section 2 (1) (e) provides that

"the claim for such restitution is lodged not later than 31 December 1998". (my emphasis)

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<sup>2</sup>New Shorter Oxford English Dictionary

[25] I am of the opinion that the provisions of the Prescription Act particularly Chapter III thereof are of a general nature. This is ascertainable from the wording in particular of section 11 (d) which states that the period of prescription shall be as stated in the Act "save where an Act of Parliament provides otherwise ..."

[26] The logical interpretation thereof in my opinion is that if there be any Act of Parliament providing for prescription of a debt then the Prescription Act may not apply. This is further galvanised by the provisions of section 16(1) of the Prescription Act.

[27] However, on the other hand section 2 (1) (a) and section 2 (1) (e) provides specifically for restitution matters. It must have been the intention of the lawmaker to regulate debts arising through claims of rights in land. The cut-off date 31 December 1998 lays down a prescription period. If therefore Chapter III of the Prescription Act is said to be applicable in restitution cases, section 2 (1) (a) and 2 (1) (e) would be rendered futile.

[28] I am not aware of any provision in the Restitution Act that provides for the processing of a claim after lodgement to be finalised within a specific period. I come to the conclusion that the provisions of Chapter III to the Prescription Act are inconsistent and cannot apply to claims under the Restitution Act. This special plea stands to be dismissed.

#### Section 11 (7) (aA) Compliance

[29] Applicants submit that the subdivision, rezoning and development of remainder of erf 2274 Constantia falls to be set aside. The submission is premised on the provisions of section 11 (7) (aA) to the Act. The section provides as follows:

"Once a notice has been published in respect of any land no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given in respect of -

- (i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit;
- (ii) any development of land and the Court is satisfied that such development was not done in good faith, the Court may grant any order it deems fit;" [my emphasis]

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[30] In deciding on this issue I need to enquire into the absence or otherwise of the notice as required. Further if the notice was not given, I need to enquire whether such failure to give notice demonstrates lack of good faith.

[31] The interpretation and application of any section within an Act is a process that is  
10 fraught with various considerations. It is not enough to simply look at a section; one must consider the section in relation to the entire Act and the objects of that Act. The golden rule of interpretation is to be found in *Ferrar's Estate v Commissioner for Inland Revenue*<sup>3</sup>

"The governing rule of interpretation...is to endeavour to ascertain the intention of the lawmaker from a study of the provisions of the enactment in question"

[32] However, for Botha<sup>4</sup> the legislative function is a purposive activity; in terms of this approach, the purpose or object of the legislation (the legislative scheme) is the prevailing factor in interpretation. The context of the legislation, including social factors and political policy directions, are also taken into account to establish the purpose of the legislation. These arguments are given in light of the change in the status of South Africa from parliamentary sovereignty to Constitutional democracy. The Constitution and not parliament is now  
20 supreme thus the move away from the intention of the legislature to the purpose of the Act  
[my emphasis]

[33] Thus when interpreting and applying section 11 (7) (aA) this must be done in the context of the objects and purpose of the Restitution Act and the Constitution.

#### Interpretation of the Section

[34] In order to interpret this section it is necessary to understand it within the context of the Restitution Act. The constitutionality of section 11 (7) was challenged in *Transvaal Agricultural Union v the Minister of Land and Another*<sup>5</sup>. The Constitutional Court was  
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<sup>3</sup> 1926 TPD 501 at page 508

<sup>4</sup> Botha C. *Statutory Interpretation* (4<sup>th</sup> Ed) (Juta, Cape Town 2005) at 56

<sup>5</sup> 1997 (2) SA 621 (CC)

required to examine if this section met the Constitutional requirements of just administrative action; in doing so the court considered the object of the section and held:

"The purpose of s 11 (7) and (8) of the Act is to maintain the status quo pending the determination of the claim for restitution, and to protect claimants against possible eviction or damage to improvements to the property while the claim is being processed. These could include residential accommodation and other improvements necessary for the claimants to continue living on the property.<sup>6</sup>

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[35] The Constitutional Court found that the purpose of this section is to maintain the *status quo* and protect claimants pending the determination of their restitution claim. Thus the provisions of this section must be interpreted in view of the object of the entire section which is to maintain the *status quo* and protect the claimants.

[36] From the provisions of the section the following is apparent: firstly, this section only comes into operation once a notice has been published<sup>7</sup>. Prior to such happening this section cannot be relied on.

[37] Secondly, the section is restrictive in that it prevents a person from performing any of the following acts: selling, donating, leasing, subdividing, rezoning or developing the land in question without giving written notice to the regional land claims commissioner. Two possible interpretations may emerge from this; on the one hand it could be argued that the land owner need only give the notice after which he may perform the act. On the other hand it is submitted that the regional land claims commissioner should have the power to authorise the proposed act. Van Der Merwe<sup>8</sup> is a proponent of the former construction arguing that the section does not prohibit the activities it merely requires notification of an intention to do so. On the other hand it may be argued that if the regional land claims commissioner could do nothing as long as the notification was given that may defeat the object of the Act. However, this is a question that has yet to come before the courts and the reason for this is linked to the application of the section which will be discussed below.

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<sup>6</sup> *Supra* note 6 at paragraph 34

<sup>7</sup> This refers to a notice in terms of section 11 (1) of Act 22 of 1994

<sup>8</sup> Van Der Merwe C.F. 2003. "Consequences of Gazetting a Land Claim" *The South African Valuer*, December:14-19 at 18-19

[38] Thirdly, the role of the Court if this section is invoked; from a reading of the entire section, the Court is only required to review any of the listed activities if they take place without a notice being given. Thus as was mentioned above it could be argued that the regional land claims commissioner should be allowed to authorise the activity because once a notice is given the Court will not come into play despite the fact that the activity may have not occurred in good faith. On the other hand the commissioner may, after notice is given, rely on the other remedies such as an interdict to prevent the land owner from defeating the purpose of the Act.

Application of the section

[39] The application of this section is linked to the role this Court plays in terms of this section. The section will generally be invoked if a land owner or any other person performs one of the listed activities without giving the regional land claims commissioner notice. In *Allie NO & Another v the Department of Land Affairs and 3 Others*<sup>9</sup> section 11 (7) (aA) was invoked by the applicant hoping that a sale of property subject to a land claim would be set aside. Meer AJ canvassed the issue in the following manner:

20 "The issue that I am required to determine with regard to the sale of the subject property by the second to the third respondent is whether the Court may set aside the sale in terms of section 11 (7) (aA) (i) on the grounds that it was not done in good faith. It was common cause that the subject property was sold to the third respondent contrary to second respondent's stated policy not to sell properties subject to land claims. It was also common cause that as far back as 1993 the Department of Housing received a letter from the Regional Land Claims Commissioner to the effect that a claim for restitution of land rights had been registered by the claimant against the subject property in terms of Section 10 of the Restitution Act and that steps had been taken to have the claim published in the in the Government Gazette as required by the Act. Thereafter the claim was referred to the Housing Board task team. The above notwithstanding, the subject property was sold to the third respondent in November 1997 as part of a low cost housing sale policy at the price of R95,28 per square metre. The subject property fell into what was called Phase 2 of Walmer Estate"<sup>10</sup>

[40] After determining that the subject property had been sold contrary to the provisions of section 11 (7) (aA), Meer AJ was faced with another question. Does the sale stand to be set aside on the basis of *mala fides*? with regard to this she held that:

30 "The property was mistakenly sold contrary to the decision, in the absence of the kind of *mala fides* referred to in *Leach*. The commentary on *mala fides* by Burns accordingly has no application to the different circumstances of the present case. Nor, in my view, do these

<sup>9</sup> (LCC 13/200) [2002] ZALCC 50

<sup>10</sup> *Supra* note 10 at paragraph 73-74

sections of Baxter and Wiechers as referred to support an argument construing second respondent's negligence in selling the property as mala fides. As is aptly argued by Wiechers, mala fides presumes consciousness of wrongfulness, a conscience which was clearly absent in the sale of the subject property. Therefore the negligence on the part of the second respondent notwithstanding, I am unable to find that the sale was not in good faith and stands to be set aside for that reason."<sup>11</sup>

10 [41] In *Crystal Holding (Pty) Ltd & Others v The Regional Land Claims Commissioner*<sup>12</sup> the section was mentioned in passing. The respondents tried to invoke it to justify their obligation to interfere in an agreement entered into with the applicant, the court held as follows:

"It could not therefore be true and correct to say when the applicants entered into the Shareholders Agreements, the notice was still valid and that they had thereby acted in violation of the provisions of sections 11 (7)(a) and (aA)."

[42] The conclusion in the *Crystal Holdings (Pty) Ltd* case is reached because the Court was of the view that the restitution process was complete because the land had been transferred to the claimants, therefore, it was found that the Restitution Act did not apply and section 11 (7) (aA) could not be relied on.

20 [43] If a person fails to give notice as required and embarks on the prohibited activities, that entitles the claimant or any interested party to approach court to set aside any of the said activities.

[44] The manner in which the first applicant handled this matter is discomforting. On the 23<sup>rd</sup> September 2009 the first applicant wrote a letter to one of the directors of first respondent one John Viveiros. This letter calls upon the first respondent to stop the development forthwith as the same are in contravention of section 11(7) of the Act. It cannot be true that the knowledge about the development reached first applicant only during the year 2009. First applicant was served with a notice as early as 29 November 2002 and further received notification of the intended development on the 11 May 2005 to which nothing was done by the first applicant.

30 [45] Startling again is the memorandum of the first applicant dated 16 November 2009. This memorandum suggests that the whereabouts of first respondent are unknown.

<sup>11</sup> *Supra* note 10 at paragraph 82-83

<sup>12</sup> [2008] 1 All SA 243 (N)

[46] This is confusing given the fact that the very Legal Officer seeking to assist in locating the first respondent has actually as far back as 23 September 2009 instructed first respondent to stop the development. It appears to have been the right hand not knowing what the left hand is doing.

[47] Under the *bona fide* belief that section 11 (7) (aA) has been complied with, third  
10 respondent representing first respondent sent a letter dated 26 November 2009 to first applicant informing first applicant of commencement of the development on the property.

[48] The first applicant reacted to the notice seven years later. The first applicant had the authority to deal with the intended development in accordance with section 6(3) of the Act as far back as 2002.

[49] It is our law that both rights of the owner and claimant(s) are to be respected.

[50] Mr. Jacob for applicants argues that the alleged notice of the 29 November 2002 is invalid because it was not done by the owner of the property. There is no merit in this line of argument, section 11 (7) (aA) states "no person may sell ..." [my emphasis]  
20

[51] The purpose of section 11 (7) (aA) plays a role. In other words what is it that the legislature intends to achieve with this provision. I have indicated earlier that, in my opinion, the purpose is to alert the Commission about activities conducted or to be conducted on the subject property. The Act does not prescribe as to how the notice is to be written. As long as a notice is served, no matter how deficient, it shall be accepted as a notice.

[52] In *Unlawful Occupiers, School Site v City of Johannesburg*<sup>13</sup> Brand JA stated that:

"It is clear from the authorities that even when the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved." [my emphasis]

30 Brand JA was relying on the dictum of Olivier J.A in *Weenen Transitional Local Council v van Dyk*<sup>14</sup> which held as follows:

<sup>13</sup> 2005 (4) S. A. 199 (SCA) at 209G-paragraph 22

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"it seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see *Nkismane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434A - B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required, whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc. may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posterior, not a priori significance. The approach described above, identified as '... a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in *Ex parte Mthuloe (Law Society, Transvaal, Intervening)* 1996 (4) SA"

In paragraph 23 Brand JA clarified the reason for this approach and went on to say:

20

"...the purpose of s 4(2) is to afford the respondents in an application under FIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances they allege to be relevant before the court (see *Cape Killarney Property Investments* at 1229E - F). The two subsections of s 4(5) that had not been complied with were (a) and (c). The object of these two subsections is, in my view, to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case. The question is therefore whether, despite its defects, the s 4(2) notice had, in all the circumstances, achieved that purpose. With reference to the appellants who all opposed the application and who were at all times represented by counsel and attorneys, the s 4(2) notice had obviously attained the Legislature's goal. However, there were also respondents who did not oppose and who might not have had the benefit of legal representation. It is with regard to these respondents that the question arises whether the s 4(2) notice had, despite its deficiencies achieved its purpose."

[53] In the light of the above, I find that proper notice was given in compliance with section 11 (7) (aA) of the Act.

#### Dispossession

[54] A claim for restitution of a right in land under section 2 of the Restitution Act may succeed only if:

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- (a) the claimant is a person or community or part of a community;
- (b) that had a right in land;

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<sup>14</sup> 2002 (4) SA 653 (SCA) at paragraph [13]

(c) which was dispossessed;

(d) after 19 June 1913;

(e) as a result of past racially discriminatory laws or practices;

10 (f) where the claim for restitution was lodged not later than 31 December 1998; and

(g) no just and equitable compensation was received for the dispossession.[my emphasis]

The above requirements were outlined in the *Department of Land Affairs v Goedgelegen Tropical Fruits*<sup>15</sup>.

[55] Section 25 (7) of the Constitution of the Republic of South Africa provides:

20 "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 the property or to equitable redress".

[56] In analysing the purpose of the Restitution of Land Rights Act 22 of 1994 (the Act) the Constitutional Court states in *Alexkor Ltd v Richtersveld Community*<sup>16</sup>

"In our view, although it is clear that a primary purpose of the Act was to undo some of the damage wreaked by decades of spatial apartheid, and that this constitutes an important purpose relevant to the interpretation of the Act, the Act has a broader scope. In particular, its purpose is to provide redress to these individuals and communities who were dispossessed of their land rights by the government because of the government's racially discriminatory policies in respect of those very land rights."

[57] In the *Department of Land Affairs* case it was held at paragraph 53 that<sup>17</sup>:

30 "It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing "as a result of past racially discriminatory

<sup>15</sup> 2007 (6) SA 199 (CC)

<sup>16</sup> 2004 (5) S A 460 (CC) at page 492 paragraph 98

<sup>17</sup> *Supra* note 17 at page 218-219 paragraph 53

laws or practices" in its setting of section 2 (1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purpot and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the prid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous." [my emphasis]

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[58] The requirement "as a result of past racially discriminatory laws or practices" is the only one in dispute. It is common cause that:

(i) the Group Areas Act (and its successors) and the Community Development Act (and its successors) were both Acts that have in the past discriminated on the basis of race as contemplated in terms of section 2(1) of the Restitution Act;

(ii) that in terms of proclamation number 34 of 10 February 1961 promulgated in terms of section 20 of the Group Areas Act (77 of 1957) the area in which the property is situated was declared an area for ownership and occupation by members of the White group;

20

(iii) that the Sadien brothers were the registered owners as at date of the said 10 February 1961 proclamation; and

(iv) that the Sadien brothers in view of their race group were disqualified from forever continuing to remain the owners of the property and that if they were to sell the property, they could only do so to a "white" person or alternatively face possible expropriation in terms of the discriminatory laws as and when the State deemed fit so to do.

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[59] In LAWSA volume 10 the purpose of the Group Areas legislation is described as follows:

"the ultimate object of the Group Areas Legislation was the establishment and allocation of group areas in which only members of specified racial groups would be entitled to own and occupy land in their respective areas".

[60] Discrimination between the groups and members of the different groups is an inevitable consequence of the application of the Act. Proclamation of a group area entails consequences for owners of fixed property in that the commercial value of the property would be affected. This court is to determine the reasons for the loss of the property by the Sadien family. Was the dispossession as a result of the racially discriminatory laws or practices of the time?

[61] The Constitutional Court, in *Department of Land Affairs*<sup>18</sup> states the following regarding meaning of "as a result of".

"I conclude that the term "as a result of" in the context of the Restitution Act is intended to be less restrictive and should be interpreted to mean no more than 'as a consequence of' and not 'solely as a consequence of'. It is fair to add that, on this construction, the consequence should not be remote, which means that there should be a reasonable connection between the discriminatory laws and practices of the State, on the one hand, and the dispossession, on the other. For that determination, a context-sensitive appraisal of all relevant factors should be embarked upon".

[62] The applicants submit that the dispossession was occasioned by the racially discriminatory practices then in the form of the Group Areas Act 77 of 1957 (as amended) and the Proclamation of number 34 of 1961 dated 10 February 1961.

[63] The Respondent's defence is that the dispossession was not as a result of discriminatory laws or practices but financial distress on the part of the claimants. The argument is that the property was sold by the Sadien brothers at an auction in order to pay the registered bond to the mortgagee.

[64] Conrad Henre Hablutzel an auctioneer and valuer in the employ of J. J. Hofmeyr and Son testified. I hasten to state that he was a credible witness. His evidence is to the effect that according to ledgers in his possession and custody pertaining to the Sadien family loan accounts, he disputes the presence of any financial distress on the Sadien family. However, he conceded that shortly after the 1961 proclamation, the family fell in arrears but managed to make good the debt.

<sup>18</sup> *supra* note 17 at page 224 paragraph 69

[65] I am of the opinion that Mr. Hablutzel was best suited to testify about the presence or otherwise of the alleged financial distress. It may be argued that the witness merely interpreted ledger entries done by his grandfather some fifty years ago. It may be so but this does not make him a non-credible witness. Note that even if the family had financial distress- they would have been forced to sell because the Group Areas Act gave them no choice.

10

[66] Dawood Sadien testified that he grew up on the property from age fourteen. He is the son to Omar Sadien. I found him to be a credible witness. He also dispelled the allegations that the Sadien family had financial distress. His evidence is further corroborated by Prof. Nicoleen Natrus, an economist and lecturer at the University of Cape Town.

[67] On the issue of financial distress it was suggested under cross examination that the widow of the late Ismail Sadien did not have money to take transfer of the share in the deceased's estate. In reply Prof. Natrus said<sup>19</sup>

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"Well I have a long discussion about that, that given that 1951 said that it was a controlled area right, they could only get a coloured person buying into that and given that 1956 people knew that it was going to be a white area right, you could say she wasn't able to sell it, but that's got nothing to do with financial distress, it's got everything to do with the Group Areas Act.."

This is a neutral independent witness who, in my mind was quite credible.

[68] The respondents on the other hand tendered no evidence to support the financial distress defence. The only argument advanced is that the Sadien family had a shortfall of R 1 871.02 at the close of their account and the said shortfall was paid two years later after the sale of the property. It is argued that this should indicate presence of financial distress, nothing really turns on this.

[69] I conclude that, based on the evidence before me, there was no financial distress experienced by the Sadien family.

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<sup>19</sup> Transcript page 982 lines 20-25

[70] On the 10 February 1961 Proclamation Number 34 was promulgated in accordance with section 20 of the Group Areas Act 77 of 1957. Paragraph A (a) of the proclamation states:

“(a) that the areas defined in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the schedule hereto shall, as from the date of publication hereof, be areas for occupation and ownership by members of the White group...”

10

[71] It is common cause that the subject property falls under paragraph 16 to the schedule. The property then became a controlled area.

[72] On the 21<sup>st</sup> of March 1962 the property was sold on auction by the Sadien brothers. It was bought by Jacob Adriaan Jacobus Badenhorst, the grandfather to the third respondent for the amount of R 13 550.00. The said property was subsequently transferred and registered in the name of Jacob Adriaan Jacobus Badenhorst.

[73] Mr. Van der Westhuizen for the respondents submits that there was no racially discriminatory law or practice in operation at the time of the auction sale. Further that, if the court finds otherwise then a submission is made that section 23 of the Group Areas Act 77 of 1957 read with A (h) of the 10 February 1961 proclamation would apply. The effect here being that the claimants or the Sadien family were under no pressure to vacate or sell the property as they did. That no notification or any activity was taken by the then authorities to enforce the Group Areas provisions. Section 23 (1) of the Group Areas Act 77 of 1957 provides:

“As from the date specified in the relevant proclamation under sub-paragraph (ii) of paragraph (a) of sub-section (1) of section *twenty*, and notwithstanding anything contained in any special or other statutory provision relating to the occupation of land premises, no disqualified person shall occupy and no person shall allow a disqualified person to occupy any land or premises in any group area to which the proclamation relates, except under the authority or a permit.” [my emphasis]

Paragraph A (h) to the 1961 proclamation provides:

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“that the provisions of section twenty three of the said Act shall, on the expiration of a period of seven years as from the date of publication hereof, apply in the areas defined in paragraphs 10 and 16 of the Schedule hereto.” [my emphasis]

It is indeed so that the claimants or the Sadien family had the right to occupy the premises until the 10<sup>th</sup> February 1968. However, the fact that the family voluntarily left the property earlier does not warrant a conclusion that there was no dispossession

Causal Connection

10 [74] The Constitutional Court in the *Department of Land Affairs*<sup>20</sup> states.

"In enacting the Restitution Act, the Legislature must have been aware that apartheid laws on land were labyrinthine and mutually supportive and in turn spawned racist practices, and vice versa. Therefore, often the cause of historical dispossession of land rights will not lie in an isolated moment in time or a single act. The requisite causal connection must be gathered from all the facts as long as the connection comments itself to common sense and is reasonable rather than remote or far-fetched." [my emphasis]

[75] The effect the proclamation had on the property was that of compliance by the registered owner.

20 [76] It was common then that authorities would visit controlled areas and measure premises and inform the community that they will be moved to other places soon. This is common knowledge to all affected in the past and I take judicial cognisance thereof. Events of Sharpeville and Langa in the 1960's were indication and signal enough to communities in affected areas as to what the then apartheid government was capable of doing<sup>21</sup>.

[77] It is significant to note that in 1962 the property was advertised for auctioning for all to see. At the bottom of the advert words "Proclaimed White Area" were visible.

[78] Evidence by Prof. N. Natrus is to the effect that the value of the property dropped from R 22 000.00 in 1958 to R 13 550.00 in 1962. She ascribes the drop to the Group Areas Act as people were forced to sell their properties.

30 [79] It is recorded that the Sadien family was told to go because the area is going to be a white area and they will lose everything if they do not go. The shops and butchery in the

<sup>20</sup> *Supra* note 17 at page 223E paragraph 66

<sup>21</sup> Evidence of Spatial Historian S.M Titlestad, Transcript page 117

21

neighbourhood of the property were demolished. It was all over that Group Area had now arrived<sup>22</sup>.

[80] Evidence by second applicant Sedick Sadien, son to one of the five Sadien brothers Abduragman Sadien confirms the happenings of that time. He is now 77 years of age. He was born and lived on the Sillery property. His unchallenged evidence is that his father told him  
10 that the farm was being sold because it is now Group Areas time. That the area was now a white area. That everything like shops and flats were demolished.

[92] It was not always a requirement that before affected persons could leave the controlled area; the State was expected to take action to move people or even to advise them to move. The mere passing of a proclamation in most cases caused panic and coupled with the presence of government officials, evoked fear in people's minds.

[81] The Constitutional Court in the *Department of Land Affairs*<sup>23</sup> matter stated:

20

"In my view, the causal connection under s. 2 of the Restitution Act should not be understood to require that the State or a public functionary should itself perform the dispossession of rights in land. It is sufficient if the termination of rights in land is permitted, aided and supported by racially discriminatory laws or practices of the State or other functionaries exercising public power. The question is not whether the dispossession is effected by the State or a public functionary, but rather whether the dispossession was as a consequence of laws or practices put in place by the State or other public functionary." [my emphasis]

[82] Attached to the Deed of Transfer is a Group Areas Act certificate certifying that the property is within a white group area. This certificate is issued in compliance with section 30 (1) of the Group Areas Act 77 of 1957.

[83] Another certificate regarding this property was issued on the 26 February 1963 in terms of section 17 (3) of the Group Areas Development Act 69 of 1955 as amended. This certificate was issued before the registration and transfer of the property in the name of Jacob Adriaan Jacobus Badenhorst.

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<sup>22</sup> Report of Oral Historian C. Cornell, page 1998 volume 5 of the Record

<sup>23</sup> *Supra* note 17 at page 225 I – J paragraph [76].

[84] I come to the conclusion that the sale and dispossession of the property was as a result of the racially discriminatory laws and practices.

10 Just and Equitable Compensation

[85] A claimant who has received compensation at the time of dispossession will not be entitled to restitution of a right in land. Section 2 (2) of the Act provides:

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

[86] It is common cause that the market value of the property at the time of dispossession in 1962 was R 22 000.00. Further that an amount of R 13 550.00 was paid as a purchase price at the time of dispossession. The purchase price paid cannot be regarded an equitable compensation as contemplated in section 2 (2) of the Act<sup>24</sup>.

Restoration

[87] Regarding restoration of the property as it is presently an evaluation of the property will have to be conducted. It was suggested that the property may be worth an amount in the region of R 80 million to R 140 million. I am aware of the strain on the finances of the department<sup>25</sup>. However, the claimants have always opted for alternative state land. The Commission informed the current owners that the claim was for alternative state land. The same Commission even informed the claimants that "we do not regard the restoration of the land as feasible"<sup>26</sup>

<sup>24</sup> *Abrams v Allie NO* [2004] 2 All SA 99 (SCA)

<sup>25</sup> *Baphiring Community v Uys and Others* 2010 (3) SA 130 LCC; *Nkomazi Municipality v Ngomane of Lugeklane Community and others* [2010] 3 All Sa 563 (LCC)

<sup>26</sup> Letter dated 11 May 2005 (submitted in terms of Rule 47), Bundle at page 90

[88] In addition a letter dated 12 March 2003 from the Commission indicates that the nature of the claim is for alternative state land. The issue of alternative land was never changed save at the hearing of this matter. One of the claimants Magmoed Sadien wrote a letter to the Commission which reads:

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"Dear Mrs. Jansen

LAND CLAIM – ERF 2274 CONSTANTIA

I refer to the letter of Mr. D. M Jacobs of your office, dated 11 May 2005.

I herewith confirm that the claim is for alternative state land to the same value. I also want to request that no development take place on Erf 2274 until this land claim has been settled.

Regarding my claim against the farm stall (claim ref. No. S721) your officials have told me that they would investigate the possibility that alternative state land can be offered to the current owner in exchange for the relevant piece of land. I would appreciate if that can be done.

Yours faithfully

Mr. Magmoed Sadien  
(13 June 2005) "

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[89] I come to the conclusion that restoration in the form of alternative state land or equal redress by means of financial compensation would be appropriate.

### Entitlement to a Right in Land

[90] The subject property was co-owned by the five Sadien brothers each entitled to a one-fifth undivided portion. Only one descendant (Mogamat Rashaad Sadien) lodged a restitution claim representing his forebear.

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[91] The right in land claimed given the interpretation of the statute<sup>27</sup> would have to be awarded to the descendant who lodged a claim<sup>28</sup>. This implies that the second applicant

<sup>27</sup> Section 2 (1) (C) (i) and (ii)

before Court would be entitled to a one-fifth undivided share of the subject property. The other descendants who have not lodged claims stand to benefit nothing.

[92] The question to be answered as to what then happens to the remaining four-fifths of the subject property. Does this revert to the state or get retained by the current land owner?

10 [93] The Sadien family lived a communal life on the subject property they co-owned. The statute (the 'Act') does not provide for a situation of descendants who have not lodged claims.

"The Court must exercise its powers to order restitution within the confines of the Restitution Act, duly interpreted by using all relevant norms of interpretation (the presumptions and other intra-textual and extra-textual aids). Where the language of a statute leaves a gap to be filled, the Court must fill that gap. In doing so, it must reconstruct the thinking contained in the statute, consider the practical implications and come up with a solution which conforms with the purpose of the statute and with the spirit, purport and objects of the Bill of Rights, while also serving the requirements of justice and equity.

20 The purpose of statutory interpretation is to give meaning to legislative text. The Constitutional Court, in interpreting the fundamental rights enshrined in chap. 3 of the constitution, adopted '... an approach which, whilst paying due regard to the language which has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution'. This Court has, in the past, followed the same approach in interpreting the Restitution Act.

Per Gildenhuys J in *In Re Former Highlands Residents: Sonny and Others v The Department of Land Affairs*<sup>29</sup>.

[94] In achieving the "generous and purposive" interpretation Dodson J<sup>30</sup> suggests as follows:

"The purposive approach as elucidated in the decisions of the Constitutional Court and this Court requires that one must:

- 30 (i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,

<sup>28</sup> Section 2 (1) (C) (i) and (ii)

<sup>29</sup> 2000 (2) SA 351 (LCC) at page 355-356 paragraphs 10 and 11

<sup>30</sup> *Minister of Land Affairs and another v Slamdien and others* [1999] 1 All SA 608 (LCC)

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- (ii) have regard to the context of the provision in the sense of its historical origins;
- (iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it.
- (iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;
- (v) have regard to the precise wording of the provision; and
- (vi) where a constitutional right is concerned, as is the case here, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers"

[95] It is trite that the purpose of the restitution provision in the Constitution and the Restitution Act is to remedy the injustice perpetrated by dispossession of the right in land. The claim of the descendants is not to make good the injustice suffered by the claimants but rather the injustice suffered by their parents. The fact that certain descendants did not lodge claims, in my mind, should not be interpreted as meaning that their forebears did not suffer injustice at the time of the dispossession. I am inclined to accept that the facts *in casu* justify the restoration of rights in land even to those who did not lodge claims when they qualified to but did not do so. It is the injustice caused by the dispossession that has to be addressed.

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[96] I have already indicated above that the descendants who did not lodge claims shared the subject property at the time of the dispossession. They were (the descendants who did not claim) not exempt from the injustice and hurt occasioned by the dispossession. I am in agreement with *Gildenhuys J*<sup>31</sup>

"In my view, the purpose of the Constitution and of the Restitution Act will not be fully achieved if restitution is reduced by holding back portions which would have gone to descendants who failed to lodge claims. Such partial restitution would leave some of the injustice unremedied."

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[97] It is desirable, given the fact that the whole Sadien family led a communal life on the property that the land is restored to all the descendants. However, only one descendant has submitted a land claim and logically restoration is to be in his interests. I am of the opinion that the land to be restored be shared or enjoyed accordingly by all including those descendants who have not lodged a claim.

<sup>31</sup> *Supra* note 32 at page 361 paragraph 21 G-H

[98] In terms of section 32 (3) (b) of the Restitution Act this Court may conduct any part of any proceedings on an inquisitorial basis. Applying this inquisitorial power the court enquired as to the availability of state owned land. The court was informed that three pieces of state owned land were vacant in the province of the Western Cape and these are:

- I. Erf 142 Constantia
- II. Erf 3110 Constantia
- 10 III. Erf 1783 Constantia

The Department of Rural Development and Land Reform has confirmed the availability of the same. The Department also indicated that if a judgement was given regarding the restoration of any of the three properties to the claimant they would abide with such judgment.

[99] ERF 1783 CONSTANTIA was chosen taking into consideration the size of the dispossessed land. This was the closest in extent.

[100] I took the liberty of ascertaining the attitude of the second applicant to the enjoyment of the property with the rest of the Sadien family. Counsel for the applicants Mr Krige  
20 indicated that it will be in accordance with the wishes of the family.

#### Costs

[101] The trend generally is that costs follow the event. However, in matters before the Land Claims Courts the general rule may not always apply.

[102] In this case an unusual picture regarding litigants emerges. Generally in restitution claims the state is the defendant / respondent and claimants (private individuals) are plaintiffs or applicants. The unusual part is that the state (RLCC) is one of the applicants herein. The effect being that the current landowners are the only respondents. The existence of a *lis*  
30 between the claimants and the state is skewed. The restitution claim is not against the respondents but the state who is also an applicant herein in the form of the Land Claims Commission.

60.

[103] The claimants have achieved success in this matter not against the respondents but against the state. Generally I would have to make an order of costs against the state in favour of the claimants. This I cannot do. The claimants are funded by the state<sup>32</sup>. I am inclined to make no order as to costs.

In the circumstances I am satisfied that the following order is appropriate  
Order

- a) A portion of the property ERF 1783 CONSTANTIA in the Western Cape Province measuring ten (10) hectares in extent shall be transferred to the second Applicant.
- b) The Department of Rural Development and Land Reform to designate the said property in favour of the second Applicant.
- c) The interdict order granted on the 23<sup>rd</sup> of February 2010 is hereby uplifted.
- d) There is no order as to costs.

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ACTING JUDGE M J MPSHE

I concur

For the applicant

*Adv Jacobs S C & Adv J Krige* instructed by State Attorney, Cape Town.

For the respondents

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<sup>32</sup> *Florence v Broadcount Investments (Pty) Ltd* (LCC 148/2008) [2012] ZALCC 11 (5 June 2012)

"C"

61.  
2709

**VARIATION OF A COURT ORDER IN TERMS OF RULE 64(1) OF LAND CLAIMS COURT RULES.**

10

**In Chambers**

Before: Mpshe AJ

In the matter between

Case No.: LCC26/2010

**THE REGIONAL LAND CLAIMS  
COMMISSIONER  
SEDICK SADIEN  
EBRAHIM SADIEN.**

**1<sup>ST</sup> Applicant  
2<sup>ND</sup> Applicant  
3<sup>RD</sup> Applicant**

And

**JAZZ SPIRIT 12 (PTY) LTD  
YAMIV (PTY) LTD  
HEIN R. BADENHORST  
THE REGISTRAR OF DEEDS**

**1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent  
3<sup>rd</sup> Respondent  
4<sup>th</sup> Respondent**

**ORDER**

20

Court order (a) that reads "A portion of the property ERF 1783 CONSTANTIA in the Western Cape Province measuring ten (10) hectares in extent shall be transferred to the second Applicant."

is amended to read

(a) A portion of the property ERF 142 Constantia (measuring 8.9 hectares) situated in the Western Cape Province shall be transferred to the second Applicant.

Given this 8<sup>th</sup> February 2013

  
**PRESIDING JUDGE: AJ MPSHE**



**LAND CLAIMS COURT**

30



"D"

62.



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

Case No: 704/2013  
Not Reportable

In the matter between

<b>JAZZ SPIRIT 12 (PTY) LIMITED</b>	<b>FIRST APPELLANT</b>
<b>YAMIV (PTY) LIMITED</b>	<b>SECOND APPELLANT</b>
<b>HEIN J BADENHORST</b>	<b>THIRD APPELLANT</b>

and

<b>THE REGIONAL LAND CLAIMS COMMISSIONER: WESTERN CAPE</b>	<b>FIRST RESPONDENT</b>
<b>SEDICK SADIEN</b>	<b>SECOND RESPONDENT</b>
<b>EBRAHIM SADIEN</b>	<b>THIRD RESPONDENT</b>

**Neutral citation:** *Jazz Spirit 12 (Pty) Ltd & others v The Regional Land Claims Commissioner: Western Cape & others* (704/2013) [2014] ZASCA 127 (22 September 2014)

**Coram:** Bosielo, Saldulker and Swain JJA, Mocumie and Gorven AJJA

**Heard:** 27 August 2014

**Delivered:** 22 September 2014

**Summary:** Civil appeal against costs – Section 21A(1) of the Supreme Court Act 59 of 1959 – whether the matter is appealable – will the judgment or order sought have practical effect or result – exceptional circumstances – Section 21A(3) – application to intervene – direct and substantial interest – application for rescission – Section 35(11) of the Restitution of Land Rights Act 22 of 1994 – is the pending appeal in respect of the order appealed against.

A handwritten signature in black ink, appearing to be 'J.S.' followed by a flourish.

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**ORDER**

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**On appeal from:** Land Claims Court, Cape Town (Mpshe AJ sitting as court of first instance):

It is ordered that:

The appeal is dismissed.

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**JUDGMENT**

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**Bosielo JA (Saldulker and Swain JJA, Mocumie and Gorven AJJA concurring):**

[1] At the end of a protracted and bitterly fought legal battle, and on 7 December 2012, the Land Claims Court, Cape Town (Mpshe AJ) gave judgment and held as follows:

‘The claimants have achieved success in this matter not against the respondents but against the State. Generally, I would have to make an order of costs against the State in favour of the claimants. This I cannot do. The claimants are funded by the State. I am inclined to make no order as to costs.’

[2] The appellants appeal against this portion of the order with the leave of the court below. This appeal is therefore confined to the costs order.

[3] In granting leave to appeal, the trial judge held as follows: ‘The Land Claims Court is also subject to the basic rule that awarding of costs is in the

discretion of the court. Due to the social justice legislation the Land Claims Court is seized with, it is not bound by the general principle that costs follow the event. In effect the tendency and trend in the Land Claims Court is not to order costs against a party save under exceptional circumstances.'

[4] What gave rise to this case is a disputed land claim lodged by the second and third respondents in respect of a farm, Erf 2274 Constantia (the property) also called Sillery Farm. The appellants opposed this claim. As the dispute regarding the properties could not be resolved either by mediation or negotiation, the matter was referred to the Land Claims Court in terms of s 14 of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). The trial commenced during November 2010 until judgment was delivered on 7 December 2012.

[5] At the end of a protracted trial, the court below found that the second and third respondents had in fact been deprived of this property as a result of racially discriminatory laws or practices. Furthermore, the court below found that the amount of R13 550 paid as the purchase price did not qualify as just and equitable compensation. Based on the fact that the second and third respondents had opted for alternative State land and not restoration of the original land, the court below made an order for Erf 1783 Constantia to be allocated to the respondent. In the result both parties had achieved substantial success. As pointed out, the court below declined to make any order in respect of costs.

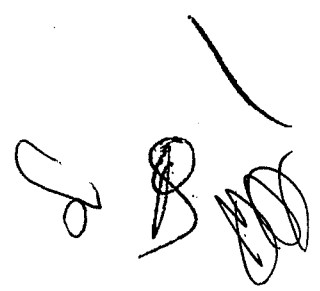
[6] On 8 February 2013 the court below varied its original allocation of Erf 1783 Constantia and substituted it with a portion of Erf 142 Constantia. It seems that the court below was under the mistaken belief

that this property was vacant and free to be allocated and transferred to the respondents as alternative State land.

[7] This variation of the order gave rise to an application by the South African Riding for the Disabled Association, Cape Town Branch (the intervening party) for leave to intervene in the appeal and for the rescission of the judgment of the court below. This application was dismissed with costs at the hearing of the appeal. In addition, the application to rescind the judgment of the court below was struck off the roll with costs. The reasons for these orders follow.

[8] The ground upon which the application was advanced was the undisputed fact that the intervening party had been occupying Erf 142 Constantia, on the strength of a written lease signed with the secretary of the School Board, Cape Town on 8 December 1981. This property was expropriated for educational purposes by the Cape Provincial Government during 1966. The intervening party avers that it had occupied the property for some 34 years and, that in the process, it had effected substantial improvements to it with the consent of the lessor to the value of R7, 5 million.

[9] It is common cause that this property was allocated and transferred to the respondents as alternative State land without the knowledge or consent of the intervening party. The intervening party avers that by virtue of being a tenant of the property, it is entitled to just and equitable compensation. No such compensation was paid to the intervening party. It is for this reason that the intervening party seeks leave to intervene in the appeal proceedings before us with the aim of rescinding the main judgment of the court below.



[10] Counsel for the intervening party relied on s 35(11) of the Restitution Act for the contention that it was entitled to apply for the rescission of the judgment on appeal before this court Insofar as it is relevant this section provides that:

'The court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it –

- (a) in the absence of the person against whom that order or judgment was granted;
- (b) which was void from its inception or was obtained by fraud or mistake common to the parties;
- (c) in respect of which no appeal lies; or
- (d) in the circumstance contemplated in section 11(5):

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.'


[11] Counsel for the intervening party submitted that, as the judgment, in respect whereof Erf 142 Constantia was transferred to the second respondent, was given in its absence and was obtained by a mistake common to the parties, it stood to be rescinded. He submitted further that as the judgment or order of the Land Claims Court was the subject of an appeal in this Court, this Court had the authority to entertain the application for rescission. He contended further that, although the section refers to the judgment or order whilst the proviso refers to the order only, there is no real distinction between an order and a judgment as used in the section. He urged us to interpret the terms judgment or order liberally to mean one and the same thing which includes the reasoning, executive order of the judgment as well as that for costs. The fact that the appeal before us is confined to costs only is immaterial as the order is an integral part of the judgment, so he contended.



[12] On the other hand, counsel for the respondents contended that the proviso to s 35(11) is specific and not open-ended. It requires a party which invokes it to show that it is affected by the order appealed against. He submitted that as the appeal before us is confined to costs only the intervening party has no interest in the matter as it is not affected thereby. In essence, he pointed out that the part of the judgment on the merits which directly affected the appellants was not appealed against. Based on this, he contended further that as the intervening party conceded that the appeal on costs will not affect him in any manner, he therefore cannot rely on the proviso to s 35(11). Put plainly, the intervening party failed to show a direct and substantial interest in the subject of the appeal on costs, so went the contention.

[13] The following facts are common cause: that the intervening party was not a party to the previous proceedings in the court below; that the appeal before us is on costs only; that whatever the outcome of the appeal on costs might be, it will not affect the intervening party, and further that the order to be rescinded was not made on appeal by this Court, nor was it pending before us.

[14] It is clear from s 35(11) that for the applicant to succeed, it must prove that the pending appeal is in respect of the order made by the court below which the intervening party seeks to rescind. It suffices to state that the appellant has not succeeded in meeting this test. This means that the jurisdictional requirements laid down in s 35(11) have not been met. The application to intervene was accordingly dismissed with costs. Self-evidently this sounded the death-knell for the application for rescission.



[15] I now revert to the main appeal against costs. As I alluded to above, the court below did not deem it necessary to make an order in respect of costs. Given the fact that this appeal is on costs only, the appellants' legal representative was reminded of the reluctance of the appellate courts to interfere with the discretion exercised by a trial judge in awarding costs, and was asked whether this appeal was not hit by the provisions of s 21A(1) and (3) of the Supreme Court Act 59 of 1959 (the Supreme Court Act). For ease of reference this section insofar as it is relevant provides that:

'(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to considerations of costs.'

[16] In an attempt to scale the hurdle presented by s 21A(1), the appellants' legal representative sought refuge under s 21A(3) and submitted that this case presented 'exceptional circumstances' justifying the appeal to be heard. As support for this submission, he relied amongst others on the long duration of the trial which spanned 21 days. In addition, he called in aid the failure by the respondents to adopt measures to curtail the length of the case, the leading of irrelevant witnesses by the respondents and, what he described as defamatory or derogatory arguments made by the respondents about the appellants. Essentially, he complained about the manner in which the respondents conducted the trial, which he submitted contributed to its length with concomitant huge costs.



[17] Based on the above, he argued that, given the social importance of this legislation and the need to address the public quest for land restoration as speedily as possible, we should find the respondents' conduct to have been not only obstructive but, in the process, to have exposed the appellants to considerable unnecessary litigation costs. He contended further that such conduct should not be countenanced as it has the potential to defeat the underlying purpose of the Act. In conclusion, he submitted that the trial court erred in not awarding costs against the respondents to mark its displeasure at the manner in which they conducted the trial.

[18] On the other hand, the respondents' counsel countered that the facts adduced by the appellants do not qualify as exceptional or unusual, uncommon or out of the ordinary as envisaged by the Act. Based on this he urged us to dismiss the application.

[19] It is common cause that for the appellants to succeed, they need to prove 'exceptional circumstances' as required by s 21A(3). What then are 'exceptional circumstances'? I have found the following definition in *MV AIS MAMAS Seatrons Maritime v Owners, MV AIS MAMAS & another* 2002 (6) SA 150 (C) at 157E-F by Thring J to be a useful guide:

'I think that, for the purposes of s 5(5)(a)(iv) the phrase 'exceptional circumstances' must, both for the specific reason mentioned by Jones J and by reason of the more general consideration adumbrated by Innes ACJ in *Norwich Union Life Insurance Society v Dobbs*, (supra loc cit), be given a narrow rather than a wide interpretation. I conclude to use the phraseology of Comrie J in *S v Mohammed* (supra, loc cit), that, to be exceptional within the meaning of the subparagraph, the circumstances must be "markedly unusual or specially different"; and that, in applying that test, the circumstances must be carefully examined.'

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[20] This is the test against which the facts or circumstances raised by the appellant must be measured to determine if they amount to 'exceptional circumstances' for purposes of s 21A(3) of the Supreme Court Act.

[21] As already alluded to above, the appellants relied amongst others on the duration of the trial, the conduct of the respondents' witnesses and legal representatives and the concomitant huge costs, as exceptional circumstances. Because the appellants relied on what happened during the trial, we had to wade through 30 volumes and 2737 pages of evidence to determine if the circumstances relied on by the appellant qualified as 'exceptional circumstances' as required by s 21A(3).

[22] The appellant sought support for its contention that exceptional circumstances were present in the decision of this court in *Oudebaaskraal (Edms) Bpk v Jansen van Vuuren* 2001 (2) SA 806 (SCA). In this case the appellants had applied in a Water Court for a permit in terms of the Water Act 54 of 1956, but the application was dismissed. The appellants appealed to this court against the dismissal of the application, but before the appeal was heard, the Water Act was repealed in its entirety by s 163 of the National Water Act 36 of 1998. The respondent contended that this court could accordingly no longer grant a permit to the appellants and although there could still be an appeal against the costs order of the Water Court, such an appeal would have no practical effect or result and should be dismissed in terms of s 21A of the Supreme Court Act 59 of 1959.

[23] This court held that there was no indication in the National Water Act that the legislature had intended the unfair result of depriving the

*[Handwritten signatures and initials]*

appellants of their right of appeal. Accordingly the appellants had not been deprived of their rights of appeal. This factor taken together with the fact that considerable costs had been incurred in the case constituted exceptional circumstances in terms of s 21A(3) of the Supreme Court Act. The question whether the judgment or order of the court of appeal would have a practical effect or result, could be determined with reference to considerations of costs. Accordingly if the appeal succeeded there would be a practical effect or result. It is therefore clear that a valid appeal on the merits had been lodged, but in the interim the grounds of appeal had been nullified by the repeal of the act upon which the appeal was based.

[24] The facts of the present case are quite clearly distinguishable from *Oudebaaskraal* as to the presence of exceptional circumstances. The mere fact that the costs are considerable in the present case and other factors called in aid do not in themselves constitute exceptional circumstances justifying the hearing of the appeal.

[25] I am consequently unable to find that the facts and circumstances on which the appellants sought to rely are so markedly unusual, specially different, unusual uncommon, rare or different so as to constitute 'exceptional circumstances' within the meaning of s 21A(3). The appeal must accordingly be dismissed.

[26] What remains is the question of the costs of appeal. Counsel for the respondents conceded, correctly in my view, that primarily because we are dealing with social legislation which has the noble and laudable objective of addressing the controversial problem of restitution of land

rights and payment of equitable compensation in appropriate cases, that it would not be proper to make an award of costs against the losing party as is the general rule in ordinary litigation.

[27] It is crucial for the promotion and maintenance of the rule of law that parties who approach the courts to resolve their land disputes should not be mulcted with costs, particularly where there are no allegations of wilfulness or vexatiousness as is in this case. Undoubtedly s 6 of the Restitution Act places an onerous duty on the office of the Land Claims Commission to take all reasonable steps to ensure that claims that are lodged are well investigated and properly prepared. Evidently, this is intended to ensure that all facts relevant to a particular claim are considered. In addition, it has as its rationale the fact that many of the people dispossessed of land have also been systematically disadvantaged in many other ways and may well be unlikely to be in a position to fund any adverse costs order. Such people might be dissuaded from pursuing the very rights provided for in the Restitution Act if costs orders were made in the ordinary course. If this was their response, it would defeat the very object of the Restitution Act. This is, perhaps, an additional reason for the exceptional circumstances envisaged in s 21A(3) to be required to meet an even higher standard in matters concerning costs arising from the Restitution Act.

[28] Where there is an unresolved dispute, the Commission is obliged to refer such dispute to the Land Claims Court for adjudication. The investigation and reports by the Commission play a pivotal role in the ultimate resolution of any ensuing dispute. Self-evidently, costs orders might be subversive to the spirit of social justice underlying the

Restitution Act. Dealing with this vexed issue, Harms ADP stated the following in *Haakdoringbult Boerdery CC & others v Mphela & others* 2007 (5) SA 596 (SCA) para 76:

'That leaves the costs on appeal. This Court has not yet laid down any fixed rule and there are judgments that have ordered costs to follow the result and others that have made no orders. I believe that the time has come to be consistent and to hold that in cases such as this there should not be any costs orders on appeal absent special circumstances.'

I agree and, as a result, we decline to make an order regarding the costs of the appeal.

[29] In the result, I make the following order  
The appeal is dismissed.

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L O BOSIELO  
JUDGE OF APPEAL

**Appearances:**

**For Appellants : M Schreuder SC (with him JP du Plessis)**

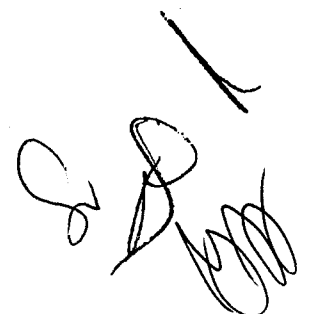
**Instructed by:  
Du Plessis, Hofmeyr Malan Inc.; Somerset  
West  
Honey Attorneys, Bloemfontein**

**For Respondents : DJ Jacobs SC**

**Instructed by:  
State Attorney; Cape Town  
State Attorney, Bloemfontein**

**Intervening Party: SP Rosenberg SC (with him S Wagener)**

**Instructed by:  
Bowman Gilfillan Inc.; Cape Town**



"E1"

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT CAPE TOWN

CASE NO: LCC 26/10

Before: The Honourable Mpshe AJ

Heard on: 19.08.15.

Delivered on: 11.09.15.

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED: YES / NO

11.9.15.  
DATE

SIGNATURE

In the matter between:

THE REGIONAL LAND CLAIMS COMMISSIONER

First Applicant

SEDICK SADIEN

Second Applicant

EBRAHIM SADIEN

Third Applicant

and

JAZZ SPIRIT 12 (PTY) LTD

First Respondent

YAMIV (PTY) LTD

Second Respondent

MR HEIN R BADENHORST

Third Respondent

THE REGISTRAR OF DEEDS

Fourth Respondent

and

SOUTH AFRICAN RIDING ASSOCIATION FOR  
THE DISABLED ASSOCIATION ("SARDA")

Intervening Party

1

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**JUDGEMENT**

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**INTRODUCTION**

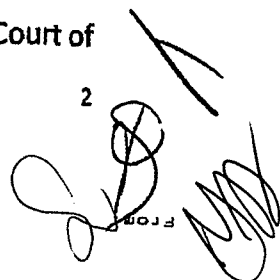
[1] The South African Riding for the Disabled Association ("SARDA") Cape Town Branch issued an application on 8 September 2014 in which it seeks the following substantive orders:

- 1.1 leave to intervene in the proceedings under the above case number;
- 1.2 condonation for the late filing of the application;
- 1.3 rescission of paragraph 3 of the order of 24 March 2010 and the whole judgement, and order of 7 December 2012 as varied on 8 February 2013;
- 1.4 costs of suit to be paid by the First and Second Applicants, together with any party opposing the relief sought, jointly and severally.

**BACKGROUND**

[2] The present application relates to Erf 142 Constantia which was awarded to the Second Applicant by this Honourable Court in terms of an order handed down on 8 February 2013.

[3] On 18 July 2014 SARDA filed an intervention and rescission application in this Honourable Court. SARDA withdrew that application on 30 July 2014 and subsequently launched a similar application in the Supreme Court of

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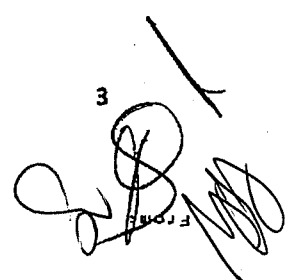
Appeal (SCA) before whom an appeal, solely on the issue of costs, was pending.

- [4] The intervention and rescission application filed in the SCA was also heard on 27 August 2014 prior to the hearing of the appeal on the issue of costs. The SCA dismissed the intervention and rescission application with costs on the day of the hearing of the application and issued its reasons in a judgement delivered on 22 September 2014.

**HISTORY RELEVANT TO THIS APPLICATION**

- [5] On 24 March 2010 this Court interdicted the development and subdivision of remainder Erf 2274 Constantia pending, *inter alia*, restitution proceedings for the restoration of the remainder Erf 2274 Constantia into the name of the Sadlen family. It also granted an order substituting the Second and Third Respondents, Sedick and Ebrahiem Sadien, as Claimants.
- [6] On 7 December 2012, this Court ordered the restoration of a portion of Erf 1783 Constantia, measuring ten hectares in extent, in accordance with the provisions of the Restitution of Land Rights Act 22 of 1994 ("the Act"), to Sedick Sadien, a descendant of Omar Sadien, who was a co-owner of "*Sillery Constantia*" – the land that was dispossessed from the Sadien family.
- [7] However, because Erf 1783 Constantia was considerably smaller than the land from which the family was dispossessed, this Court amended its

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order to award an equivalent size in land. That is why, on 8 February 2013, this Court varied its 7 December 2012 order to read:

*"A portion of the property Erf 142 Constantia (measuring 8.9 hectares) situated in the Western Cape Province shall be transferred to the second respondent".*

#### **PARTIES**

- [8] First Applicant is the Regional Land Claims Commissioner (Western Cape) with offices in the Western Cape Province.
- [9] Second Applicant is the son to the deceased Claimant, Mogamat Rashaad Sadien.
- [10] Third Applicant is the son to the deceased Claimant, Magmoed Sadien.
- [11] First Respondent is a company duly registered according to the company laws of South Africa.
- [12] Second Respondent is a company duly registered according to the company laws of South Africa. Second Respondent is the owner of Erf 2274 Constantia in the Western Cape Province.
- [13] Third Respondent is the director of First Respondent.
- [14] Fourth respondent is a juristic person established in terms of the Deeds Registries Act 47 of 1937 with offices at Plein Street, Cape Town.
- [15] The intervening party is SARDA. It is a public interest, non-profit organisation whose objective include providing therapeutic horse and pony riding for people living with disabilities to promote their education

and to improve their conditions of life generally by training, recreation and rehabilitation.

- [16] It is important to give a brief history as to how the intervening party ("SARDA") is connected to Erf 142 Constantia.
- [17] The intervening party has been in occupation of the property for the past 35 years.
- [18] Intervening party leased the property in 1981 from the School Board of the Cape. The said lease expired on 30 June 2001 and was thereafter renewable on an annual basis. The last annual renewal expired on 30 June 2007.
- [19] The Department of Transport and Public Works in the Western Cape Provincial Government informed the intervening party that the lease will not be renewed any further beyond 30 June 2007.
- [20] However, a month-to-month basis rental was agreed upon. The intervening party is currently occupying the property.
- [21] The property is currently managed by the Department of National Works (National Government).
- [22] As a result of an order handed down on 8 December 2013, awarding Erf 142 Constantia to Second Applicant, intervening party launched this application.
- [23] Only First and Second Applicants oppose this application.

[24] The condonation for the late filing of this application is not opposed.

**LEAVE TO INTERVENE IN THE PROCEEDINGS**

[25] The application is in accordance with the provisions of section 29(1) of the Act which provides:

*"Any interested person, including an organisation, may apply to the Court for leave to intervene as a party to any proceedings before the Court."*

[26] Whilst Rule 13(1) to the rules of this Court provides:

*"Any person whose rights may be affected by the relief claimed in a case and who is not a party in the case may, within a reasonable time after he or she became aware of the case, apply to the Court for leave to intervene in the case."*

[27] The intervening party is regarded to be a third party who intervenes in a case in which he/she has an interest. The Intervening party, if successful in the application may be joined as either Plaintiff or Defendant.

[28] The test in such applications is that the intervening party has to prove that he/she has a direct and substantial interest in the proceedings.

[29] *In Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In Re Sizwe Development and Flagstaff Municipality*<sup>1</sup> the court stated the requirements for acceptance of an Intervening party as follows:

- "(a) The applicant must satisfy the Court that:*
  - (i) he has a direct and substantial interest in the subject-matter of the litigation, which could be prejudiced by the judgement of the Court ...;*

<sup>1</sup> 1991(1) SA 677 (TK) at page 678 - 679

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(ii) *the application is made seriously and is not frivolous and that the allegations made by the applicant constitute a prima facie case or defence ...*

(b) *A 'direct and substantial interest' means ... an interest in the right which is a subject-matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation."*

[30] The direct and substantial interest in the subject-matter of the litigation is regarded as being the decisive criteria.<sup>2</sup>

[31] The phrase "any interested person" in section 29(1) of the Act means a person with a "direct and substantial interest".<sup>3</sup>

[32] I now turn to the facts of this application in relation to the law as stated above.

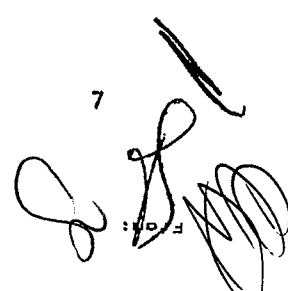
[33] The intervening party in order to succeed has to have substantial interest in the subject-matter of litigation. The litigation to which intervening party requires acceptance is one of a land claim in accordance with the Act.

[34] The claim was lodged by second and third applicants against the state.

[35] At that stage and throughout litigation to the handing down of judgement, intervening party had nothing to do with the property under claim. Intervening party had no interest whatsoever in the subject-matter of litigation. The awarded Erf 142 Constantia was not the subject-matter of litigation.

<sup>2</sup> Ex Parte Sudurhavid (Pty) Ltd: In Re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd 1993 (2) SA 737 (NM)

<sup>3</sup> Ex Parte Beukes and Bekker [1998] 1 All SA 34 (LCC)

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[36] Rule 13(1) of rules of this Court, *inter-alia*, provides that:

*"any person whose rights may be affected by the relief claimed in a case..."*

[37] Intervening party has failed to prove that the land claim, being the relief claimed, was going to or had the potential of affecting its rights.

[38] The intervening party relies on the decision of *Emfuleni Resorts (Pty) Ltd and Manzini Community*<sup>4</sup>. The *Emfuleni Resorts (Pty) Ltd* case is distinguishable from this application in that the Prudhoe Community, being the appellants had substantial interest in the property awarded by court to the Manzini Community. The Prudhoe Community had to be admitted as intervening party because its rights were clearly affected by the relief claimed.

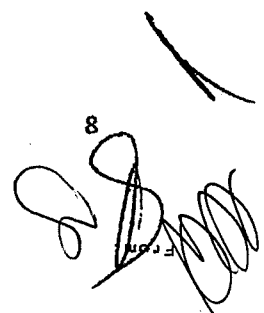
[39] The presence of direct and substantial interest appears, as argued by Intervening party, to be found in the fact that Intervening party is entitled to compensation<sup>5</sup> in terms of section 35(9) of the Act, which provides:

*"Any state-owned land which is held under a lease or similar arrangement shall be deemed to be in the possession of the State for the purposes of subsection (1) (a): Provided that, if the Court orders the restoration of a right in such land, the lawful occupier thereof shall be entitled to just and equitable compensation determined either by agreement or by the Court."*

[40] Provisions of this section do not provide for direct substantial interest. The section attempts to compensate person(s) who may be affected by the order awarding the possessed property to another party. It does not

<sup>4</sup> 2011 JDR 1163 (SCA)

<sup>5</sup> Replying Affidavit pp 228 paragraph 6

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provide the current possessor or lawful occupier with the requirements to be admitted in the initial proceedings.

[41] The submissions of the intervening party are untenable. The application stands to be dismissed.

[42] Having made a finding on the intervening application, I find it unnecessary to attend to the rescission application.

#### **COSTS**

[43] In this matter costs have to follow the event.

[44] The intervening party initially launched this application on 18 July 2014 with this Court. On 30 July 2014 the said application was withdrawn in order to be pursued in the Supreme Court of Appeal. After failure in the Supreme Court of Appeal the intervening party reinstated the application on 06 October 2014.

[45] The withdrawal on 30 July 2014 did not tender costs.

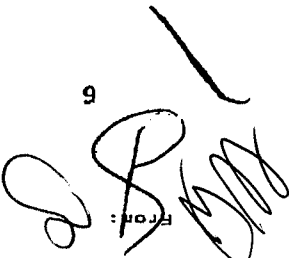
[46] First Applicant argued for such costs.

[47] I am of the opinion that such costs in favour of first and second applicants are permissible.

[48] I make the following order:

(a) Condonation for late filing of the application is granted.

(b) Application to intervene is dismissed.

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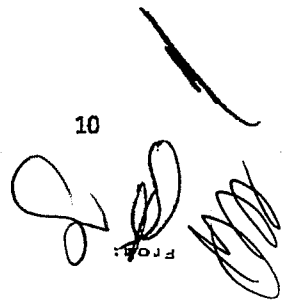
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(c) Intervening party is to pay costs including wasted costs occasioned by the withdrawal of the previous application on 30 July 2014. Regarding First Applicant, costs will be costs of two counsels.



**M. J. MPSHE**

**Acting Judge in the Land Claims Court**



"E2"

85.

**IN THE LAND CLAIMS COURT OF SOUTH AFRICA**

**(Held at Cape Town)**

LCC 26/2010

Before: The Honourable Mpshe AJ

Heard on: 19 August 2015

In the matter between:

**THE REGIONAL LAND CLAIMS COMMISSIONER**

First Applicant

**SEDICK SADIEN**

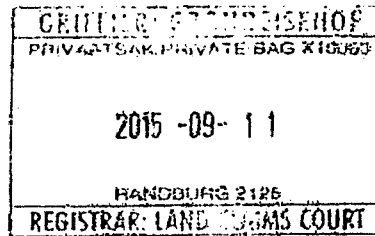
Second Applicant

**EBRAHIM SADIEN**

Third Applicant

And

**JAZZ SPIRIT 12 (PTY) LTD**



First Respondent

**YAMIV (PTY) LTD**

Second Respondent

**MR HEIN R BADENHORST**

Third Respondent

**MINISTER OF AGRICULTURE, FORESTRY**

**REGISTRAR OF DEEDS**

Fourth Respondent

And

**SOUTH AFRICAN RIDING ASSOCIATION FOR**

**FOR THE DISABLED ASSOCIATION ("SARDA")**

Intervening Party

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**COURT ORDER**

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**HAVING read the papers filed of record and having heard Counsel, I make the following order:**

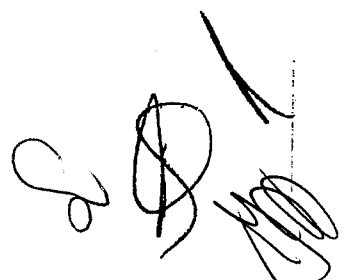
- 1. Condonation for late filing of the application is granted.**
- 2. The application to intervene is dismissed.**
- 3. The intervening party is to pay the costs including wasted costs occasioned by the withdrawal of the previous application on 30 July 2014. Regarding the first Applicant, costs will be costs of two counsel.**

**Given on this Friday the 11<sup>th</sup> day of September 2015**

---

**REGISTRAR  
LAND CLAIMS COURT**



"F1"

LCC26/2010

IN THE LANDS CLAIMS COURT OF SOUTH AFRICA  
(CAPE TOWN)

CASE NO: LCC26/2010

DATE: 31 MARCH 2016

5

In the matter between:

REGIONAL LAND CLAIMS COMMISSIONER 1<sup>st</sup> Applicant

SEDICK SADIEN 2<sup>nd</sup> Applicant

EBRAHIM SADIEN 3<sup>rd</sup> Applicant

10 and

JAZZ SPIRIT 12 (PTY) LIMITED 1<sup>st</sup> Respondent

YAMIV (PTY) LIMITED 2<sup>nd</sup> Respondent

HEIN R BADENHORST 3<sup>rd</sup> Respondent

THE REGISTRAR OF DEEDS 4<sup>th</sup> Respondent

15 And

SOUTH AFRICAN RIDING FOR THE  
DISABLED ASSOCIATION ("SANDRA") Intervening Party

J U D G M E N T

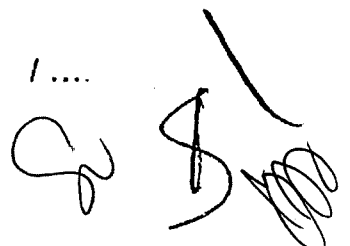
20

(Application for leave to appeal)

MPSHE, AJ:

This is an application for leave to appeal lodged by the  
Intervening party. I have listened to all counsel in this matter  
25 pertaining to this application.

/IM

1....  


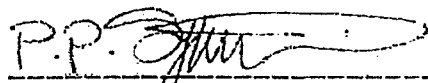
88.

LCC26/2010

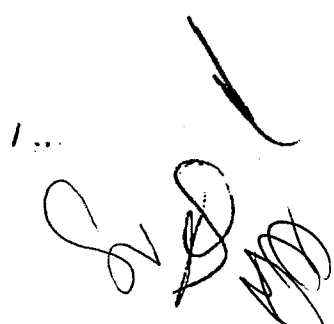
I still come to that same conclusion after the submissions by  
counsel that my judgment stands and I abide by my judgment.  
Therefore, I find no reasonable prospects for another court to  
5 come to a different conclusion.

THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED.  
I MAKE NO ORDER AS TO COSTS.

10

  
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MSHE, AJ

/IM

1...  


"F2"

**IN THE LAND CLAIMS COURT OF SOUTH AFRICA**

**(Held at Cape Town)**

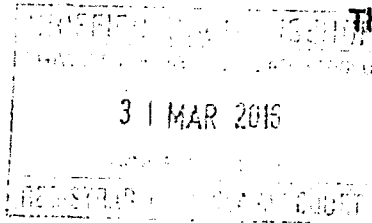
**LCC 26/2010**

**Before: The Honourable Mpshe AJ**

**Heard on: 31 March 2016**

**In the matter between:**

<b>REGIONAL LAND CLAIMS COMMISSIONER</b>	<b>First Applicant</b>
<b>SEDICK SADIEN</b>	<b>Second Applicant</b>
<b>EBRAHIM SADIEN</b>	<b>Third Applicant</b>



**And**

<b>JAZZ SPIRIT 12 (PTY) LIMITED</b>	<b>First Respondent</b>
<b>YAMIV (PTY) LIMITED</b>	<b>Second Respondent</b>
<b>HEIN R BADENHORST</b>	<b>Third Respondent</b>
<b>THE REGISTRAR OF DEEDS</b>	<b>Fourth Respondent</b>

**And**

<b>SOUTH AFRICAN RIDING FOR THE DISABLED ASSOCIATION ("SANDRA")</b>	<b>Intervening Party</b>
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90.

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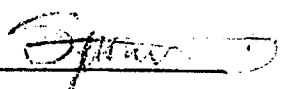
COURT ORDER

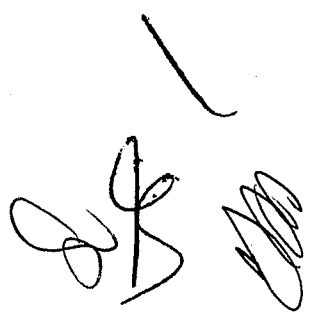
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HAVING read the papers filed of record and having heard Counsel, the following order is made:

1. The application for leave to appeal is dismissed.
2. No order as to costs.

Given on this Thursday the 31<sup>th</sup> day of March 2016

  
\_\_\_\_\_  
REGISTRAR  
LAND CLAIMS COURT



"G"

91.



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**CASE NO: 344/16  
LCC CASE NO: LCC26/10**

In the matter between:

**SOUTH AFRICAN RIDING FOR THE DISABLED  
ASSOCIATION ("SARDA")**

**APPLICANT**

And

**THE REGIONAL LAND CLAIMS COMMISSIONER  
SEDICK SADIEN  
EBRAHIM SADIEN**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT**

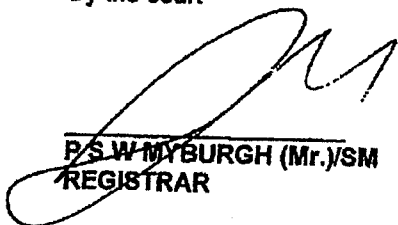
**COURT ORDER**

**PETSE JA and POTTERILL AJA**

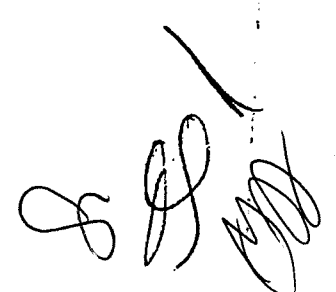
**ORDERED ON 05 JULY 2016**

The application for leave to appeal is dismissed with costs on the grounds that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard.

By the court



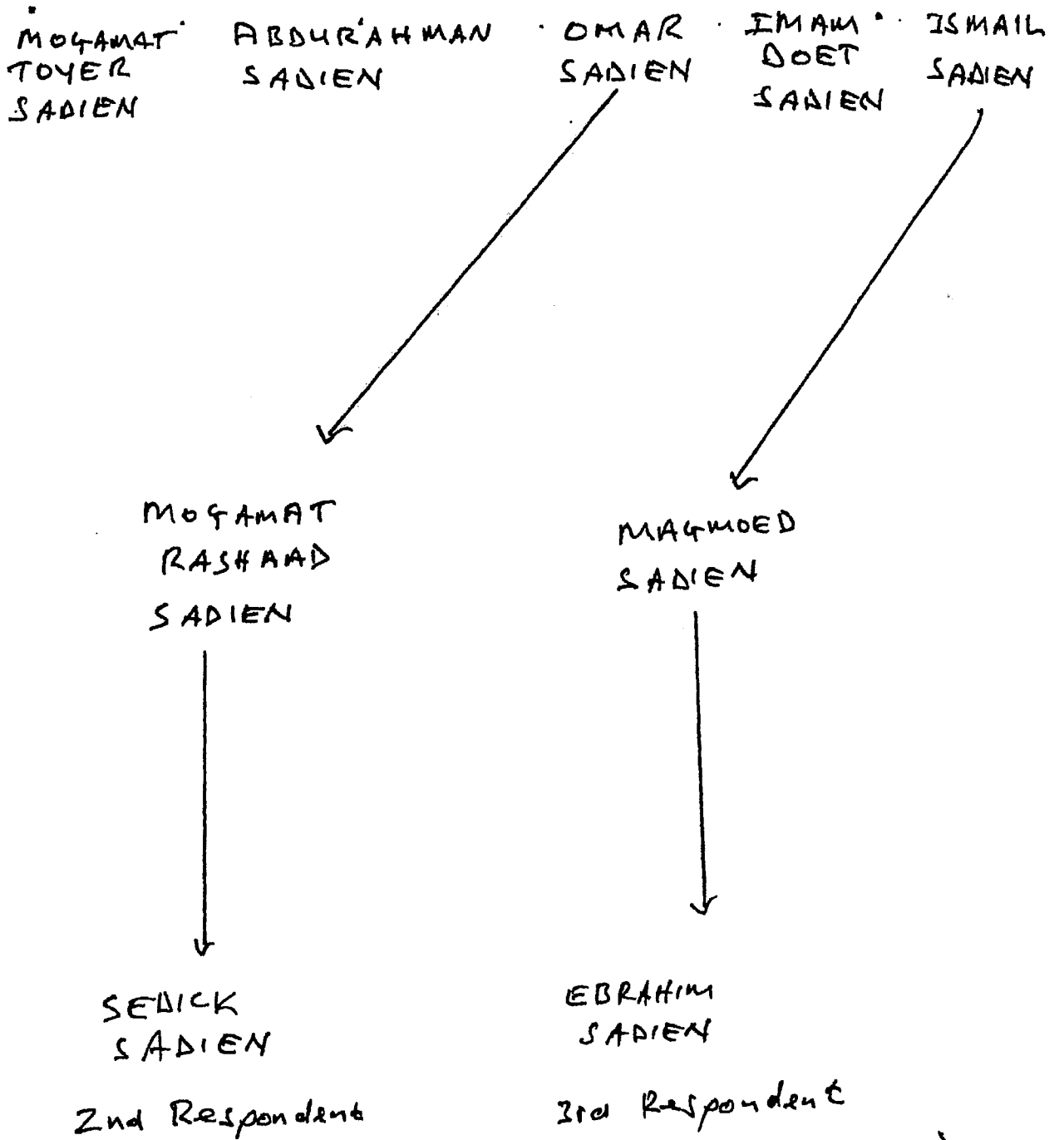
**P.S.W. MYBURGH (Mr.) SM  
REGISTRAR**



"H"

92.

CO OWNERS OF ERF 2274 IN 1962,  
THE BROTHERS SADIEN



"I"

93



**rural development  
& land reform**

Department:  
Rural Development and Land Reform  
REPUBLIC OF SOUTH AFRICA

**OFFICE OF THE CHIEF LAND CLAIMS COMMISSIONER**  
Private Bag X833, Pretoria, 0001; Tel: 012 312 9846; Fax: 012 321 0428

**Enquiries: Mthethelell Patrick Thembani**

**SARDA Centre  
Brommervlei Road  
CONSTANTIA  
7806**

Dear Fennela

**Re: SOUTH AFRICAN RIDING SCHOOL FOR THE DISABLED (SARDA)**

Thank you for your correspondence, which was addressed to the Chief Land Claims Commissioner of the Department of Rural Development and Land Reform.

The Chief Land Claims Commissioner notes with appreciation the nature and extent of your concern and wishes to respond as follows;

It was previously agreed that the Regional Land Claims Commission: Western Cape would facilitate an urgent meeting between the National Department of Public Works and all stakeholders in order to find a solution to the problem. In a meeting held between the Commission and the National Department of Public Works on 18 February 2014, it was agreed that the Commission will submit the request for the transfer of the land in favour of the claimants. The NDPW has agreed that on receipt of this request from the state attorney, they will find a suitable solution regarding SARDA.

For further enquiries please feel free to contact the Project Officer, Mr. Patrick Thembani at (021) 409 0300.

We thank you for your patience and kind co-operation.

Kind regards

**Ms. N. GOBODO  
CHIEF LAND CLAIMS COMMISSIONER**

DATE: 05/03/2014

"3"

94

**From:** Joseph Peter Dreyer <JPDreyer@ruraldevelopment.gov.za>  
**Sent:** 08 July 2014 07:31 AM  
**To:** Michael Wagener  
**Cc:** Lynette Muller  
**Subject:** Erf 142 Constantia

Good day Mr. Wagener

As at 8 Jul 2014, no transfer documents have been lodged for the transfer of portion of Erf 142 to Mr. Sadien. Please provide me with a bar code number if convinced that the transfer documents have been lodged.

Regards

J Dreyer

Toll-free number 0800 037 095  
Email [claim@ruraldevelopment.gov.za](mailto:claim@ruraldevelopment.gov.za)  
Website [www.ruraldevelopment.gov.za](http://www.ruraldevelopment.gov.za)

**LODGE YOUR LAND CLAIM**  
until 30 June 2019  
Commission on Restitution of Land Rights

20th Year of Struggle

COMMISSION ON RESTITUTION OF LAND RIGHTS

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\*Act 71 of 2008 s 112 .....2017 (5) SA 508 (SCA)  
 \* s 115(2)(a) .....2017 (5) SA 508 (SCA)  
 \* s 153(1)(a)(ii) .....2017 (5) SA 40 (SCA)  
 \* s 153(1)(b)(i)(bb) .....2017 (5) SA 40 (SCA)  
 \* s 153(2)(b) .....2017 (5) SA 40 (SCA)  
 \* s 153(7) .....2017 (5) SA 40 (SCA)  
 \*Act 10 of 2013 s 18(1) .....2017 (5) SA 402 (SCA)  
 Act 16 of 2013 s 47(1) .....2017 (5) SA 161 (ECP)

# THE SOUTH AFRICAN LAW REPORTS

## DIE SUID-AFRIKAANSE HOFVERSLAE

SEPTEMBER 2017 (5)

### SA RIDING FOR THE DISABLED ASSOCIATION v REGIONAL LAND CLAIMS COMMISSIONER AND OTHERS

CONSTITUTIONAL COURT

NKABINDE ACJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MADLANGA J, MBHA AJ,  
MHLANTLA J, MUSI AJ and ZONDO J

2017 FEBRUARY 23

CASE No CCT 172/16  
[2017] ZACC 4

*Land—Land reform—Restitution—Claim—Right to intervene—Claim for resti- C  
tution of state land—Right to intervene of lawful occupier who made  
improvements to property during occupancy—May intervene only for  
purpose of determining compensation—Restitution of Land Rights Act  
22 of 1994, s 35(9).*

*Land—Land reform—Restitution—Compensation of lawful occupiers of state D  
land subject to restitution—May intervene if left out of restitution proceed-  
ings—Restitution of Land Rights Act 22 of 1994, s 35(9).*

Section 35(9) of the Restitution of Land Rights Act 22 of 1994 affords lawful  
occupiers of state land the right to claim compensation—to be determined  
either by agreement or the Land Claims Court—when the land they occupy  
is awarded to a claimant for restitution of land rights. E

The applicant (the Association) was the lessee of state land that the Land Claims  
Court (the court) transferred to the second and third respondents (the  
Sadiens) as compensation for land lost during apartheid. The court made  
the order without the knowledge of the Association, which had made F  
improvements valued at R7,5 million during its tenancy. Dissatisfied, the  
Association applied to intervene and for the variation or rescission of the  
order under s 35(11) of the Restitution of Land Rights Act 22 of 1994.  
The court held that the Association lacked direct and substantial interest in  
the restoration of the land to the Sadiens, and refused the application.  
The Association sought relief from the Constitutional Court. G

*Handwritten initials/signature*

*F*

*F*

A **Held**

To succeed, the Association had to meet the direct and substantial interest test—ie show a right that was, or was likely to be, adversely affected by the order sought. All it had to do at the intervention stage was to make allegations which, if proved, would entitle it to relief. A direct and substantial interest would exist if the Association were able to show that it had some right which was affected by the order issued. Here the LCC order had the effect of transferring the land, without determination of compensation to the Association, under s 35(9). While the LCC was correct in holding that the Association had no direct and substantial interest in the property, it erred by overlooking the Association's statutory right, as occupier, to just and equitable compensation. In the light of this the Association would be allowed to intervene for the purpose of determining compensation. The fact that a final order had already been issued at the time of the application for intervention was not material: the LCC should have granted leave to intervene for the purpose of considering the issue of compensation only. The matter would be remitted to the LCC for the determination of compensation payable to the Association. (Paragraphs [9]–[12] and [18]–[20].)

C **Cases cited**

*Aquatour (Pty) Ltd v Sacks and Others* 1989 (1) SA 56 (A): referred to  
*Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*  
2007 (6) SA 199 (CC) (2007 (10) BCLR 1027; [2007] ZACC 12):  
referred to

*Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (Tk): dictum at 679A applied

*Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) ([2003] ZAECHC 5): dictum in para [9] applied

*Snyders v De Jager (Joinder)* [2016] ZACC 54: referred to  
*United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C): referred to.

F **Legislation cited**

The Restitution of Land Rights Act 22 of 1994, s 35(9): see *Juta's Statutes of South Africa* 2016/17 vol 6 at 4-377.

*M Wagener* for the applicant.

*D Jacobs SC* (with *J Krige*) for the first respondent.

*B Joseph* for the second respondent.

H No appearance for the third respondent.

An application leave to appeal and an appeal against the Land Claims Court's refusal to allow the applicant to intervene in a restitution claim.

I **Order**

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Land Claims Court is set aside.
4. The South African Riding for the Disabled Association is allowed to intervene for the purpose of determining compensation payable to the Association.

5. The matter is remitted to the Land Claims Court for determination A of compensation payable to the South African Riding for the Disabled Association.
6. The Regional Land Claims Commissioner is ordered to pay costs in the Land Claims Court and this court.

**Jafta J (Nkabinde ACJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring):**

B **Introduction**

[1] This is an application for leave to appeal against an order of the Land Claims Court in terms of which a request to intervene in proceedings that served before that court was dismissed with costs. The Land Claims Court refused leave to appeal and a petition to the Supreme Court of Appeal was also not successful. The application concerns the interpretation and application of the Restitution of Land Rights Act<sup>1</sup> (Act) which was enacted to give effect to s 25(7) of the Constitution.<sup>2</sup> D As a result a constitutional issue is raised.<sup>3</sup>

[2] The Chief Justice directed the parties to file written submissions on the question whether the applicant had a direct and substantial interest in an amended order of the Land Claims Court that ordered transfer of a certain immovable property to the second respondent. In compliance E with the directions, the parties have lodged written argument and the matter was decided without oral hearing.

F **Factual background**

[3] The applicant is the South African Riding for the Disabled Association (the Association). The Association has cited as respondents the Regional Land Claims Commissioner (the Commissioner), Mr Sedick Sadien and Mr Ebrahim Sadien (Sadiens).

[4] The Association has occupied Erf 142, Constantia, Cape Town, under a lease for 34 years. This property belonged to the state. In terms G of the amended order, the Land Claims Court directed that the property be transferred to the Sadiens as compensation for the land they had lost. The Sadiens had claimed restoration of land they had lost as a result of discriminatory practices of the previous apartheid order.

[5] The claim for restoration was determined by the Land Claims Court H in December 2012. That court ordered the transfer of Erf 1783, Constantia to Mr Sedick Sadien, a descendant of Mr Omar Sadien who was

<sup>1</sup> 22 of 1994.

<sup>2</sup> Section 25(7) 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.'

<sup>3</sup> *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) (2007 (10) BCLR 1027; [2007] ZACC 12).

A the owner of the dispossessed land. But this erf proved to be considerably smaller than the dispossessed land. As a result the Land Claims Court awarded the Sadiens a different piece of land to make up for the shortfall. On 8 February 2013 the court varied its order to replace the smaller land with Erf 142, Constantia.

B [6] This variation was effected without the knowledge of the Association which had allegedly made improvements valued at R7,5 million on the property in question during its tenancy. No offer was made by any party to compensate the Association and the Land Claims Court ordered none. This was at variance with the provisions of s 35(9) of the Act. This  
C section confers upon a lawful occupier of state land compensation determined by agreement or the Land Claims Court, if that court orders restitution of state land occupied by a lawful occupier.

D [7] Aggrieved by the turn of events, the Association instituted in the Land Claims Court an application for leave to intervene. The Association also applied for rescission of the amended order in terms of s 35(11) of the Act.<sup>4</sup> It sought to have the varied order set aside, including the order of 7 December 2012 in terms of which the smaller land was awarded to the Sadiens.

E [8] The Land Claims Court held that the Association had no direct and substantial interest in the remedy sought by the Sadiens. That court concluded that on the facts the Association had no interest in the subject-matter of the case which was the restoration of land to the Sadiens.

F **Intervention**

G [9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely

<sup>4</sup> Section 35(11) provides:

H 'The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it—  
I (a) in the absence of the person against whom that order or judgment was granted;  
(b) which was void from its inception or was obtained by fraud or mistake common to the parties;  
(c) in respect of which no appeal lies; or  
(d) in the circumstances contemplated in section 11(5):  
Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.'

affected or likely to be affected by the order sought.<sup>5</sup> But the applicant A does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.<sup>6</sup>

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic B principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial C interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

'In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.'<sup>7</sup>

[12] While it is true that the Association had no interest in the subject-matter of the claim by the Sadiens and that the order issued by the Land Claims Court on 7 December 2012 affected none of its E interests, the same cannot be said about the variation of 8 February 2013. The varied order had the effect of transferring Erf 142 to Mr Sedick Sadien without determination of compensation to the Association.

[13] Section 35(9) affords lawful occupiers of state land like the Asso- F ciation the right to claim compensation when the land they occupy is awarded to a claimant for restitution of land rights. Section 35(9) provides:

'Any state-owned land which is held under a lease or similar arrangement shall be deemed to be in the possession of the State for the purposes of subsection (1)(a): Provided that, if the Court orders the restoration of a right in such land, the lawful occupier thereof shall be entitled to just and equitable compensation determined either by agreement or by the Court.'

[14] What this provision seeks to achieve is to mandate the Land Claims H Court to order restoration of rights even where the state land is occupied by a third party. It accomplishes this objective by deeming that such land is in the possession of the state for purposes of restoration in terms of

<sup>5</sup> *Snyders v De Jager (Joinder)* [2016] ZACC 54; *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (Tk) (*Sizwe Development*).

<sup>6</sup> Id at 679A.

<sup>7</sup> *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) ([2003] ZAEHC 5) para 9.

A s 35(1).<sup>8</sup> Compensation under s 35(9) is payable to lawful occupiers only. It must be just and equitable compensation determined by the parties themselves by means of an agreement, failing which by the Land Claims Court.

[15] In the written submissions the Commissioner contended that the Association was not an interested person envisaged in s 29(1) of the Act because it merely had a financial interest in the litigation concerning restoration of land to the Sadiens.<sup>9</sup> This is not true. Section 35(9) confers an entitlement upon lawful occupiers to have just and equitable compensation determined if transfer of the land they occupy is ordered. It is the determination of the right to compensation that gives rise to a direct and substantial interest.

[16] Here it is common cause that the Association was a lawful occupier of Erf 142 at the time the variation order was made. Also it cannot be

D <sup>8</sup> Section 35(1) of the Act provides:

'The Court may order—

- (a) the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or right in land; Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant, unless—
- (i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land concerned; or
- (ii) the Court is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;
- (b) the State to grant the claimant an appropriate right in alternative state-owned land and, where necessary, order the State to designate it;
- (c) the State to pay the claimant compensation;
- (d) the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land;
- (e) the grant to the claimant of any alternative relief.'

H <sup>9</sup> Section 29 of the Act provides:

- (1) Any interested person, including an organisation, may apply to the Court for leave to intervene as a party to any proceedings before the Court.
- (2) The State shall have the right to intervene as a party to all proceedings before the Court.
- (3) Any party appearing before the Court may do so in person or may be represented by an advocate or attorney.
- (4) Where a party can not afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the State legal aid system or, if necessary, at the expense of the Commission.'

disputed that s 35(9) afforded it a right to compensation and that restoration of rights in state land lawfully occupied was subject to determination of compensation to the Association. The Association alleged that it had made improvements valued at R7,5 million. It is also common cause that no compensation to the Association was agreed upon and that none was determined by the Land Claims Court before ordering that Erf 142 be transferred to Mr Sedick Sadien.

[17] It cannot be gainsaid that the varied order adversely affected the Association's right to compensation. Section 35(9) authorises transfer of the state land to a claimant without the involvement of the lawful occupier of the land in question. But the section safeguards the occupier's interests by conferring on it an entitlement to just and equitable compensation. In these circumstances entitlement to compensation is the precondition for authorising transfer. In the absence of an agreement, the lawful occupier is entitled to be heard on what would constitute just and equitable compensation.

[18] While the court was empowered by s 35(1) to order the transfer, its order was subject to the provision in s 35(9) which required that the Association be paid just and equitable compensation. Absent the Association's compensation, it cannot be said that the court's variation order was consonant with the proviso. The Association was therefore entitled to intervene and enforce its right to compensation. It is in this limited sense that it had a direct and substantial interest in the proceedings. This interest does not include the question whether Erf 142 must be transferred to the Sadiens. Its interest is restricted to the entitlement to just and equitable compensation which must be determined by agreement or by the Land Claims Court.

[19] It is apparent from the papers that the Association misconceived the extent of its interest and sought the rescission of the varied order. As shown here it had no legal interest in the transfer of the land. Therefore the Land Claims Court was right in holding that the Association had no direct and substantial interest in the property in question. But that court was in error when it overlooked the statutory right to compensation conferred on a lawful occupier like the Association and that the transfer of the property was subject to the determination of just and equitable compensation. It follows that it was not necessary to rescind the varied order. What was required was to allow the Association to intervene solely for the purpose of determining compensation.

[20] The fact that a final order had already been issued at the time of the application for intervention is immaterial.<sup>10</sup> Once it was shown that the Association was a lawful occupier of Erf 142, the Land Claims Court should have granted it leave to intervene for purposes of considering the issue of compensation only. It follows that that court erred in dismissing the application to intervene.

<sup>10</sup> *Sizwe Development* above n5 at 679C. See also *Aquatour (Pty) Ltd v Sacks and Others* 1989 (1) SA 56 (A); and *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C).

## A Costs

[21] The Association has succeeded in its appeal and therefore it is entitled to costs. However, I do not consider it fair to order the Sadiens to pay any of those costs. Their interest in these proceedings was to defend the order that transferred the land in question to Mr Sedick Sadien. They conceded the Association's right to compensation. The same cannot be said about the Commissioner. He advanced the incorrect argument to the effect that s 35(9) afforded the Association a mere financial interest which did not entitle it to intervene. That argument has been rejected.

## C Order

[22] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Land Claims Court is set aside.
- D 4. The South African Riding for the Disabled Association is allowed to intervene for the purpose of determining compensation payable to the Association.
5. The matter is remitted to the Land Claims Court for determination of compensation payable to the South African Riding for the Disabled Association.
- E 6. The Regional Land Claims Commissioner is ordered to pay costs in the Land Claims Court and this court.

Applicant's Attorneys: *Bowman Gilfillan*, Cape Town.

First Respondent's Attorneys: *State Attorney*, Cape Town.

Second Respondent's Attorneys: *Sadien Attorneys Igshaan*, Cape Town.

## OFF-BEAT HOLIDAY CLUB AND ANOTHER v SANBONANI HOLIDAY SPA SHAREBLOCK LTD AND OTHERS

CONSTITUTIONAL COURT

NKABINDE ACJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MADLANGA J, MBHA AJ,  
MHLANTLA J, MUSI AJ and ZONDO J

2017 MAY 23

CASE No CCT 106/16  
[2017] ZACC 15

*Company—Oppressive conduct—Relief—Minority shareholder's claim under  
old Companies Act—Prescription—Not 'debt'—Incapable of prescription—  
Companies Act 61 of 1973, s 252.*

Section 252 was the 'oppression' section of the (old) Companies Act 61 of 1973.

It allowed the courts to provide equitable relief to minority shareholders aggrieved by 'unfairly prejudicial, unjust or inequitable' conduct by the majority or the board. The issue in the present application for leave to appeal was whether claims brought under s 252 were debts that could prescribe under the Prescription Act 68 of 1969.

The applicants, both timeshare clubs, were minority shareholders in the first respondent (Shareblock), a company that operated holiday resorts. In 2008 the applicants commenced a High Court application for declaratory relief under s 252. They claimed that the third respondent (Mr Harri), the controlling mind and principal shareholder of Shareblock, had during 1998–1999 improperly amended Shareblock's articles to allow the allocation of shares in a timeshare development, and then allocated such shares in an unfair manner. They sought an order declaring the amended articles invalid, that the shares were improperly issued, and that the holders of those shares were barred from voting on them.

The issue was whether the applicants' s 252 claim had prescribed. The High Court held that it had because the claim was a 'debt' as intended in ss 11 and 12 of the Prescription Act and the applicants had been aware of their cause of action for many years. The court rejected the argument that the causes of action amounted to continuing wrongs. In an appeal the Supreme Court of Appeal, attaching a wide meaning to the term 'debt', endorsed the High Court's view that the s 252 debts had prescribed.

In the present application, also for leave to appeal, the applicants argued that the Constitutional Court's decision in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) (2016 (6) BCLR 709; [2016] ZACC 13) required a narrow meaning to be ascribed to 'debt': it could be either a claim for the payment of money, or a claim for the delivery of something, and since their claim under s 252 was neither, it had not prescribed. In the alternative, the applicants argued that their claims constituted continuing wrongs that were incapable of prescription. The respondents argued that the applicants' claim was a debt because it sought the alteration of Shareblock's articles, that is, the performance of an obligation as ordinarily understood.

### Held per Mhlantla J for the majority

The appeal would be upheld. The plain text of s 252 gave the court a broad discretion to grant equitable relief (see [28]). Until the court made a determination under s 252, neither party could discharge its obligations to the other because neither would be aware of their existence or extent (see [30]). A claim had to be correctly characterised before a decision on the

G

AGREEMENT OF LEASE

71SD.4

42

made and entered into by and between

.....  
MR J A LAING  
.....

.....  
in his capacity as SECRETARY OF THE SCHOOL BOARD OF THE  
CAPE  
.....

duly authorized thereto by the Educational Trustees\*  
created by section 193 of the Education Ordinance  
No. 20 of 1956.

~~by the Cape Provincial Administration created by section 193 of the  
Education Ordinance No. 20 of 1956.~~

~~by the Cape Provincial Administration created by section 193 of the  
Education Ordinance No. 20 of 1956.~~

\*Delete what  
is not  
applicable.

(hereinafter referred to as the Lessor) of the one part

AND

THE S A RIDING FOR THE DISABLED ASSOCIATION,  
CAPE TOWN BRANCH  
.....

(hereinafter referred to as the Lessee) of the other part.

here  
describe  
the premi-  
ses in suf-  
ficient  
detail to  
enable them  
to be iden-  
tified.

1. The Lessor hereby lets and the Lessee hereby  
hires certain premises situate as 6 Klaassenbosch High  
and Primary School Site consisting of erven 141, 142,  
560 and 684 situated along Brommersvlei Road, Constantia  
.....

(hereinafter referred to as the Leased Premises).

2.1....

E. 955/4/70.

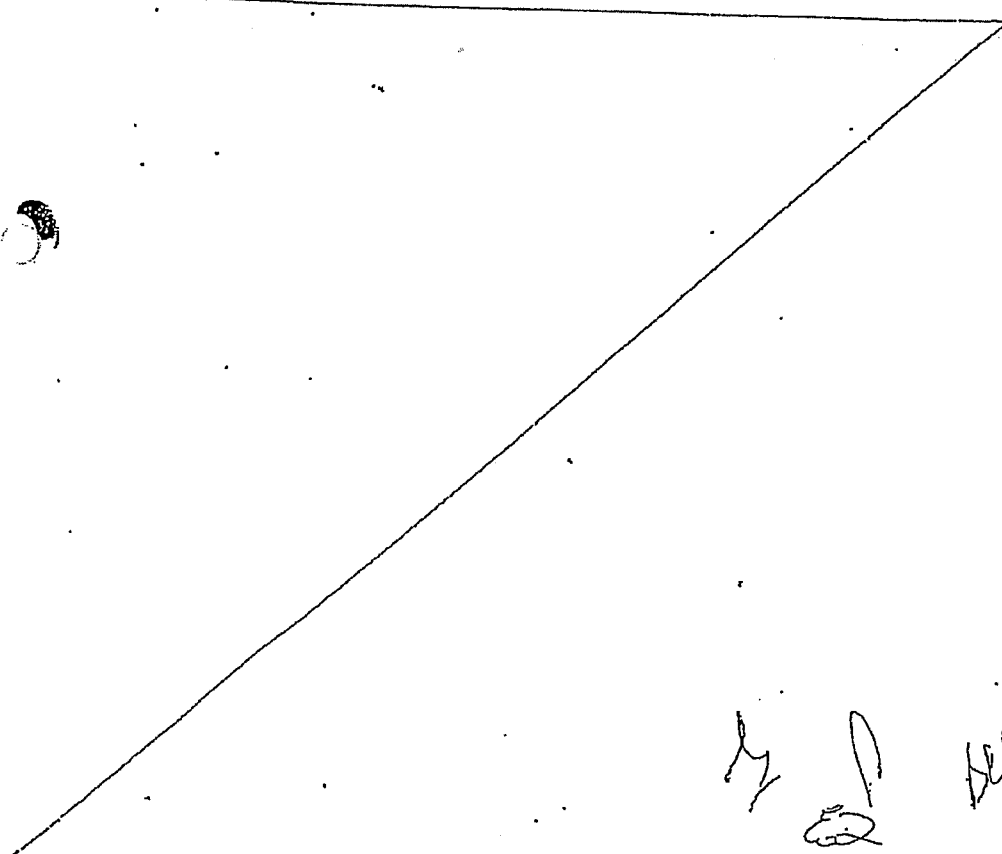
*[Handwritten signatures]*

*[Handwritten initials and signatures]*

. 1(a)

43

- 1.1 This lease shall be for a period of 20 (twenty) years commencing on the first day of July 1981 at a rental of R100,00 per annum, subject to the option to extend the lease at its expiration on the same terms and conditions except for the period of such extension which will be in the sole discretion of the Provincial Administration, and subject further to the Provincial Administration retaining the right to reduce the size of the land leased to the Association to four hectares should the said property be required for educational purposes within the duration of the lease agreement.
- 1.2 All structures of whatever nature to be erected on the site will be subject to the prior approval of the Provincial Administration and such structures including the foundations must be removed by the S A Riding for the Disabled Association : Cape Town Branch at the expiry of this lease agreement and the lessee must make good where the land has been disturbed.
- 1.3 Soil may under no circumstances be removed from the site.
- 1.4 The attached indemnity clause (no. 13) forms part of this lease agreement.



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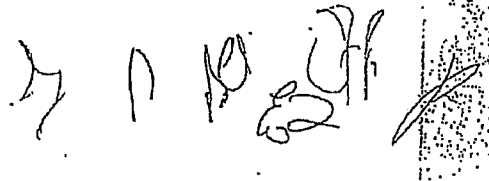
not, under any circumstances, be liable for any damage sustained by the Lessee arising from any such defects, nor for any loss or damage to any goods or articles in the Leased Premises from whatsoever cause arising;

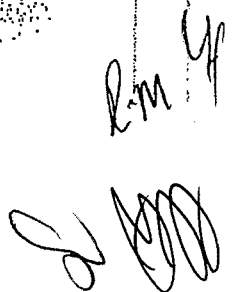
"(b) he shall to the satisfaction of the Lessor, maintain the Leased Premises in the state of repair in which they stand at the date on which this agreement is signed by the lessee, both internally and externally, as well as all fixtures and fittings therein, and shall promptly repair all damage to and rectify all deterioration of the said premises, fittings and fixtures;"

(c) if the Lessee fails to discharge to the satisfaction of the Lessor, the obligation imposed upon him by Clause 6(1)(b) within thirty days from the date of receipt by him of a written notice to discharge such obligation, the Lessor shall be entitled at its option, either itself to do the necessary work and to recover the cost thereof from the Lessee, or immediately to terminate this lease.

(2) Rectification of deterioration shall include general renovation and all necessary painting and colour washing.

7. The Lessee shall not make any alterations in or additions to the Leased Premises without the Lessor's consent which may be given to such conditions as the Lessor may impose.

4.1.11  




8. The Lessee shall not do or permit to be done upon the Leased Premises anything which, in the opinion of the Lessor, may be a nuisance or annoyance to or in any way interfere with the quiet and comfort of persons in the neighbourhood or which may be in contravention of any law or the conditions of title under which the Leased Premises are held by the Lessor.

9. In the event of the partial or total destruction of the Leased Premises by fire or any other cause this Lease shall, at the option of either party terminate without prejudice to the right of the Lessor to recover damages from the Lessee by whose negligence, default or wilful act such destruction has occurred.

10. The Lessor and his agents shall be entitled at all reasonable times to enter and view the Leased Premises for the purpose of determining the state of repair of such Premises and generally for any other purpose arising out of, or connected with the discharge by the Lessee of his obligations under this Lease.

11. Should the Lessee fail to comply with any of the provisions of this Lease, notwithstanding any previous waiver, or anything to the contrary herein contained, the Lessor shall have the right to cancel this Lease forthwith and thereupon to enter and retake possession of the Leased Premises or, should the Lessee resist or obstruct the Lessor in such entry and retaking of possession, to sue the Lessee in a court of competent jurisdiction for an order of ejectment from the Leased Premises.

The Lessee shall nevertheless be liable for the payment of any or all the rent and other monies that may or shall be owing under this Lease up to the date upon which the Lessor regains possession of the Leased Premises, and the Lessor shall be entitled to recover from the Lessee any damages sustained by the Lessor as the result of the Lessee's conduct.

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12. The Lessee elects as his domicilium citandi et executandi and for the purposes of any notice or for the service of any legal process arising out of this Lease the following address:-

S A Riding for the Disabled Association  
Cape Town Branch  
P O Box 235, CONSTANTIA 7848

The lease agreement which was signed on 16 July 1981 is hereby cancelled

SIGNED AT Cape Town on this 8<sup>th</sup> day of December 1981.

*[Signature]*  
Lessor for and on behalf of

\* Delete what is not applicable.

- \* The Educational Trustees
- \* ~~The Hospital Trustees~~
- \* ~~The Provincial Administration of the Cape of Good Hope.~~

WITNESSES:

1. *[Signature]*  
2. *[Signature]*

SIGNED AT Cape town on this 8<sup>th</sup> day of December 1981.

WITNESSES:

1. *[Signature]*  
2. *[Signature]*

*[Signature]*  
Lessee  
for S.A. Riding for Disabled Ass.  
A.F. Brauer

*[Signatures]*

*[Signatures]*

Indemnity Clause

48

Lease of land situated at Constantia

This indemnity clause numbered 13 forms part of the lease agreement which was signed on behalf of the Educational Trustees and the tenant S A Riding for the Disabled Association : Cape Town Branch

on ..... 8/12/81 .....

- 13. The Lessee hereby agrees to indemnify and keep the Lessor indemnified against all actions, proceedings, claims and demands, costs, damages and expenses which may be levied, brought or made against the Lessor or which the Lessor may pay, sustain or incur by reason of any negligent act on the part of the Lessee, its employees or persons acting under its control or its members.

*[Signature]*

.....  
Lessor for and on behalf of the Educational Trustees.

Witnesses:

- 1. .... *[Signature]* .....
- 2. .... *[Signature]* .....

Date : ... 8/12/81 .....

*[Signature]*

.....  
Tenant  
for S.A. Riding for Disabled Ass.  
C.T. Branch

Witnesses :

- 1. .... *[Signature]* .....
- 2. .... *[Signature]* .....

Date : ... 8/12 Dec 1981 .....

*[Handwritten initials and signatures]*

RM 4

*[Signature]*

*[Signature]*





hereinafter referred to as "the Tenant"

## 2. DEFINITIONS

- 2.1 "building" means the building on the leased premises;
- 2.2 "leased premises" means the premises as specified in clause 3.2 of this Agreement;
- 2.3 "total lettable area" means the area as indicated in clause 3.2 of this Agreement;
- 2.4 "property" means the property as specified in clause 3.1 of this Agreement;
- 2.5 "pro rata share" means the ratio which the area of the leased premises bears to the total lettable area of the property.

## 3. PROPERTY

- 3.1 The Landlord is the registered owner of the property described as:  
(hereinafter referred to as "the property")  
Erven 141, 142, 506 & 684, Brommersvlei Road, Constantia

- 3.2 The Landlord lets to the Tenant who hereby hires:

A portion measuring  $\pm 12$  ha (12 hectares) of the property, described in Clause 3.1 (hereinafter referred to as "the leased premises"), indicated on the attached locality map, marked Annexure "A" and hereby incorporated into this Agreement.

## 4. PERIOD

- 4.1 Notwithstanding the date of signature of this document or the date of occupation of the leased premises by the Tenant, this Lease shall commence on **1 July 2006** and shall terminate on **30 June 2007**, notwithstanding the date of vacation of the leased premises by the Tenant.

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4.2 The Tenant may apply to renew this lease for a further period in writing at least 3 (three) months prior to the date on which the lease period, as described in Clause 4.1, will expire.

4.3 The Landlord must notify the Tenant in writing within 1 (one) month after receipt of such application for renewal whether his or her application was approved or not and must give reasons if the application was not approved.

4.4 If the application for renewal was approved, a new lease agreement must be concluded between the parties incorporating all the terms of this lease, save that

4.4.1 the financial liabilities of the Tenant with regard to rent, security and municipal charges may increase; and

4.4.2 this right of renewal is also subject to the right of the Landlord to resile from this agreement, which will cancel any further right of renewal.

4.5 If the Tenant fails to give notice to the Landlord in terms of and in accordance with Clauses 4.2 – 4.3 of its intention to renew the lease, the Landlord will deem the right of renewal by the Tenant as not being exercised and the Tenant must vacate the premises at the expiry of the Lease term, as described in Clause 4.1.

*[Handwritten signatures and initials]*  
JP  
B  
re  
R.M  
H  
[Signature]

5. ENTITLEMENT TO RESILE

In accordance with the provisions of the proviso to Regulation 4(1) of the Regulations to the Western Cape Land Administration Act, No. 6 of 1998 ("the Act"), the Tenant hereby takes notice that:

5.1 The Provincial Cabinet, after consulting the Provincial Property Committee, appointed in terms of Regulation 3(1) to the Act, may resile from this Agreement within 21 (twenty-one) days after the receipt of written representations received pursuant to section 3(3) of the Act, or such longer period not exceeding 3 (three) months as the Provincial Cabinet may determine in writing prior to the expiry of that 21 (twenty-one) day period; and

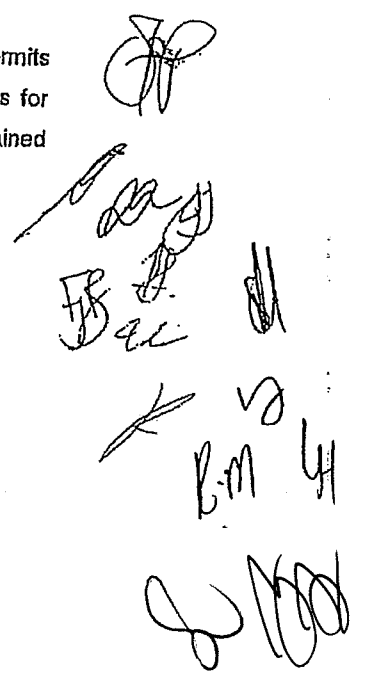
5.2 In the event of the Provincial Cabinet so resiling, the Tenant will have no right of recourse against the Landlord or any of its organs or functionaries, but if the Landlord intends to lease the leased premises for more than the rental specified in this Agreement within a period of 3 (three) months from the date when it resiled from this Agreement, the Landlord must first offer to lease the leased premises to the Tenant at that rental.

6. LEASED PREMISES

6.1 The Tenant confirms hereby that the leased premises have been physically identified to him or her.

6.2 The Tenant must satisfy himself that the leased premises are suitable for the purpose for which it is let and the Landlord gives no warranties or undertakings in this regard.

6.3 The Tenant must obtain all authorisations, licences and permits necessary to lawfully use the leased premises for the purposes for which it is leased to him and provide to the Landlord such obtained

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7. DEPOSIT AND RENTAL

- 7.1 The Tenant shall pay a deposit of R0.00 (Zero Rands and Zero Cents) to the Landlord on signature of this Lease or on receipt of the keys of the leased premises, whichever is the earlier or provide the Landlord with a bank guarantee to the same value, in lieu of a deposit, if so agreed by the Landlord.
- 7.2 The Landlord shall retain this deposit for the full duration of the Lease and any renewal thereof as security for the prompt fulfilment of all the Tenant's obligations under this Lease.
- 7.3 The Landlord shall have the right to apply the whole or a portion of this deposit and interest towards payment of rent, service charges, rates and insurance increases, key replacements, renovations and other amounts for which the tenant is responsible in terms of the Lease at the expiry or cancellation of the contract. If any portion of the deposit is so applied, the Tenant shall forthwith reinstate the deposit to its original amount within 30 days of date of use.
- 7.4 The Tenant may not set-off monies owing by it under this Lease against the deposit during the period of the Lease or at its termination.
- 7.5 On termination of this Lease, the deposit or the balance thereof as the case may be, shall be refunded by the Landlord to the Tenant:
- 7.5.1 after the Tenant has vacated the leased premises and returned the keys of the leased premises to the Landlord;
  - 7.5.2 after all the Tenant's obligations to the Landlord in terms of the Lease have been fully discharged; and
  - 7.5.3 free of interest.

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authorisations, licences and permits within 7 (seven) days after the issuing of such documentation.

- 6.4 Failure to provide the Landlord with copies of the documentation as provided for in Clause 6.3 will constitute a breach of contract by the Tenant.
- 6.5 The Tenant will use the leased premises for the duration of the Lease exclusively for the commercial purpose of:  
*A horse riding school and such necessary fundraising functions which may take place from time to time for the funding of the riding program.*
- 6.6 For purposes of this Lease, the Tenant shall be obliged to comply strictly with all relevant statutory requirements with regard to licences, permits or authorisations necessary for the business to be conducted on the leased premises.
- 6.7 The Tenant shall at no time be considered to have acquired any right or lawful claim to a grant of the leased premises by virtue of this Lease agreement.
- 6.8 The Tenant shall take all necessary precautionary measures to prevent any damage to the leased premises, any other buildings on the property, any movable property of the Landlord or of third parties, arising from the use of the leased premises by the Tenant.
- 6.9 The Tenant hereby indemnifies the Landlord against all claims in respect of damage or injuries by third parties arising from the use of the leased premises by the Tenant that is directly or indirectly the cause of such damage or injuries.
- 6.10 The leased premises are leased *Voetstoots*.



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- 8.4 Where any such charges are payable by the Tenant directly to the Authority concerned, the Tenant must furnish the Landlord with a copy of the receipt in respect of payments made for the charges.
- 8.5 Irrespective of to whom the amounts are payable for water and electricity and any other municipal charges, non-payment thereof will constitute a breach of contract by the Tenant and interest may be charged on the outstanding amounts.
- 8.6 A certificate signed by any director, employee or official of the Landlord, stating the amount due by the Tenant and the due date for payment, shall be conclusive evidence of the amount and the due date for payment.
- 8.7 If at any time during the currency of this agreement the charges in respect of assessment rates and/or sewage and/or refuse removal and/or for charges, imposts or tax are increased, then with effect from the date upon which any such increases become effective, the tenant shall pay an additional amount which will be determined by the Landlord at the same ratio as the leased premises bears to the total lettable area of the property, which is described in clause 3.2 with regard to such increase.

#### 8A. PREMISES' ALARM SYSTEM

- 8A.1 The Tenant shall contract directly with the service provider who installed the alarm system with regard to the rendering of security services to the premises if it requires such services for the premises.
- 8A.2 The Landlord will not be liable for any failure of payment by the Tenant to the service provider regarding the rendering of security services to the premises.

*J.P.*  
*[Handwritten signatures and initials]*  
*R.M.*

- 7.6 The rental amount to be paid by the Tenant to the Landlord free from deduction and demand and free from Bank Exchange shall be *R2 163.60 (Two Thousand One Hundred and Sixty Three Rand and Sixty Cents) per month.*
- 7.7 All rent shall be payable monthly in advance without deduction or set-off on or before the first day of each month with effect from the commencement date.
- 7.8 All payments of rent shall be made free of commission or other deduction. Cheques must be made out to "Property Management".
- 7.9 Until further written notice the rental must be paid to the Landlord at any financial institution into the following account:

NAME OF ACCOUNT : Property Management

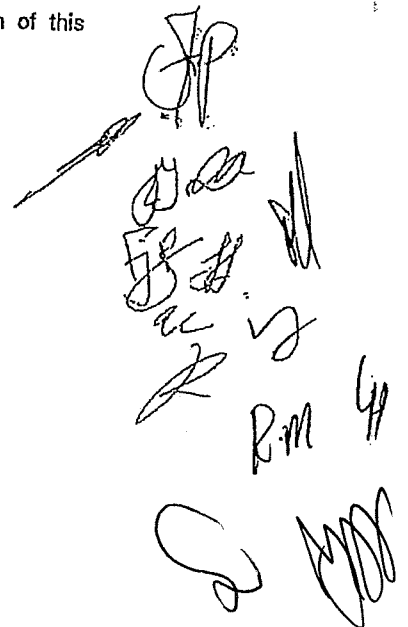
ACCOUNT NUMBER : 4054910146

BRANCH CODE : 638909

BRANCH NAME : ABSA Bank – Government  
Banking Branch

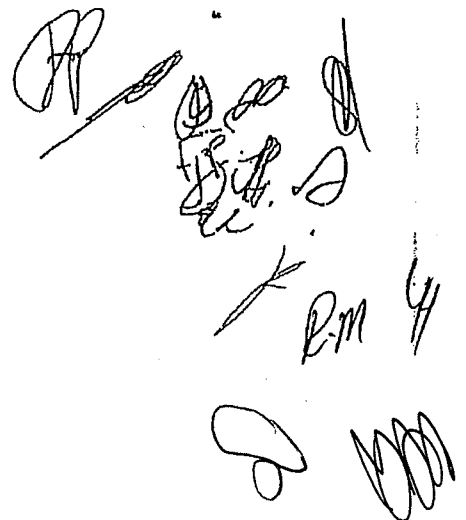
REFERENCE NUMBER : 0462

- 7.10 In the event of a dispute regarding payment, only the bank deposit receipts bearing the original and official stamp of the relevant financial institution will be accepted as proof of payment by the Landlord.
- 7.11 The Landlord will submit invoices to the Tenant for amounts due by the Tenant, but the failure of the Landlord to submit any such invoice will not excuse the Tenant from payment. Non-payment of any outstanding amount by the Tenant will constitute a breach of this Lease notwithstanding that an invoice was not submitted.



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- 11.2 When applying for such consent the Tenant shall submit to the Landlord in duplicate plans drawn to scale of each sign or advertisement together with all relevant information relating thereto including, *inter alia*, details of the size and depth of letters to be used, the materials to be used, and the method of manufacture, illumination and attachment to, or suspension from the leased premises or the building.
- 11.3 The Landlord shall have the right to refuse such consent should the Landlord deem in its sole discretion that any aspect of the sign or advertisement is not in keeping with the Landlord's signage requirements or with the general signage or aesthetics of the building or in the public interest.
- 11.4 In the event of such consent being granted, the Tenant—
- 11.4.1 shall keep and maintain any such signs in good, clean and proper working order and condition and comply with the requirements of any competent authority pertaining to such signs. Should the Tenant fail to do so the Landlord shall be entitled, after giving the Tenant 7 (seven) days written notice, to attend to the signs in such manner as the Landlord deems necessary and to recover the costs of so doing from the Tenant on demand.
- 11.4.2 hereby indemnifies the Landlord against all claims of whatsoever nature made against the Landlord as a result of the installation, erection or operation of such signs.
- 11.5 The Tenant shall, by not later than the expiry or earlier termination of this agreement, remove all signs affixed, painted, placed, displayed, erected or installed by it and make good at its own cost any damage caused as a result of such removal. Should the Tenant fail to so remove all signs or make good any such damage, the Landlord shall



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7.12 If the Tenant fails to make payment to the Landlord of any monies payable by him or her in terms of this Lease, then the Landlord may, without prejudice to and in addition to the other rights and remedies it may have, recover interest from the Tenant on the outstanding monies at the rate of two percentage points above the prime rate as charged by the Landlord's bankers from due date of such payment to the date upon which payment is made.

7.13 Without prejudice to any rights and remedies of the Landlord and notwithstanding any legal rule to the contrary, payments, if made in terms of any instrument, other than cash, will only have been validly made when such instrument has been honoured.

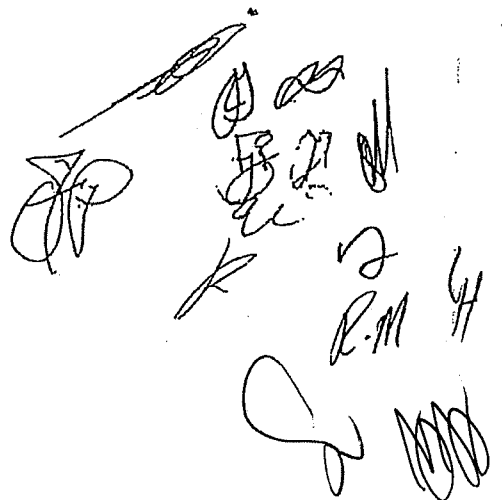
**8. EXPENSES, RATES, FEES AND CHARGES PAYABLE BY THE TENANT**

If the premises is metered and invoiced by a third party supplier:

- 8.1 The Tenant shall pay on the due date, directly to the supplier, all charges in terms of that supplier's monthly invoice with regard to water and electricity consumed on the premises and other municipal services, including effluent disposal, refuse removal and any other municipal charges of whatever nature, including any minimum charge levied in the event on non-usage of any of the above.
- 8.2 The Landlord will submit invoices to the Tenant on a monthly basis for amounts due by the Tenant, but the failure of the Landlord to submit any such invoice will not excuse the Tenant from payment of all amounts due by it under this Lease, and non-payment of any such amount by the Tenant will constitute a breach of this Lease notwithstanding that an invoice was not submitted.
- 8.3 If the Tenant fails to pay the charges for any service as invoiced for on a monthly basis with regard to the leased premises within seven (7) days of due date, then, without prejudice to any other rights, the Landlord shall be entitled to terminate such services to the leased premises.

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- 12.1.6 The Tenant shall not contravene any provisions of the conditions of title of the property or any of the provisions of the house rules applicable to the property.
- 12.1.7 The Tenant shall not leave refuse or allow it to accumulate in or about the property, except in the provided refuse bins.
- 12.1.8 The Tenant shall refrain from interfering with the electrical, plumbing or heating installations or air conditioning equipment serving the leased premises or property, except as may be necessary to carry its obligation of maintenance and repair in terms of this Lease. The Tenant shall ensure that the electricity supply is not overloaded at any time during the currency of the Lease agreement.
- 12.1.9 The Tenant shall take all reasonable measures to prevent blockages and obstructions from occurring in the drains, sewerage pipes and water pipes serving the leased premises.
- 12.1.10 The Landlord reserves the right to install / construct power, water, sewerage, telephone lines and other services / installations on and across the leased premises and the Tenant shall be obliged to adjust at own cost to such public services installations which are provided or altered.
- 12.1.11 The Tenant may apply in writing for the construction of essential services such as water, sewerage or power cables across adjoining State land to the leased premises. The Landlord shall, however, not accept liability for the cost of maintenance of such services. The Tenant shall comply with all conditions, which are imposed in connection with such services and shall properly maintain such services at his own cost and shall alter, adapt or totally remove such services should the Landlord so require.



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be entitled to do so and to recover the costs thereof from the Tenant on demand.

11.6 The Tenant shall not affix any posters, placards or notices to the leased premises, without the Landlord's prior written consent.

## 12. SUNDRY OBLIGATIONS, MAINTENANCE AND REPAIRS

### 12.1 Tenant's obligations:

12.1.1 The Tenant shall within 7 (seven) days after taking occupation of the leased premises advise the Landlord in writing of any defects to the leased premises, failing which the Landlord will deem the leased premises to have been received in good order.

12.1.2 The Tenant is obliged to maintain the leased premises in a clean and hygienic condition at its own cost to the satisfaction of the Landlord.

12.1.3 Appurtenance, fixtures and fittings provided by the Landlord on the leased premises form part of the leased premises and may not be removed by the Tenant.

12.1.4 The Tenant shall not place or leave any article or other thing in any pathway, parking space or other common part of the property so as to cause a nuisance or obstruction to any other person.

12.1.5 The Tenant shall not bring onto the leased premises or property any article that due to its weight or other characteristics is likely to cause damage to the leased premises or property or any movable property on the property.

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clause 12.1.10, the Tenant will be responsible for all such costs.

12.4 The Landlord shall not, however, be in breach of its obligations in terms of clause 12.3 insofar as any of its obligations thereunder cannot be fulfilled by reason of any *vis major* or acts or omissions over which the Landlord does not have direct control or authority, and in instances where the Landlord is in breach of its obligations in terms of clause 12.3, the Tenant's only remedy against the Landlord shall be a right of action for specific performance.

### 13 ALTERATIONS AND IMPROVEMENTS

13.1 If the Tenant wishes to effect structural changes or to place or erect advertisements or signs to at or on the premises, the prior written approval of the Landlord must first be obtained.

13.2 If the Tenant wishes to effect structural changes to the leased premises reasonably required for the purpose of conducting its business, the prior written approval of the Landlord must first be obtained.

13.3 Structural changes to the leased premises must be undertaken in accordance with approved buildings plans.

13.4 If the Tenant does effect alterations, improvements or structural changes to the leased premises without the prior written approval of the Landlord, the Tenant shall, if so required in writing by the Landlord, restore the leased premises to its former condition.

13.5 The Tenant shall not have any claim against the Landlord for compensation for any improvement to the leased premises, unless such improvements were made with the Landlord's prior written approval and agreement to compensate the Tenant for such

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12.1.12 The Tenant shall at its own expense promptly repair or make good all damage caused on the leased premises within 21 days after being notified during the Lease period, and on termination of the Lease, the Tenant shall vacate the leased premises and remove all its equipment and machinery, litter, rubbish or any other material and return the leased premises in good order, fair wear and tear excepted, to the Landlord.

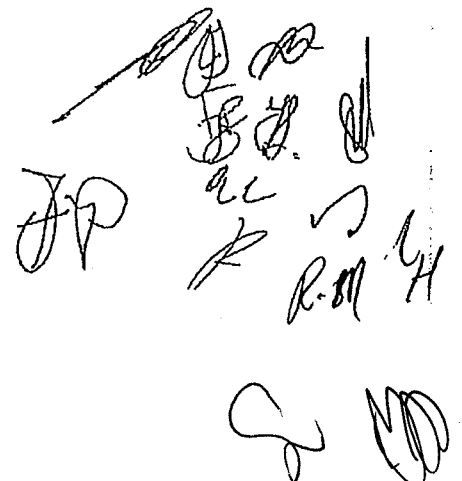
12.2 Should the Tenant fail to carry out any of its obligations under this Lease with regard to clauses 12.1.1 – 12.1.12, the Landlord shall be entitled, without prejudice to any of its other rights or remedies, to effect the required action and to recover the cost thereof from the Tenant on demand.

12.3 Landlord's responsibilities:

12.3.1 The Landlord will endeavour to rectify the defects, which was agreed by the parties to be rectified by the Landlord, identified at the commencement of the Lease within a reasonable time.

12.3.2 The Landlord will inspect the leased premises at any time during the term of Lease and if not satisfied with the condition of the leased premises, will advise the Tenant in writing to reinstate the leased premises within thirty (30) days of the date of the notice.

12.3.3 The Landlord shall be responsible for the maintenance and replacement, if necessary, of electricity switches, geysers, sewerage and water pipes, subject to compliance by the Tenant with its responsibilities in terms of clause 12.1.10. If any evidence is found of the non-compliance of the Tenant to

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## 15. REDEVELOPMENT

The Landlord may cancel this Agreement without the payment of any compensation to the Tenant, on 12 (twelve) months written notice to the Tenant, if the Landlord wishes to redevelop, or to incorporate the property into any scheme or redevelopment involving any adjoining property, as approved by Provincial Cabinet.

## 16. TERMINATION AND BREACH OF CONTRACT

- 16.1 The Landlord may terminate or suspend the Lease agreement without prior notification in the event of a national or provincial emergency.
- 16.2 The decision of the Provincial Cabinet of the Province of the Western Cape with regard to the interpretation of the concept "national emergency" and "provincial emergency" shall be conclusive and final.
- 16.3 In the event that the Landlord should exercise the right reserved, the Tenant shall not be entitled to any compensation.
- 16.4 Should the Tenant fail to comply with any or all of the terms or conditions contained in this Lease, the Landlord shall send a notice of breach to the Tenant by registered mail.
- 16.5 A notice of breach shall -
- i) Indicate clearly the nature and extent of such breach;
  - ii) contain a demand that the Tenant remedies the breach within 14 (fourteen) days of receiving such notice.
- 16.6 If such breach is not remedied by the date and to the extent, as stipulated in the notice of breach, the Landlord may immediately, without prejudice to any of its other rights under this Agreement or common law -

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improvement. Such agreement with regard to compensation shall be limited to the costs of the improvement.

13.6 The Tenant shall have no right of retention in respect of any improvements.

13.7 Any improvements agreed to by the Landlord must be effected before the expiry of the term of the Lease.

14. WAIVER

14.1 The Landlord shall not be liable to the Tenant, its agents, representatives, contractors or any of its employees or patrons for any loss or damage to movable property or other interests of the Tenant or such other person upon the leased premises or property, whether such loss or damage is caused by negligence of the Landlord or the negligence of persons for which the Landlord is vicariously liable in law.

14.2 The Tenant shall have no claim for damages against the Landlord and may not withhold or delay any payment due to the Landlord by reason directly or indirectly of –

14.2.1 a breach by the Landlord of any of its obligations under this Lease agreement;

14.2.2 the condition or state of repairs at any time of the leased premises, building or property; and

14.2.3 any failure or suspension of, or any interruption in, the supply of water, electricity, air-conditioning, heating or any other amenity or service to the leased premises, building or property, whatever the cause.

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17.3 If there is damage to the leased premises or to the building so as to affect the enjoyment of the leased premises, but not to such extent as to entitle the Landlord to cancel, then the Tenant shall be entitled to a remission of rental and costs for the period during which and to the extent to which it is deprived of beneficial occupation and enjoyment of the leased premises, provided that such damage was not occasioned by any act or omission by the Tenant, its agents, representatives, contractors, employees or patrons.

18 RIGHT OF WAY

The Landlord shall not guarantee to the Tenant any right of way from or to the leased premises across any other property. This Lease shall not impose any obligation on the Local Authority to provide an access road to the leased premises.

19. DOMICILIUM CITANDI ET EXECITANDI

19.1 The parties nominate as their *domicilli citandi et executandi* for the purposes of this Agreement and for the serving of legal documents and notices the following street addresses:

Landlord:

Department of Transport and Public Works  
Chief Directorate: Property Management  
9 Dorp Street  
CAPE TOWN  
8001

Tenant:

SARDA CENTRE  
Brommersvlei Road  
CONSTANTIA  
7806

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- i) cancel the Agreement and claim damages;
- ii) claim specific performance and damages; or
- iii) avail itself of any other remedy that is legally available upon breach of contract.

16.7 In the event of the Landlord having cancelled this Lease justifiably, but the Tenant remaining in occupation of the property, with or without disputing the cancellation, and continuing to tender payments of the rent and any other amounts which would have been payable to the Landlord but for the cancellation, the Landlord may accept such payments without prejudice and without affecting the cancellation, in all respects as if they had been payments on account of the damages suffered by the Landlord by reason of the unlawful holding over on the part of the Tenant.

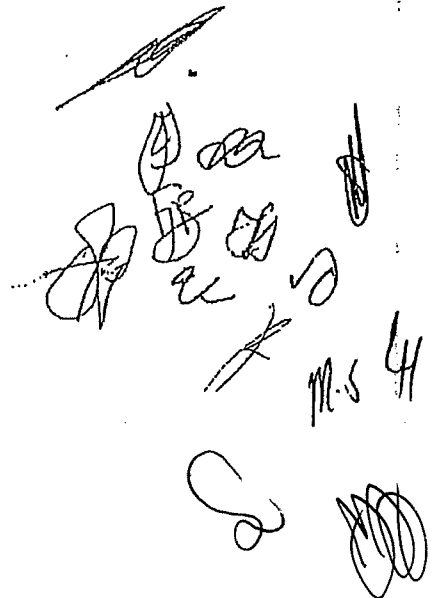
#### 17. DAMAGE OR DESTRUCTION

17.1 The Landlord may cancel this Lease if

17.1.1 the leased premises are destroyed or damaged to such an extent as to be substantially untenable; or

17.1.2 there is destruction or damage to the building or parts thereof, whether or not the leased premises are involved and the Landlord determines to put an end to the tenancies in the building in order to engage in reconstruction, renovation or rebuilding.

17.2 The cancellation under 17.1 shall be by written notice given by the Landlord within 60 (sixty) days of the taking place of the event causing such cancellation.

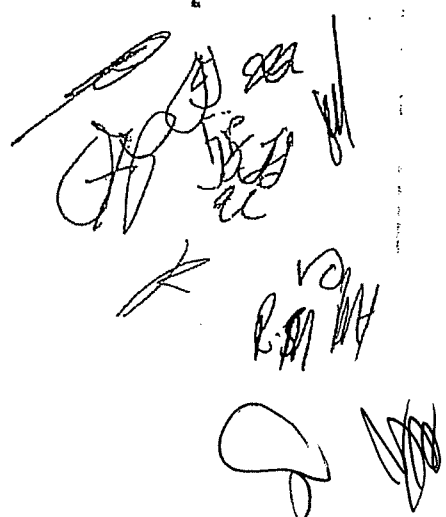


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- 20.5 No act of relaxation or indulgence or extension of time by the Landlord shall in any way be deemed to be a waiver of any of its rights in terms of this Lease.
- 20.6 In the event of the Landlord having to take legal proceedings or institute legal action against the Tenant arising from this Lease or the occupation by the Tenant of the premises, the Tenant shall be liable for and shall pay on demand in addition to the interest, all legal costs incurred, on an Attorney and own client basis, including collection charges and tracing agent's charges at the prevailing rate.
- 20.7 At the option of the Landlord any action or application arising out of this Lease may be brought in any Magistrate's Court having jurisdiction in respect of the Tenant, notwithstanding that the amount in issue may exceed the jurisdiction of such Court.

**21. TRUSTEE**

- 21.1 It is hereby agreed that where this Lease has been signed by a Trustee for a company or close corporation formed or to be formed, such Trustee undertakes that such company or close corporation will be formed within 60 (sixty) days of the signature of this Lease and should such company or close corporation not be formed within such period, or having been formed, fail to ratify and adopt this Lease within 7 (seven) days of the forming of such entity, the said Trustee, in his or her personal capacity, will be bound by all the terms and conditions of this Agreement as if he or she had entered into it in his or her own name.
- 21.2 A resolution by the company or close corporation ratifying and adopting this Lease must be provided to the Landlord within 7 (seven) days after the ratification and adoption of this Lease.

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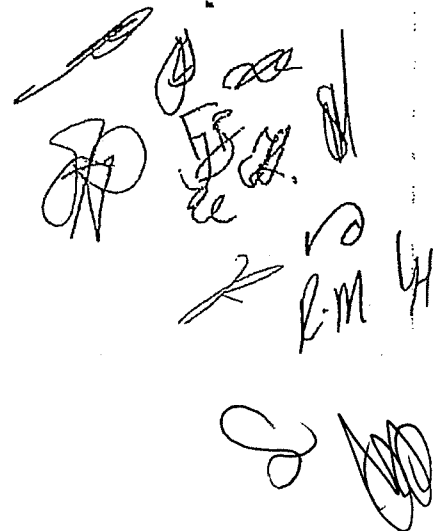
19.2 Any notice given by either party to the other ("the addressee") which -

- i) is delivered by hand during the normal business hours of the addressee at the addressee's domicile shall be presumed, until the contrary is proved by the addressee, to have been received by the addressee at the time of delivery.
- ii) is posted by prepaid post from an address within the Republic of South Africa to the addressee at the addressee's domicile shall be presumed, until the contrary is proved by the addressee, to have been received by the addressee after 10 (ten) days of the date of posting.

19.3 The Tenant shall notify the Landlord in writing within 14 (fourteen) days should the address mentioned in Clause 19.1 change during the term of the Lease.

## 20. GENERAL CLAUSES

- 20.1 This Agreement constitutes the entire agreement between the parties and supersedes any other Agreements previously concluded.
- 20.2 If any provision of this Agreement is or becomes illegal, void or invalid, it shall not affect the legality and enforceability of its other provisions.
- 20.3 No amendment or variation of this Agreement (including this clause), no consensual cancellation thereof, and no waiver of any of the Landlord's rights are binding on the parties unless expressly contained in a written document signed by both parties.
- 20.4 The Landlord will not be bound by any representation or warranty not expressly recorded in this Agreement.

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THIS DONE AND SIGNED at CONSTANTIA on  
this 24th day of JANUARY  
2007.

SARDA Cape Town Branch  
P.O. Box 285  
Constantia  
7946 R.S.A.

[Signature]  
TENANT

AS WITNESS:

1. T. SMITH [Signature]
2. F. BURGER [Signature]

THIS DONE AND SIGNED at CAPE TOWN on this  
15th day of FEBRUARY 2007

[Signature]  
LANDLORD

AS WITNESS:

1. [Signature]
2. [Signature]

[Handwritten notes and signatures]  
R.M. GH  
[Signature]