

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 40/15

In the matter between:

**LAND ACCESS MOVEMENT OF  
SOUTH AFRICA**

First applicant

**ASSOCIATION FOR RURAL  
ADVANCEMENT**

Second applicant

**NKUZI DEVELOPMENT ASSOCIATION**

Third applicant

**MODDERVLEI COMMUNAL PROPERTY  
ASSOCIATION**

Fourth applicant

**MAKULEKE COMMUNAL PROPERTY  
ASSOCIATION**

Fifth applicant

**POPELA COMMUNAL PROPERTY  
ASSOCIATION**

Sixth applicant

and

**CHAIRPERSON OF THE NATIONAL  
COUNCIL OF PROVINCES**

First respondent

**SPEAKER OF THE NATIONAL ASSEMBLY**

Second respondent

**SPEAKER OF THE EASTERN CAPE  
PROVINCIAL LEGISLATURE**

Third respondent

**SPEAKER OF THE FREE STATE  
PROVINCIAL LEGISLATURE**

Fourth respondent

**SPEAKER OF THE GAUTENG PROVINCIAL  
LEGISLATURE**

Fifth respondent

**SPEAKER OF THE KWAZULU-NATAL  
PROVINCIAL LEGISLATURE**

Sixth respondent

<b>SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE</b>	Seventh respondent
<b>SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE</b>	Eighth respondent
<b>SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE</b>	Ninth respondent
<b>SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE</b>	Tenth respondent
<b>SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE</b>	Eleventh respondent
<b>MINISTER OF RURAL DEVELOPMENT AND LAND REFORM</b>	Twelfth respondent
<b>CHIEF LAND CLAIMS COMMISSIONER</b>	Thirteenth respondent
<b>PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA</b>	Fourteenth respondent

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**PRESIDENT’S AND MINISTER’S WRITTEN SUBMISSIONS**

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## A. Introduction

1. These written submissions are filed on behalf of the twelfth and fourteenth respondents, respectively the Minister of Rural Development and Land Reform (“the Minister”) and the President of the Republic of South Africa (“the President”). The Minister and the President have a limited role in these proceedings – the actions of neither are under attack. Indeed, the applicants concede repeatedly that the impugned amendment Act “is to be welcomed”.<sup>1</sup> It is the Minister who is responsible for introducing this amendment, and it is the President who is responsible for eventually assenting to the amendment as adopted by Parliament. It is Parliament which is responsible for the parliamentary public participation process which happened in between. And it is the parliamentary process which is primarily impugned in this application.
2. It is only in the alternative that one provision in the Act is challenged. This is on the basis of vagueness. The Minister’s and President’s participation in these proceedings is confined to this alternative challenge, and so are these written submissions. The applicants’ written submissions on this alternative challenge are limited to some thirteen pages (half of which deals with direct access). In them the applicants

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<sup>1</sup> See e.g. paras 3 and 108 of the applicants’ written submissions.

concede that the Minister's and President's approach holds "obvious advantage",<sup>2</sup> and that the *prior in tempore* principle (invoked by the Minister and the President) is indeed of general application.<sup>3</sup> In this light we shall restrict these written submissions to a concomitant response.

3. In essence, the Minister's and President's position is that the impugned provision, section 6(1)(g) of the Act, is not vague – least of all *unconstitutionally* vague, on the proper application of this Court's caselaw. They accordingly oppose the alternative challenge. They also oppose the application for direct access (in respect of the alternative challenge), and the relief sought in the event that direct access is granted and the alternative challenge is upheld.
4. In what follows we deal with these bases of opposition in the sequence in which we submit they logically arise for determination. Our submissions follow the scheme set out in the index.

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<sup>2</sup> Para 113.2 of the applicants' written submissions.

<sup>3</sup> Para 117 of the applicants' written submissions, which merely identify this principle as the Minister's and President's "defence" – without advancing any argument assailing it.

**B. Direct access: The alternative challenge is not properly before Court**

5. The applicants correctly concede that the alternative challenge falls outside this Court's exclusive jurisdiction.<sup>4</sup> They also concede that this alternative challenge would ordinarily be required to be heard by the High Court, and that exceptional circumstances and compelling reasons must be established *by them* to justify what is ordinarily not in the interests of justice: for this Court to sit as a court of first and final instance.<sup>5</sup> For these established principles the applicants cite numerous authorities of this Court,<sup>6</sup> all operating *against* the applicants (as they correctly concede).<sup>7</sup>

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<sup>4</sup> Para 83 of the applicants' written submissions.

<sup>5</sup> Para 84 of the applicants' written submissions.

<sup>6</sup> Including *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); *National Gambling Board v Premier, KwaZulu-Natal* 2002 (2) SA 715 (CC) at para 29; *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) at paras 32-34; *Concerned Land Claimants Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association* 2007 (2) SA 531 (CC) at paras 18-19; *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 15; *AParty v The Minister for Home Affairs* 2009 (3) SA 649 (CC) at para 30; *Dormehl v Minister of Justice* 2000 (2) SA 825 (CC) at para 4; and the *locus classicus* for the proposition that it is not in the interests of justice for this Court to sit as a court of first and final instance: *Bruce v Fleecytex Johannesburg CC* 1998 (4) BCLR 415 (CC) at paras 7-8.

<sup>7</sup> Is it not clear whether the applicants suggest that the three further cases cited in paras 85-87 support them. They clearly do not. This is because, firstly, unlike in *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC), *in casu* there is no administrative impasse nor any interconnectedness or risk of piecemeal adjudication (as we shall show further below). Second, unlike in *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC), *in casu* the alternative challenge does not raise substantive issues already before this Court (this, too, is demonstrated in what follows). Third, unlike in *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), *in casu* there is, again, no overlap between issues and no interconnectedness between the question whether the parliamentary process was compliant with the principles governing participatory democracy, and whether section 6(1)(g) is unconstitutionally vague.

6. It is accordingly not necessary to recite the established principles and precedents.<sup>8</sup> In what follows we deal only with arguments advanced by the applicants in favour of direct access, demonstrating that the established principles operate against entertaining the alternative challenge as a court of first and final instance.

(1) First argument on direct access: Urgency

7. The first argument invoked by the applicants is urgency. The applicants assert that the Commission and the Land Claims Court are confronted

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<sup>8</sup> We would, however, draw the Court's attention to further important and well-known authorities operating against the applicants. One of them is *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC). The Court pointed out at para 11 that the starting point

“in considering an application for direct access is to recognise the importance of the principle that it is ordinarily not in the interests of justice for this Court to be a Court of first and last instance. The Constitution and the Rules of this Court do, however, provide for this Court to be the Court of first and final instance, but only in exceptional circumstances. The saving of time and costs, the importance of the issue or the existence of conflicting judgments on an issue in a case do not, without more, constitute exceptional circumstances and justify this Court being a Court of first and last instance. Indeed the importance and complexity of the issues raised would weigh heavily against this Court being a court of first and final instance. As a general rule, the more important and complex the issues in a case, the more compelling the need for this Court to be assisted by the views of another Court. Each of the issues in respect of which direct access is sought must be considered separately.”

While the Court granted direct access to challenge one subsection of a provision on the basis that it was the subject-matter of confirmation proceedings and an application for leave to appeal (*id* at para 12), the same did not apply to another subsection (*id* at para 13). The direct access application in relation to the latter was therefore refused (*ibid*). The implication of this approach and the conclusion is self-evident: the current application for direct access cannot succeed.

Another trite authority is *Besserglik v Minister of Trade, Industry and Tourism* 1996 (4) SA 331 (CC). It establishes as important factor to consider in determining whether direct access should be granted whether an applicant can show that it had exhausted all other remedies or procedures that may have been available. Because interim relief could have been obtained either from the High Court or the Land Claims Court, the applicants could not establish this factor. They have perhaps for this reason failed to list it as one of the relevant facts governing direct access applications in para 88 of their written submissions.

with “problems” regarding processing “old and new claims”.<sup>9</sup> The applicants do not argue, however, that the Land Claims Court is incapable of managing its own process or granting interim relief. Of course it can do both. But even if for some reason it could not do so, the High Court could have granted interim relief.<sup>10</sup>

8. What is more, the applicants have demonstrably failed to comply with this Court’s judgment in *Transvaal Agricultural Union v Minister of Land Affairs*.<sup>11</sup> It recognises that “[u]rgency may afford grounds for engaging this Court directly.”<sup>12</sup> But even then

“it must be clear that the urgency is such that the delay in securing a definitive ruling would prejudice the public interest or the ends of justice and good government. An applicant who contends that such urgency exists assumes an obligation of establishing such averment to the satisfaction of the Court.”<sup>13</sup>

9. The applicants correctly do not suggest that they have complied with this *dictum* or the obligation imposed by it. What this means is that they have not advanced a legally competent argument based on urgency.

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<sup>9</sup> Para 90 of the applicants’ written submissions.

<sup>10</sup> Section 172(2)(b) of the Constitution; *AParty v Minister of Home Affairs* 2009 (3) SA 649 (CC) at paras 58. See, too, *id* at para 59: urgency is unavailing where the applicant is the author of its own misfortune. *In casu* the application was lodged over seven months after the President assented to the Bill (Record vol 33 p 3149 para 65).

<sup>11</sup> 1997 (2) SA 621 (CC).

<sup>12</sup> *Id* at para 19.

<sup>13</sup> *Ibid.*

(2) Second argument on direct access: “Mass claims proceedings”

10. The second argument is that land claims constitute a “mass claims process”, that such claims “are like great ships [in that] [o]nce underway, it is difficult to change their course”, that “a high degree of certainty at as early a stage in the process as possible” is required, because they are not “best managed” by “the incremental and gradual manner in which jurisprudence is ordinarily developed as cases move between first-stage courts and appeal courts.”<sup>14</sup> This argument is not supported by the document – hardly itself authoritative, even persuasively – it cites.<sup>15</sup>
11. It is also inconsistent with the relief sought. If successful (whether on the primary or alternative cause of action), the applicants recognise that Parliament would require an 18-month period to re-legislate, pending which any declaration of invalidity is to be suspended. Unavoidably this would result in amending a “process” already “underway”. But this is

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<sup>14</sup> Paras 91-93 of the applicants’ written submissions.

<sup>15</sup> This is because the transcript (cited as Crook “Thoughts on Mass Claims Processes” (2005) 99 *American Society of International Law Proceedings* 80) contends that “adding additional claimants to a process underway will add delay, confusion and prejudice” (*id* at 84). This is not the applicants’ case. They expressly concede that the reopening of land claims is to be welcomed. Yet they impugn the amendment which achieves this result. It is, furthermore, not the “initial design” of land claims which is being impugned (*ibid*). Accordingly the transcript from the proceedings at the annual meeting of the American Society of International Law is not helpful. It is revealing, however, that this transcript advises “how to represent a claimant alleging injury”. It involves describing a situation “in very dramatic terms”, finding an NGO to rent a crowd, “certainly” “hir[ing] a public relations firm” and finding a defendant with “deep pocket[s]” (*id* at 87).

implicit in the re-opening of land claims – an exercise the applicants themselves support.<sup>16</sup>

12. Furthermore, the “mass claims” construct finds no support in this Court’s caselaw. This Court’s key judgment on mass actions is *Mukaddam v Pioneer Foods (Pty) Ltd.*<sup>17</sup> It expressly repudiates a strict and rigid approach to mass claims,<sup>18</sup> and has nowhere suggested that the ultimate test (the interests of justice, which govern both direct access applications and applications for the certification of class actions) requires “a high degree of certainty” which renders it appropriate for this Court to sit as court of first and final instance. Instead, the Court ordered that a certification application be pursued in the High Court.<sup>19</sup>
13. The argument also misconstrues the “jurisprudential” effect of an appeal process. The law is not incrementally developed every time the same case is being reheard on appeal by a higher court in the appeal hierarchy. A judgment is suspended pending an appeal, and it only has effect to the extent that it is consistent with the judgment of the highest court in the appeal hierarchy. Thus the law is not in flux during an appeal process.

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<sup>16</sup> See again para 3 of the applicants’ written submissions.

<sup>17</sup> 2013 (5) SA 89 (CC).

<sup>18</sup> *Id* at para 37.

<sup>19</sup> *Id* at para 58(3)(a). Its judgment itself expressly contemplates that certification applications for class actions be instituted in the High Court (*id* at para 47).

Accordingly, instituting the alternative challenge in the proper forum would not have resulted in “mass claim” mayhem while a confined constitutional challenge proceeds to this Court.

14. The argument is accordingly flawed in every facet.

(3) Third argument on direct access: Overlapping “factual matrix”

15. The third argument expressly concedes the unavoidable: the legal basis for the primary challenge and the alternative challenge “is different”.<sup>20</sup> This realisation is inescapable. The primary challenge relates to the parliamentary process, and raises the issue whether the process adopted complies with the principles governing public involvement in legislative processes. The alternative challenge relates to the substantive validity of section 6(1)(g) of the Act. It raises the issue whether this provision is unconstitutional in its terms.
16. Whether section 6(1)(g) is unconstitutionally vague is a facial enquiry. Whether the amendment Act’s passage through parliament complies with section 59, 72 and 118 of the Constitution is a factual enquiry. What this reveals that it is wrong to contend that both causes of action rest on the

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<sup>20</sup> Para 94 of the applicants’ written submissions.

same “factual matrix”.<sup>21</sup> The alternative challenge rests on no factual matrix at all. To the limited extent that procedures, practices and practicalities regarding prioritisation in processing land claims may impact on the facial enquiry, this requires consideration by the specialist Land Claims Court (a matter to which we return).

17. Thus the argument is flawed in its own terms. It is also contrary to this Court’s caselaw. As *AParty v Minister of Home Affairs* demonstrates,<sup>22</sup> mere commonality of any “factual matrix” does not warrant direct access. In *AParty* the legal nature of the challenges was different, and it was on this basis that direct access was refused.<sup>23</sup>
18. Accordingly also the third argument is untenable.

(4) Fourth argument on direct access: Virtual identity of remedy

19. The fourth argument is flawed in logic. It contends that because the remedies sought in the primary challenge and the alternative challenge are “virtually identical”, this may add some weight to a direct access application. It is, however, openly conceded that “on its own [the virtual

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<sup>21</sup> *Ibid.*

<sup>22</sup> 2009 (3) SA 649 (CC).

<sup>23</sup> *Id* at paras 52 and 56

identity of remedy] may not be enough to warrant direct access”.<sup>24</sup> The flaw is readily apparent: because the alternative challenge is per definition advanced in the alternative, no relief will arise on its back if the primary challenge is upheld. In that event the alternative challenge does not arise at all, and accordingly no relief arises under it. Furthermore, if both challenges fail, no remedy arises in any event. This means that there can never be any overlap in any remedy granted by this Court.

20. To the extent that the further reasoning underlying this argument appears to be that a remedy by this Court on the primary challenge may be inconsistent with a remedy granted by the Land Claims Court on the alternative challenge,<sup>25</sup> this undermines the first argument (because it presupposes the possibility of proceeding in the Land Claims Court, which in turn presupposes urgent relief *pendente lite* obtainable from the Land Claims Court).
21. It is furthermore inconsistent to contend that this Court and the Land Claims Court could issue “conflicting remedies” while it is simultaneously contended that the remedies sought are “virtually identical”. Moreover, even were there to have been any real risk of

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<sup>24</sup> Para 95 of the applicants’ written submissions.

<sup>25</sup> *Ibid.*

conflicting remedies, this would have been redressed during confirmation proceedings before this Court.<sup>26</sup> In those proceedings the alignment of remedies would and could have been achieved.

(5) Fifth argument on direct access: Prospects of success

22. The applicants merely assert that they enjoy favourable prospects of success for reasons to be advanced on the merits of the alternative challenge.<sup>27</sup> On the same basis we submit the opposite.

23. However, the correct position is that *for purposes of direct access* it is a necessary condition to establish good prospects of success. But good prospects of success are not a sufficient condition.<sup>28</sup>

24. Accordingly this conclusory contention is misdirected.

(6) Applicants' arguments against litigating in the Land Claims Court

25. Finally the applicants advance six arguments for contending that although “the Land Claims Court is a specialist court and that it would have been

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<sup>26</sup> Section 172(2)(a).

<sup>27</sup> Para 96 of the applicants' written submissions.

<sup>28</sup> *Cf Du Plessis et al Constitutional Litigation* (Juta, Cape Town 2013) at 89.

beneficial to have its views on the matter”, this “consideration [should] weigh less”.<sup>29</sup>

26. The first is “to question whether [the Land Claims Court] is to be treated as a specialist court”.<sup>30</sup> Also in this respect the applicants’ approach contradicts this Court’s caselaw. In *Florence v Government of the Republic of South Africa* this Court held that the Land Claims Court is indeed a specialist court, and that it was specifically established by the Restitution Act.<sup>31</sup> It is, with respect, not open to the applicants to “question” the composition of that court or its judges’ expertise.
27. Since its inception the Land Claims Court has interpreted and applied the Restitution Act. Already in its original form this Act contained, and still contains, a provision (section 6(2)(d)) cast in the very language used in the impugned section 6(1)(g): “ensure that priority is given to claims”. The interpretation and application of this formulation, and whether it is likely to cause practical problems or uncertainty in the context of section 6(1)(g), are accordingly most definitely matters in respect of which the Land Claims Court’s views are crucial.

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<sup>29</sup> Para 97 of the applicants’ written submissions.

<sup>30</sup> Para 97.1 of the applicants’ written submissions.

<sup>31</sup> 2014 (6) SA 456 (CC) at para 121.

28. Secondly, the applicants invoke their lack of financial means to litigate.<sup>32</sup>

The correct position is, however, that the applicants are assisted by the Legal Resource Centre and a large law firm's *pro bono* department.<sup>33</sup>

This Court has acknowledged that while “litigation of this sort is expensive and requires great expertise”, “South Africa is fortunate to have a range of non-governmental organisations working in the legal arena seeking improvement in the lives of poor South Africans.”<sup>34</sup> It held that “[t]hese organisations have developed an expertise in litigating in the interests of the poor”, and that the correct approach to constitutional litigation appropriately accommodates such organisations by applying the established “approach to costs in constitutional matters”.<sup>35</sup>

29. It is furthermore incorrect to suggest (if this is the unarticulated proposition) that litigating the alternative challenge in the ordinary course would have incurred substantially more legal costs. At most it could have resulted in an extra hearing. The same preparatory work would in any event have had to be done, whether the purely legal argument on the facial challenge to section 6(1)(g) is argued before this Court or the Land Claims Court.

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<sup>32</sup> Para 97.2 of the applicants' written submissions.

<sup>33</sup> Record vol 33 p 5159 para 93. Indeed, para 97.2 of the applicants' written submissions records that the applicants' attorneys act “for no charge”.

<sup>34</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) at para 165.

<sup>35</sup> *Ibid.*

30. The third argument is that were this Court to uphold the primary challenge, it would have rendered any alternative challenge advanced before the Land Claims Court nugatory.<sup>36</sup> This presupposes *pari passu* parallel litigation. No reason is advanced why an alternative claim should somehow have been litigated at the same (or greater)<sup>37</sup> pace then the primary claim.
31. The same applies to the fourth argument.<sup>38</sup> It contemplates a potential stay application in the Land Claims Court on the basis that “a case seeking identical relief” is pending before this Court. This argument, too, presumes *pari passu* parallel proceedings (which could well have been wasteful and premature). More importantly, however, the argument is wrong in contending that “identical relief” is sought in the primary and alternative challenges. The primary challenge impugns the amendment Act *in toto*.<sup>39</sup> The alternative challenge only impugns section 6(1)(g).<sup>40</sup>

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<sup>36</sup> Para 97.3 of the applicants’ heads of argument.

<sup>37</sup> As is suggested by the reference to the possibility of the alternative challenge already having reached the Supreme Court of Appeal by the time this Court could have delivered judgment on the primary challenge alone (para 97.3 of the applicants’ written submissions).

<sup>38</sup> Para 97.4 of the applicants’ written submissions.

<sup>39</sup> Prayer 2 of the notice of motion.

<sup>40</sup> Prayer 4 of the notice of motion.

32. The fifth argument again presumes (this time explicitly) a parallel application”.<sup>41</sup> It invokes courts’ general reluctance to entertain “piecem[e]al litigation”.<sup>42</sup> It is significant that the applicants cite Supreme Court of Appeal authority in support of this proposition.<sup>43</sup> This Court’s treatment on piecemeal proceedings in the context of direct access applications is clear: where different causes of action are advanced or different provisions are impugned on different bases, it is not in the interests of justice for this Court to sit as court of first and final instance merely because a related challenge is before it.<sup>44</sup>
33. Finally, the applicants concede that they could have approached the Land Claims Court for urgent interim relief.<sup>45</sup> However, they argue (on the one hand) that the Land Claims Court may not have granted such application in circumstances where section 6(1)(g) was under attack before this Court (by virtue of it forming part of the rest of the amendment Act, which is the subject-matter of the primary challenge). On the other hand they contend that even if the application for interim relief succeeded, an appeal might have been lodged and the suspension of the interim interdict could have been sought pending such appeal.

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<sup>41</sup> Para 97.5 of the applicants’ written submissions.

<sup>42</sup> *Ibid.*

<sup>43</sup> *South African Broadcasting Corporation v Democratic Alliance* [2015] ZASCA 156 at para 66.

<sup>44</sup> See again e.g. *AParty v The Minister for Home Affairs* 2009 (3) SA 649 (CC).

<sup>45</sup> Para 97.6 of the applicants’ written submissions.

34. The first proposition does not follow in law or logic. If the Land Claim Court was aware of a further and more comprehensive constitutional challenge pending before this Court it would have been more, not less, inclined to grant interim relief.
35. The second proposition is untenable. The applicants once again set up an obvious straw man as an argument. To the very limited extent that an interim interdict would have been appealable, the suspension of an interim interdict pending an appeal of the order granting it is highly extraordinary. It is only ordered where both the presence of irreparable harm on the part of the applicant and the absence of irreparable harm on the part of the respondent are established (by the applicant seeking the suspension of the interim interdict).<sup>46</sup> In such circumstances, were an application for such extraordinary relief to be granted, and applicant has had to acquit itself of an onerous burden, and is *ex hypothesi* entitled to such relief. It is quite correctly not suggested that any basis existed for having apprehended a cynical resort to any such appeal.
36. It follows that none of the arguments advanced by the applicants is sustainable. Accordingly the application for direct access in respect of

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<sup>46</sup> Section 18(3) of the Superior Courts Act 10 of 2013.

the alternative challenge should be refused. In that event the merits of the alternative challenge do not arise.

37. Nonetheless, in what follows we make brief submissions on the merits of the attack against section 6(1)(g).

**C. Alternative challenge: Section 6(1)(g) is not unconstitutionally vague**

38. From the appellants' heads of argument it appears that they accept the correctness of this Court's established caselaw on vagueness. They accordingly do not contend that any of these judgments is clearly wrong and therefore requires to be overruled. Yet the applicants contend that the standard set and applied in some of the most important judgments of this Court does not apply in the context of "mass claims".<sup>47</sup>

39. Mass claims, the applicants contend, demands more clarity.<sup>48</sup> Also in this context they correctly do not suggest, however, that this Court's treatment of mass claims supports them. *Mukaddam v Pioneer Foods (Pty) Ltd* not

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<sup>47</sup> Para 109 of the applicants' written submissions. For this argument the applicants again invoke the transcript of proceedings of the Annual Meeting of the American Society of International Law as Crook "Thoughts on Mass Claims Processes" (2005) 99 *American Society of International Law Proceedings* 80. It commences with the contributor's explanation of the intention with his "presentation". It is "to give you some background on various international institutions created over the last quarter century to offer 'rough justice'" (*id* at 80). It is Crook's conclusion which is invoked for the proposition that direct access should be granted.

<sup>48</sup> *Ibid.*

only repudiated, as mentioned, a strict and rigid approach to mass claims.<sup>49</sup> It also expressly acknowledged that flexibility is what is required in this context.<sup>50</sup> Similarly, this Court's key judgment on the doctrine of vagueness, *Affordable Medicines*, itself recognises the importance of maintaining "the required flexibility".<sup>51</sup> This is inconsistent with the applicants' argument that in the context of mass claims a more precise (and therefore necessarily less flexible) approach is required.

40. In what follows we show that the applicants' implicit recognition that the established test and its application do not assist them is indeed correct. This renders the applicants' alternative challenge, which contends for "a precisely defined statute",<sup>52</sup> untenable.

41. Notably, already on this basis it is apparent that the applicants have not established that they enjoy good prospects of success. Their approach is contradicted by this Court's caselaw, yet they have not suggested that they would argue that any of these cases should be overruled. This means that the established principles and precedents preclude success on the

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<sup>49</sup> 2013 (5) SA 89 (CC) at para 37.

<sup>50</sup> *Id* at para 39.

<sup>51</sup> *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 108, quoting with approval *R v Nova Scotia Pharmaceutical Society* (1992) 93 DLR (4th) 36 (SCC) ((1992) 10 CRR (2d) 34) at 58 (CRR).

<sup>52</sup> Para 105 of the applicants' written submissions.

alternative challenge. Therefore the application for direct access, which relates to this challenge, should fail on the basis of a lack of prospects of success.

(1) The correct departure point: The text of the impugned provision

42. As this Court approach confirms, the correct departure point is the text of the impugned provision.<sup>53</sup> The text cannot simply be replicated without analysis, as the applicants do,<sup>54</sup> and then to contend that it is vague for being indeterminate or open to more than one interpretation. This is because it is a “fallacy” to “suppose[e] that general language must have a single ‘objective’ meaning”.<sup>55</sup> Therefore it founds not constitutional complaint to assert that the statutory text does not “display greater precision”.<sup>56</sup> To do so forgets that “words can never attain precision”; instead, “they are as intrinsically dynamic as they are inexact”.<sup>57</sup>

43. What is required is that the text be interpreted properly to establish which of more than one plausible interpretation is correct.<sup>58</sup> Thus, contrary to

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<sup>53</sup> *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC) at para 70; *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at paras 42 and 99.

<sup>54</sup> Paras 99ff of the applicants’ written submissions.

<sup>55</sup> *S v Zuma* 1995 (2) SA 642 (CC) at paras 17.

<sup>56</sup> Para 100 of the applicants’ written submissions.

<sup>57</sup> *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC) at para 71.

<sup>58</sup> *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 42.

the applicants' approach,<sup>59</sup> the mere fact that there is more than one plausible meaning is not sufficient to establish unconstitutional vagueness.<sup>60</sup>

(2) Analysis of the impugned text

44. As mentioned, the impugned text is contained in section 6(1)(g) of the Act. It provides

“The Commission shall, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner –

...

(g) ensure that priority is given to claims lodged not later than 31 December 1998 and which were not finalised at the date of the commencement of the Restitution of Land Rights Amendment Act, 2014.”

45. The operative words are “shall”, “ensure”, “priority”, and “claims lodged”. We analyse them separately.

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<sup>59</sup> As reflected in e.g. para 114 of the applicants' written submissions.

<sup>60</sup> In *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) the impugned provisions yielded multiple different interpretations (*id* at paras 25ff). As the judgment reflects, it is quite possible that even this Court itself may be sharply divided over which interpretation is the most plausible. The majority describes the minority's interpretation as “interesting” (*id* at para 33); and the minority described the majority's interpretation as one which “ignore[s] plain words in the provision that are central to it” (*id* at para 93).

(a) “*Shall*”

46. The meaning of the word “shall” is well-understood.<sup>61</sup> It is generally used by the legislature to impose an obligation in peremptory terms.<sup>62</sup> It has been held by the Land Claims Court itself to have been used in its ordinary grammatical meaning.<sup>63</sup> Section 6(1) admitted of “no doubt”, the Court held: the relevant functionaries are “obliged” to fulfil their functions, which include “to ensure” that claims are disposed of with reasonable expedition.<sup>64</sup>
47. It is, moreover, quite clear from the contrasting use of the word “may” in section 6(2) that the use of “shall” in section 6(1) is not capable of being construed as “may” in this context. Such a word-changing interpretation would be inconsistent with the immediate textual context of section 6(1).

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<sup>61</sup> See e.g. Garner (ed) *Black Law Dictionary* 10<sup>th</sup> ed (Thomson Reuters, St Paul MN 2014) s.v. “shall”

“1. Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. • This is the mandatory sense that drafters typically intend and that courts typically uphold. 2. Should (as often interpreted by courts” <all claimants shall request mediation>. 3. May <no person shall enter the building without first signing the roster>. • When a negative word such as *not* or *no* precedes *shall* (as in the example in angle brackets), the word *shall* often means *may*”. What is being negated is permission, not a requirement. 4. Will (as a future-tense verb) <the corporation shall then have a period of 30 days to object>. 5. Is entitled to <the secretary shall be reimbursed for all expenses>. • Only sense 1 is acceptable under strict standards of drafting.”

<sup>62</sup> Claassen *Dictionary of Legal Words and Phrases* SI18 (LexisNexis, Durban 2015) s.v. “shall”.

<sup>63</sup> *The Matabane Community v Minister of Rural Development and Land Reform* [2013] ZALCC 15 (30 October 2013) at para 6.

<sup>64</sup> *Ibid.*

It is also inconsistent with the applicants' own concession that section 6(1)(g) constitutes a "command".<sup>65</sup>

48. There can accordingly be "no doubt", as the Land Claims Court held in respect of section 6(1) before its amendment, about the meaning of the word "shall" in this context. It imposes a duty. It does not confer a discretion.

**(b) "Ensure"**

49. This is reinforced by the use of the word "ensure". As Van der Westhuizen J summarised (in concurring with Yacoob J) in *Doctors for Life*, the word "ensure" is to be contrasted with a word like "facilitate".<sup>66</sup> The latter "clearly implies a considerable degree of generality and softness, rather than a specific requirement".<sup>67</sup> The opposite applies to the word "ensure".
50. Yacoob J, in turn, held that it must be emphasised that

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<sup>65</sup> Para 112 of the applicants' written submissions.

<sup>66</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 244(3).

<sup>67</sup> *Ibid.*

“‘facilitate’ is in essence what may be described as ‘softer’ than words such as ‘require’ or ‘ensure’. The word is used in two other places in the Constitution. There is a provision which requires an Act of Parliament to establish or provide for structures and institutions to promote and facilitate intergovernmental relations. Here, promote and facilitate apparently have different meanings. The second provision requires an Act of Parliament to provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. In these two settings ‘facilitate’ probably means to enable or to make easier. An obligation to ‘require’ public involvement or to ‘ensure’ public involvement is a more onerous obligation than one which demands facilitation alone.”<sup>68</sup>

51. What this demonstrates is that the duty imposed already by the use of the first key word (“shall”) is more exacting than one merely to “facilitate”. It is a duty to “ensure”. This word connotes “a more onerous obligation” inconsistent with conferring a mere discretion on a functionary.<sup>69</sup> It, too, introduces no uncertainty as regards the meaning of section 6(1)(g). Instead, it reiterates the statutory intention conveyed by using the word “shall”.

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<sup>68</sup> *Id* at para 303.

<sup>69</sup> See, too, *Minister of Public Works and Land Affairs v Group Five Building Ltd* 1999 (3) SA 12 (SCA) at 21G-H. The Supreme Court of Appeal held that a clause in a building contract which provides that the contractor shall “ensure that the nominated contractor carries out and completes the work” means that the contractor warrants or guarantees the nominated contractor’s performance. This interpretation confirms the onerous obligation imposed by the word “ensure” in legal texts.

(c) **“Priority”**

52. Priority, too, is a word well understood in legal parlance. Legal dictionaries define “priority” with reference to the ranking of claims “in priority”, “preference”, and the principle *prior in tempore potior est iure*.<sup>70</sup> The latter phrase is particularly well-established. It conveys the principle that a person who “is prior in time is stronger in right.”<sup>71</sup>
53. The principle is applied in many comparable jurisdictions.<sup>72</sup> It is often applied by the Supreme Court of Appeal itself.<sup>73</sup> During the last two decades the Supreme Court of Appeal held that the doctrine is of more general application than under the Roman-Dutch common law, and confirmed the doctrine’s equitable nature.<sup>74</sup> From these judgments it is

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<sup>70</sup> Claassen *Dictionary of Legal Words and Phrases* SI18 (LexisNexis, Durban 2015) s.v. “priority”; Hiemstra *et al Trilingual Legal Dictionary* (Juta, Cape Town 1992) Part B s.v. “priority”; and Garner (ed) *Black Law Dictionary* 10<sup>th</sup> ed (Thomson Reuters, St Paul MN 2014) s.v. “priority”, being “[t]he status of being earlier in time or higher in degree or rank; precedence.”

<sup>71</sup> Claassen *Dictionary of Legal Words and Phrases* SI18 (LexisNexis, Durban 2015) s.v. “priority”.

<sup>72</sup> See e.g. *Ex parte Coney* 1952 (3) SA 747 (SR), citing *Booth v Walkden Spinning and Manufacturing Co Ltd* [1909] 2 KB 268: “First come first served is one of the necessary axioms of this life of ours”. Indeed, Stone *Latin for the Illiterati* (Routledge, London 1996) translates “prior tempore, potior jure” in precisely those terms: “first come, first served”.

<sup>73</sup> E.g. *Pick ’n Pay Retailers (Pty) Ltd v Eayrs* 2012 (1) SA 238 (SCA) at para 21; *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA) at para 6.

<sup>74</sup> *Wahloo Sand BK v Trustees, Hambly Parker Trust* 2002 (2) SA 776 (SCA) at 784D/E-J and 788D-E (“The maxim is essentially based in equity and, in my view, it would be both logical and equitable to extend its operation to cover a case such as the present.”)

self-evident that the doctrine is concerned with substantive rights, not merely procedural entitlements.

54. In short, “priority” means what it says: substantive preference of one type of claim over another.

**(d) “Claims lodged”**

55. What type of claim is contemplated by section 6(1)(g) is clarified by the next pair of operative words: “claims lodged”. The concept could not be clearer. This is because “claims” is the very first word defined in section 1 of the Act.<sup>75</sup> This definition, read with its associated definitions, makes it clear beyond any doubt what is meant by “claims lodged”. It contemplates any type of claim – irrespective whether it is for

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<sup>75</sup> Section 1 defines “claim” as

- “(a) any claim for restitution of a right in land lodged with the Commission in terms of this Act; or
- (b) any application lodged with the registrar of the Court in terms of Chapter IIIA for the purpose of claiming restitution of a right in land”.

Section 1, in turn, defines “restitution of a right in land” as

- “(a) the restoration of a right in land; or
- (b) equitable redress.”

Section 1 further defined “equitable redress” as

- “any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including
- (a) the granting of an appropriate right in alternative state-owned land;
- (b) the payment of compensation”.

restoration, alternative land, or compensation; and irrespective whether it is instituted before the Commission or the Land Claims Court.

56. Thus, the claims contemplated by section 6(1)(g) are not qualified with reference to the type of relief sought (nor, for that matter, with reference to the forum before which it is sought). It includes all claims under the Act.

*(e) “Not later than 31 December 1998 ... not finalised at the date of the commencement of the ... Amendment Act, 2014”*

57. It is correctly not suggested that the final phrase in section 6(1)(g) is capable of giving rise to any uncertainty or vagueness. This is because the words “not later than 31 December 1998 and which were not finalised at the date of the commencement of the Restitution of Land Rights Amendment Act, 2014” are crystal clear. They are well understood to refer to extant “old-order claims”. “Old-order claims” are claims instituted under the Act prior to the amendment through which section 6(1)(g) was inserted. And an *extant* old-order claim is one which has not yet been finalised.

58. The significance of the clear time window delineated by section 6(1)(g) is that it sets this case lightyears apart from the only case ever in which legislation was declared unconstitutional for vagueness. That case is *South African Liquor Traders Association v Chairperson, Gauteng Liquor Board*.<sup>76</sup> The basis on which the legislation was held to be unconstitutionally vague is the failure of the operative definition to provide any timeframe at all. As was subsequently confirmed by Van der Westhuizen J in *National Credit Regulator v Opperman*, it was this defect which rendered the “definition completely unworkable and impermissibly vague and thus unconstitutional”.<sup>77</sup> The provision impugned in this litigation is entirely incomparable.
59. It is for this reason particularly significant that the applicants’ explicit stance is that cases like *Opperman* provides for “less precision”, and that this “can[not] be tolerated” in the context of “a mass claims process”.<sup>78</sup> We have already shown that this is wrong. But what it reveals is the applicants’ implicit concession that the principles confirmed and applied in *Opperman* (which follows *Affordable Medicines*) contradict the applicants’ argument in multiple respects. Hence the quest for a new standard: “precision”.

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<sup>76</sup> 2009 (1) SA 565 (CC).

<sup>77</sup> *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 49.

<sup>78</sup> Para 109 of the applicants’ written submissions.

(3) Precision is not what this Court's caselaw requires

60. This Court's *locus classicus* on vagueness is *Affordable Medicines*. *Opperman* is one of the most important cases applying *Affordable Medicines* and the principles governing statutory interpretation in the context of the doctrine of vagueness. We deal with each judgment in turn.

(a) *Vagueness: Affordable Medicines*

61. *Affordable Medicines* establishes the test for vagueness. The test is “reasonable certainty”, not “perfect lucidity.”<sup>79</sup> The test does not require “absolute certainty”.<sup>80</sup> All that is required is that “[t]he law ... indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.”<sup>81</sup>

62. The doctrine of vagueness must, Ngcobo J held, be applied with due recognition that “the role of government to further legitimate social and economic objectives”.<sup>82</sup> The doctrine “should not be used unduly to

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<sup>79</sup> *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 108.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

impede or prevent the furtherance of such objective.”<sup>83</sup> This is because the doctrine recognises that a “very detailed enactment would not provide the required flexibility”, and that “it might furthermore obscure its purpose behind a veil of detailed provisions.”<sup>84</sup>

63. The doctrine must be applied with due recognition of the aforesaid principles, *after first construing the impugned provision applying the normal rules of statutory construction.*<sup>85</sup> We have already done so above. The applicants’ written submissions reflect no such exercise. They merely presume vagueness on the basis of two plausible interpretations of the text.<sup>86</sup> This is inconsistent with *Opperman*.

**(b) Interpretation: Opperman**

64. Multiple plausible interpretations do not establish unconstitutional vagueness.<sup>87</sup> This is clear from *Opperman*, where the Court considered the following “different interpretations”:<sup>88</sup> “the High Court’s

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid*, quoting *R v Nova Scotia Pharmaceutical Society* (1992) 93 DLR (4th) 36 (SCC) ((1992) 10 CRR (2d) 34) at 58 (CRR).

<sup>85</sup> *Id* at para 109.

<sup>86</sup> Para 114 of the applicants’ written submissions.

<sup>87</sup> *Opperman supra* at para 42: “If more than one meaning is reasonably plausible, the one resulting in constitutional compliance must be chosen.”

<sup>88</sup> *Id* at para 25.

interpretation”;<sup>89</sup> “the applicant’s interpretation”;<sup>90</sup> “the first respondent’s interpretation”;<sup>91</sup> and “an alternative interpretation”.<sup>92</sup> All these interpretations notwithstanding, the impugned provision was not unconstitutionally vague.

65. *Opperman* confirms what has always been the legal position. It is that it is the task (and indeed the duty) of a court to interpret the law.<sup>93</sup> In fulfilling this constitutional function a court “must try to give a reasonable meaning to the text enacted by the legislature.”<sup>94</sup> In doing so an interpretation must be adopted which does not render the provision “inoperative or meaningless”.<sup>95</sup> In other words, legislation must be interpreted to render it effective, not nugatory.<sup>96</sup>

66. Even “significant ambiguity”, “poor formulation” and “frustrating” “inaccuracy” do not give rise to a cause of action based on vagueness.<sup>97</sup> Statutory provisions suffering from these problems do not permit a court to “shirk[] [its] responsibility to give meaning to an important piece of

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<sup>89</sup> *Id* at paras 26-27.

<sup>90</sup> *Id* at paras 28-31.

<sup>91</sup> *Id* at para 32.

<sup>92</sup> *Id* at paras 33-42.

<sup>93</sup> *Id* at para 47.

<sup>94</sup> *Id* at para 41.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) at paras 110-111.

<sup>97</sup> *Cf Opperman supra* at paras 44 and 51.

legislation.”<sup>98</sup> Nor do they sustain a competent vagueness complaint. To give rise to a competent constitutional cause of action on the basis of vagueness, it is required that “a constitutionally fatal level of vagueness” exist.<sup>99</sup> *South African Liquor Traders* demonstrates when this level is reached. It is reached “where the provision [i]s utterly meaningless and unworkable and where nothing in the rest of the Act assist[s] in giving meaning to the [provision].”<sup>100</sup>

67. From this and the approach adopted in *Opperman* it indeed appears that the potential for alternative interpretations actually militates against upholding a claim of vagueness. This is because in *Opperman* the Court concluded (after repeating that multiple interpretations were advanced) that “[t]he provision is ... capable of interpretation and is thus not unconstitutionally vague.”<sup>101</sup> In other words, complaining that the text is capable of more than one interpretation is a concession that the text is indeed capable of interpretation. This Court’s approach to interpretation itself presupposes the potential of more than one interpretation (because it involves preferring the interpretation which best promotes constitutional

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<sup>98</sup> *Id* at para 50.

<sup>99</sup> *Id* at para 51.

<sup>100</sup> *Ibid*. The quoted text ends with the words “definition” (instead of “provision”). We have adapted the quoted text (as reflected) to accord with the position *in casu*, where the converse applies. As we have shown, interpreting the impugned provision (section 6(1)(g)) is indeed assisted by the rest of the Act, because section 6(1)(g) uses terms defined in the definition section.

<sup>101</sup> *Id* at para 88.

rights and values), and that this does not *per se* result in impermissible vagueness.

(4) Application of governing principles to the impugned provision

68. The “ultimate question” is whether section 6(1)(g) – once it has been construed with due regard to normal rules of statutory construction and those which applies to constitutional adjudication – “indicates with reasonable certainty to those who are bound by it what is required of them.”<sup>102</sup>

69. From the analysis above it is clear that what section 6(1)(g) requires is that extant old-order claims receive substantive priority over new-order claims. This is the ordinary grammatical meaning of the wording of section 6(1)(g),<sup>103</sup> it is reinforced by its context,<sup>104</sup> the interpretation “promote[s] the spirit, purport and objects of the Bill of Rights”,<sup>105</sup> and it has – in the applicants’ words – “obvious advantages”.<sup>106</sup> It remains to consider on what basis, then, the applicants contend for a construction in

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<sup>102</sup> *Affordable Medicines supra* at para 109.

<sup>103</sup> *Opperman supra* at para 96 (Cameron J, citing *S v Makwanyane* 1995 (3) SA 391 (CC) at para 13.

<sup>104</sup> *Ibid*, adding that the ordinary meaning of words must be given to statutory text in its context.

<sup>105</sup> As section 39(2) of the Constitution requires.

<sup>106</sup> Para 113.2 of the applicants’ written submissions.

favour of unconstitutionality (which runs counter to the correct approach of interpreting *in favour of* constitutionality).<sup>107</sup>

70. It appears to us that (apart from the contentions already addressed in the above analysis) the applicants' approach revolve around three arguments. They are intertwined, but can be disaggregated as follows for purposes of analysis.
71. The first invokes *Affordable Medicines* and *Dawood*.<sup>108</sup> It contends that the text of section 6(1)(g) confers an insufficiently circumscribed discretion on administrative functionaries.<sup>109</sup> This is wrong. As we have shown, section 6(1)(g) confers no discretion at all. It imposes a duty (or, as the applicants put it, a "command").<sup>110</sup> The duty is to afford substantive priority to extant old-order claims over new-order claims.
72. The second argument is that the text of section 6(1)(g) cannot be determined by promulgating rules under section 16 of the Act.<sup>111</sup> It does not appear to us that this is a correct construction of the so-called "defence" "adopted" by the Commission, to whom this proposition is

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<sup>107</sup> *Opperman supra* at para 96 (Cameron J).

<sup>108</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).

<sup>109</sup> Paras 100, 101 and 103 of the applicants' written submissions.

<sup>110</sup> Para 112 of the applicants' written submissions.

<sup>111</sup> Para 118 of the applicants' written submissions.

attributed by the applicants. We understand the position adopted by the Commission to accord with what *Dawood* indeed contemplates.<sup>112</sup>

73. The third argument is that reopening land claims indeed promotes the right to restitution, but somehow simultaneously “constitutes a retrogressive measure”.<sup>113</sup> This argument rests on the unexpressed notion that constitutional validity is viewed subjectively, in other words (as the applicants put it) from the perspective of “those who missed the first deadline” or “those who have already claimed”.<sup>114</sup> The correct position is that constitutionality of statutory text is determined objectively.<sup>115</sup> There can be no serious argument that extending access to land restitution or equitable redress somehow restricts the right entrenched in section 25(7) of the Constitution. Any such contention argues for legal minimalism and perfectionism in terms of which the Constitution should be construed

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<sup>112</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 54: where it is necessary to give guidance to administrative officials, this may “be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.”

<sup>113</sup> Para 108 of the applicants’ written submissions.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ferreira v Levin NO* 1996 (1) SA 984 (CC) at para 26

“The answer to the first question is that the enquiry is an objective one. A statute is either valid or ‘of no force and effect to the extent of the inconsistency’. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.”

and applied as affording the best possible benefits for the fewest possible people. This is directly contradicted by the Preamble to the Constitution.<sup>116</sup>

74. Accordingly none of these arguments is sustainable. It follows that they do not justify a construction contrary to the ordinary grammatical meaning of the text (as supported by its context and section 25(7) of the Constitution), and certainly not in favour of unconstitutionality on account of vagueness.

**D. Conclusion and appropriate relief**

75. It follows that the application for direct access should be refused. However, even were the application for directed access to be granted, the alternative challenge should be refused. There is furthermore and in any event no proper basis for the convoluted relief sought.
76. The President and the Minister do not seek costs against the applicants, and ask that irrespective of the outcome no costs order be made either in favour of or against themselves.

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<sup>116</sup> It confirms that the Constitution is intended to create a country which “belongs to all who live in it”, and to “lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law” and “improve the quality of life of all citizens and free the potential of each person”.

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