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Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others CCT40/15A

Case CCT40/15A
[2019] ZACC 10

Hearing Date: 06 November 2018
Judgement Date:19 March 2019

Post Judgment Media Summary

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday 19 March 2019 at 10h00, the Constitutional Court handed down judgment in an application by the Speaker of the National Assembly and Chairperson of the National Council of Provinces (Parliament) for an extension of an interdict issued by the Constitutional Court in Land Access Movement of South Africa v Chairperson, National Council of Provinces (LAMOSA 1) against the processing of any land claims lodged between 1 July 2014 and 28 July 2016 (interdicted claims) pursuant to the now repealed Restitution of Land Rights Amendment Act (repealed Amendment Act).

In LAMOSA 1, the Land Access Movement of South Africa (LAMOSA) and other applicants brought an application challenging the constitutionality of the now repealed Amendment Act on the basis that Parliament failed to satisfy its constitutional obligation to facilitate public participation in the promulgation of the repealed Amendment Act. On 28 July 2016, the Constitutional Court declared the now repealed Amendment Act to be invalid. The Constitutional Court afforded Parliament an opportunity to enact a new Amendment Act within a period of 24 months from the date of the declaration of invalidity. Furthermore, the Court ordered that if Parliament failed to meet the aforementioned deadline, the Chief Land Claims Commissioner must (and any other party to the LAMOSA 1 application or person with a direct and substantial interest in the LAMOSA 1 Order may) apply to this Court within two months after the 24 months elapsed for an appropriate order on the processing of land claims lodged between 1 July 2014 and 28 July 2016 (interdicted claims).

Parliament failed to enact a new Amendment Act within the 24-month period. As a result, it launched this application seeking an extension of the interdict against the processing of the interdicted claims until 29 March 2019. It argued that this period was sufficient for the new Amendment Bill to pass through both the National Assembly and the National Council of Provinces. It argued further that it has already taken reasonable steps towards the expeditious processing of the Bill.

The first to sixth respondents (LAMOSA respondents) opposed the application. They argued that upon expiry of the 24-month period, the responsibility for determining the fate of the interdicted claims shifted to the Constitutional Court. The LAMOSA respondents also argued that the LAMOSA 1 Order was final and binding, and that this Court has no power to vary its previous order. If it does have this power, they argued that it is a discretionary power which must be used in very exceptional circumstances, and that Parliament has not shown that exceptional circumstances exist. The seventh to tenth respondents (Communities) did not oppose the relief sought by Parliament. They argued that no prejudice would be suffered and that it is in the interests of justice that the extension be granted.

In a unanimous judgment written by Mhlantla J, the Constitutional Court noted that it has wide discretionary powers pursuant to the Constitution and is required to make a just and equitable order. The Court held that although there was no suspension of the declaration of invalidity of the repealed Amendment Act, the act of interdicting the processing of the interdicted claims until either the enactment of a new Amendment Act or the processing of old claims operated like a suspension of a declaration of invalidity. Accordingly, the Court considered and applied the factors and considerations outlined in its previous jurisprudence in relation to extensions of a suspension of a declaration of invalidity. In doing so, it noted that Parliament had delayed in bringing the application before the Court and the explanations offered for its inaction were insufficient. Parliament had failed to show that there were exceptional circumstances justifying the order sought and, further, it had failed to show that a new Amendment Act would be enacted, and with the necessary public participation processes, by 29 March 2019. Thus, the application was dismissed.

In recognition of its remedial powers pursuant to the Constitution, the Court upheld the counter-application and granted the alternative relief proposed by the LAMOSA respondents. The Court held that the alternative relief creates a default position for regulating the old claims and interdicted claims and allows the Commission to consider the interdicted claims, albeit to a limited extent. This limits the prejudice outlined by the Communities as the processing of claims will, in theory, be faster. Further, the Court held that the alternative relief represents compromise, in that the Court provides relief pursuant to LAMOSA 1 and determines the process regarding the prioritisation of claims. It has the effect of being flexible and equitable by allowing Parliament to depart from this position by passing new legislation in respect of the prioritisation.

Finally, the Court held that the alternative relief, while lifting the supervisory role of the Court, makes provision for appropriate judicial oversight by the Land Claims Court. The Commissioner will be required to file reports on a range of aspects, including both constraints and the solutions thereto and the Land Claims Court will have the necessary expertise to assist where need be. This will ensure accountability by the Commissioner and the opportunity for the Commission to reflect on its progress in this arduous process.

The Full judgment here.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 40/15

In the matter between:

SPEAKER OF THE NATIONAL ASSEMBLY	First Applicant
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Applicant

and

LAND ACCESS MOVEMENT OF SOUTH AFRICA	First Respondent
ASSOCIATION FOR RURAL ADVANCEMENT	Second Respondent
NKUZI DEVELOPMENT ASSOCIATION	Third Respondent
MODDERVLEI COMMUNAL PROPERTY ASSOCIATION	Fourth Respondent
MAKULEKE COMMUNAL PROPERTY ASSOCIATION	Fifth Respondent
POPELA COMMUNAL PROPERTY ASSOCIATION	Sixth Respondent
MATABANE COMMUNITY	Seventh Respondent
MAPHARI COMMUNITY	Eighth Respondent
MLUNGISI AND EZIBELENI DISADVANTAGED GROUP	Ninth Respondent
LADY SELBORNE CONCERNED GROUP	Tenth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Eleventh Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Twelfth Respondent

CHIEF LAND CLAIMS COMMISSIONER	Thirteenth Respondent
SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE	Fourteenth Respondent
SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE	Fifteenth Respondent
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	Sixteenth Respondent
SPEAKER OF THE KWAZULU-NATAL PROVINCIAL LEGISLATURE	Seventeenth Respondent
SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE	Eighteenth Respondent
SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE	Nineteenth Respondent
SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE	Twentieth Respondent
SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE	Twenty-first Respondent
SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE	Twenty-second Respondent

Neutral citation: *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* [2019] ZACC 10

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ, Theron J

Judgment: Mhlantla J (unanimous)

Heard on: 6 November 2018

Decided on: 19 March 2019

Summary: Application for extension of interdict — interdict in respect of processing of land claims — appropriate remedy — just and equitable order

ORDER

The following order is made:

1. The application by the applicants for an extension is dismissed.
2. The counter-application by the first to sixth respondents is upheld to the following extent, subject to the Parliament of the Republic of South Africa legislating otherwise:
   (a) The Commission on Restitution of Land Rights (Commission) is prohibited from processing in any way any claims lodged in terms of section 10 of the Restitution of Land Rights Act 22 of 1994 (Restitution Act) between 1 July 2014 and 28 July 2016 (interdicted claims) until the earlier of the dates when—
      (i) it has settled or referred to the Land Claims Court all claims lodged on or before 31 December 1998 (old claims) by way of a referral of the claim in terms of section 14; or
      (ii) the Land Claims Court, upon application by any interested party, grants permission to the Commission to begin processing interdicted claims, whether in respect of the whole or part of the Republic of South Africa and whether in respect of part or all of the process for administering an interdicted claim.

   (b) Until the date referred to in paragraph (a), no interdicted claims may be adjudicated upon or considered in any manner whatsoever by the Land Claims Court in any proceedings for the restitution of rights in land in respect of old claims, provided that

interdicted claimants may be admitted as interested parties before the Land Claims Court solely to the extent that their participation may contribute to the establishment or rejection of the old claims or in respect of any other issue that the presiding judge may allow to be addressed in the interests of justice.

(c) Notwithstanding the provisions of section 11(5) and 11(5A) of the Restitution Act, no interdicted claimant shall be entitled to any relief having the effect of—

   (i) altering or varying—

      (a) the relief granted to any claimant in terms of section 35 of the Restitution Act in respect of a finalised old claim;

      (b) the terms of an agreement concluded in terms of section 42D of the Restitution Act; or

      (c) an award in terms of section 42E(1)(a) or (b) of the Restitution Act,

   unless the Land Claims Court in exceptional circumstances orders otherwise; and / or

   (ii) awarding to such interdicted claimant land or a right in land that is subject to a pending claim for restoration by an old claimant.

(d) The Chief Land Claims Commissioner must file a report with the Land Claims Court, to be dealt with as the Judge President of that Court may deem fit, at six-monthly intervals from the date of this order, setting out—

   (i) the number of outstanding old claims in each of the regions on the basis of which the Commission's administration is structured;

   (ii) the anticipated date of completion in each region of the processing of the old claims, including short-term targets for the number of old claims to be processed;

(iii) the nature of any constraints, whether budgetary or otherwise, faced by the Commission in meeting its anticipated completion date;

(iv) the solutions that have been implemented or are under consideration for addressing the constraints; and

(v) such further matters as the Land Claims Court may direct;

until all old claims have been processed.

(e) The Land Claims Court may make such order or orders as it deems fit to ensure the expeditious and prioritised processing of old claims.

3. The applicants are jointly and severally ordered to pay the costs of the first to sixth respondents, including the costs of two counsel.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Petse AJ and Theron J concurring):

Introduction

[1] "There can be no freedom, without land. There can also be no peace until the emotional issue of land is settled."[1] Land restitution, albeit with its complications and setbacks,[2] still forms part of an important process. It aims to right historical wrongs, resolve unjust dispossession and heal the "trauma of deep, dislocating loss of land"

[1] "Open Letter to the Multiparty Negotiations at the World Trade Centre, 18 August 1993" *AFRA News: Newsletter of the Association for Rural Development* (August/September 1993).

[2] Chokozo and Managa "Can we unlock rural socio-economic transformation through land reform? Revisiting the land redistribution public policy imperatives in South Africa" *Human Sciences Research Council Policy Brief* (March 2018), available at http://www.hsrc.ac.za/en/research-data/view/9207.

that has taken root in our country.[3] It entails the practical disruption of racialised privilege in respect of land ownership. But it also incorporates a symbolic function of recognising histories and legacies of injustice that influence the lives of individuals, families and communities.[4]

[2] This Court in *LAMOSA 1* has given credit to the importance of the restitution process and linked it to the "restoration of dignity".[5] This matter is a sequel to *LAMOSA 1*. In *LAMOSA 1*, this Court prospectively struck down the Restitution of Land Rights Amendment Act[6] (repealed Amendment Act) from the date of the judgment on 28 July 2016. In paragraph 4 of the Order, this Court interdicted the Commission on Restitution of Land Rights (Commission) from processing any claims lodged between 1 July 2014 and 28 July 2016 pursuant to the repealed Amendment Act (the interdicted claims), pending the enactment of a new Act re-opening the lodgement of land claims.[7] Paragraph 7 of the Order provided that, should Parliament

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[3] Walker *Landmarked: Land Claims and Land Restitution in South Africa* (Jacana, Johannesburg 2008) at 34. See also Hall "Reconciling the Past, Present and Future" in Walker et al (eds) *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa* (Ohio University Press, Athens 2010) at 17.

[4] Id.

[5] *Land Access Movement of South Africa v Chairperson, National Council of Provinces* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (*LAMOSA 1*) at para 63.

[6] Act 15 of 2014.

[7] The order in *LAMOSA 1* (Order) reads:

> "1. It is declared that Parliament failed to satisfy its obligation to facilitate public involvement in accordance with section 72(1)(a) of the Constitution.
>
> 2. The Restitution of Land Rights Amendment Act 15 of 2014 is declared invalid.
>
> 3. The declaration of invalidity in paragraph 2 takes effect from the date of this judgment.
>
> 4. Pending the re-enactment by Parliament of an Act re-opening the period of lodgement of land claims envisaged in section 25(7) of the Constitution, the Commission of Restitution of Land Rights, represented in these proceedings by the Chief Land Claims Commissioner (Commission), is interdicted from processing in any manner whatsoever land claims lodged from 1 July 2014.
>
> 5. The interdict in paragraph 4 does not apply to the receipt and acknowledgement of receipt of land claims in terms of section 6(1)(a) of the Restitution of Land Rights Act 22 of 1994.
>
> 6. Should the processing, including referral to the Land Claims Court, of all land claims lodged by 31 December 1998 be finalised before the re-enactment of the Act referred to in paragraph 4 above, the Commission may process land claims lodged from 1 July 2014.

not enact an Act within 24 months of the date of judgment in *LAMOSA 1*, the Chief Land Claims Commissioner (Commissioner) must, and any other interested party to *LAMOSA 1* or person with a direct and substantial interest may, apply to this Court within two months of the elapsed period for an appropriate order on the processing of those interdicted claims.

[3] The effect of the Order was that, first, the repealed Amendment Act was declared invalid immediately from 28 July 2016. Simply put, the repealed Amendment Act was struck down finally and irrevocably. Second, the Commission was interdicted from processing any interdicted claims. Third, the interdict would endure until (1) Parliament enacted a new Amendment Act (new Amendment Act) re-opening the period of lodgement of land claims; (2) the processing of all claims lodged before 31 December 1998 (old claims) was finalised before the enactment of a new Amendment Act; or (3) if Parliament were to fail to enact a new Amendment Act within 24 months of the date of the Order, until the Commission, or any other interested party, applied to this Court for an appropriate order on the processing of the interdicted claims.

[4] The applicants, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (collectively, Parliament), now seek an extension of the period of 24 months mentioned in paragraph 7 of the Order until 29 March 2019, in order to enable Parliament to finalise the process of enacting a new Amendment Act. The extension will, if granted, extend the interdict in paragraph 4 of the Order and, consequently, paragraph 7 will not be activated until 29 March 2019. The seventh to tenth respondents (collectively, the Communities) support Parliament's request for the extension.

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7. In the event that Parliament does not re-enact the Act envisaged in paragraph 4 within 24 months from the date of this order, the Chief Land Claims Commissioner must, and any other party to this application or person with a direct and substantial interest in this order may, apply to this Court within two months after that period has elapsed for an appropriate order on the processing of land claims lodged from 1 July 2014.

8. The National Council of Provinces must pay the applicants' costs, including costs of two counsel."

[5] The first to sixth respondents (the LAMOSA respondents) oppose the application. They have brought a counter-application asking this Court to lift the interdict and grant an order, as set out in their counter-application, dealing with the processing of the interdicted claims.

Background

[6] In 1994, Parliament passed the Restitution of Land Rights Act[8] (Restitution Act), being the legislation envisaged by section 25(7) of the Constitution[9] to address evictions, forced removals and past dispossession of land. The Restitution Act established a system allowing people and communities who were, as a result of racially discriminatory laws or practices, dispossessed of their land rights to claim either restitution of the land or equitable redress. The Restitution Act provided that all claims had to be lodged by 31 December 1998. During the period between the enactment of the Restitution Act and 31 December 1998, about 80 000 claims were lodged. However, by 2014, over 20 000 of those claims had not yet been finalised.

[7] In 2014, Parliament enacted the repealed Amendment Act. One of the major changes brought in by the repealed Amendment Act was the re-opening of the restitution process, allowing new claims to be lodged until 30 June 2019.[10] However, the procedures followed by the National Council of Provinces (NCOP) and the provincial legislatures in passing the repealed Amendment Act were challenged in *LAMOSA 1*.

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[8] Act 22 of 1994.

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

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

[10] Other changes introduced include: two new offences; changes to the composition of, and appointment of judges to the Land Claims Court; and an obligation on the Minister to consider all the factors in section 33 of the Restitution Act when settling a claim in terms of section 42D of that Act.

[8] In *LAMOSA 1*, the LAMOSA respondents filed an application for direct access to this Court for a declaration of constitutional invalidity of the repealed Amendment Act.[11] The applicants challenged the constitutionality of the repealed Amendment Act on two grounds: first, that the NCOP and the provincial legislatures respectively breached section 72(1)(a) of the Constitution by failing to "facilitate public involvement" in the passing of the Bill that preceded the repealed Amendment Act, and, second, that section 6(1)(g) of the Restitution Act, as inserted by the repealed Amendment Act, was incurably vague.[12]

[9] The provincial legislatures took issue with the challenge by the applicants in *LAMOSA 1* against the participation process conducted by them and the NCOP and, to the contrary, argued that they had fulfilled their constitutional obligations under the impugned sections. The Minister of Development and Land Reform (Minister) and the President of the Republic of South Africa (President) invoked the legal maxim of *qui prior est tempore potior est jure*[13] to argue that section 6(1)(g) conferred substantive priority on current claims. The Commissioner, on the other hand, contended that developing rules would assist in determining the proper meaning of section 6(1)(g) on the prioritisation of claims.

[10] On 28 July 2016, this Court held that the re-opening of land claims, which the repealed Amendment Act sought to do, is of paramount public importance. In addition, it held that there must be reasonable public participation in the legislative process.[14] The Court concluded that the NCOP's public participation process was unreasonable and therefore constitutionally invalid. It also declared the repealed Amendment Act to be invalid, thereby accepting the LAMOSA respondents' first argument and rendering the need to consider the complaint against section 6(1)(g) irrelevant. The Order interdicted the Commission from processing any of the

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[11] The Communities were joined at a later stage.

[12] *LAMOSA 1* above n 5 at para 4.

[13] The person who is earlier in time is stronger in law.

[14] *LAMOSA 1* above n 5 at para 64.

interdicted claims, in order to ensure that the old claims were not superseded. Further, Parliament was directed to facilitate the enactment of a new Amendment Act that would deal with the re-opening of land claims, as envisaged in section 25(7) of the Constitution, within 24 months of the judgment. In the event that this did not take place, the Court held that it would be empowered to issue an appropriate order regarding the processing of the interdicted claims if an application was so filed. Further, in the event that all old claims were finalised before Parliament completed the enactment of a new Amendment Act, the Commission could proceed with the interdicted claims.[15]

[11] Parliament has failed to enact a new Amendment Act within 24 months. On 30 July 2018, two days after the expiry of the 24-month period referred to in paragraph 7 of the Order, it lodged this application asking this Court to extend the expired period of 24 months by a period of eight months until 29 March 2019.

[12] On 12 September 2018, this Court granted an interim extension pending the outcome of the application and set the matter down for hearing.

[13] The application is opposed by the LAMOSA respondents. They submit that this Court does not have the power to extend the 24-month period as the Order made on 28 July 2016 was final. They submit that by failing to provide a legislative solution within 24 months of the Order, Parliament has forgone the opportunity to address the prioritisation issue, and that this matter now stands to be determined finally by this Court. Further, the LAMOSA respondents have filed a counter-application, in which they propose, amongst other things, that old claims should be prioritised over interdicted claims (substantively and procedurally).

[15] Paragraph 6 of the Order.

Issues

[14] The main question to be determined here is whether this Court may grant the extension sought by Parliament and, if so, whether it is just and equitable to do so. As noted above, if the extension is granted, the interdict in paragraph 4 of the Order will also be extended and, consequently, paragraph 7 of the Order will not be activated. The counter-application would then fall away. However, if the application is dismissed, the counter-application will have to be dealt with. I thus proceed to consider the issue of the extension.

Application

Submissions by Parliament and the Communities

[15] Parliament submits that it is already in the advanced stages of its processes of enacting a new Amendment Act, and so it is best to allow it the space to do its job. In this regard, Parliament has provided an account of what it has done. It contends that the legislative process will be concluded within the extended period sought and explains that the following steps have been taken since 28 July 2016 to give effect to the Order:

(a) Parliament was in recess when the judgment was handed down and re-opened on 20 August 2016. On 30 August 2016, the Management Committee of the Portfolio Committee on Rural Development and Land Reform (Portfolio Committee) invited the Legal Resources Centre to share its views on the implications of *LAMOSA 1* on the re-opening of claims.

(b) On 31 August 2016, the Portfolio Committee convened and was briefed by Parliament's internal legal advisor. The legal advisor stressed the importance of facilitating maximum public participation in the legislation-making process going forward.

(c) On 7 September 2016, the Portfolio Committee again convened to discuss the financial implications for the state of enacting a new Amendment Act.

(d) During October and November 2016, the Portfolio Committee was unable to attend to any issues relating to legislation due to its pre-scheduled oversight business. Parliament was then in recess from December 2016 until February 2017.

(e) The draft Amendment Bill was tabled on 13 March 2017 as a Private Member's Bill. The National Assembly Tabling Office referred the draft Amendment Bill to Parliament's internal legal services for consideration.

(f) On 23 March 2017, Parliament's internal legal services stated that the draft Amendment Bill was non-compliant and needed to be amended.

(g) On 7 April 2017, an explanatory summary that invited public comments was published in the Government Gazette, as well as in local newspapers. The deadline for comments was extended to 31 May 2017.

(h) On 18 and 19 April 2017, a meeting was held between Parliamentary legal advisors, the Commissioner and the Portfolio Committee's legal advisors.

(i) The draft Amendment Bill was finalised on 5 May 2017 and was certified by the Parliamentary legal advisor on the same date.

(j) On 10 May 2017, the Portfolio Committee was briefed on the draft Amendment Bill.

(k) Between the periods of 19 to 30 June 2017 and 3 to 31 July 2017, Members of Parliament conducted oversight visits and constituency work respectively.

(l) On 7 August 2017, various supporting documents were submitted to the Bills Office to facilitate the introduction of the draft Amendment Bill, as well as its editing.

(m) The editing of the draft Amendment Bill was finalised on 16 August 2017, and it was introduced in the National Assembly on the same day.

(n) On 25 August 2017, the draft Amendment Bill was referred to the Joint Tagging Mechanism for tagging.

(o) On 5 October 2017, the Portfolio Committee convened its first briefing meeting and resolved to conduct public hearings in all the provinces.

(p) During October and November 2017, the Portfolio Committee was unable to attend to any issues relating to legislation due to its pre-scheduled oversight business. Parliament was then in recess from December 2017 until February 2018.

(q) On 28 February 2018, the Portfolio Committee concluded its work on the Communal Property Associations Amendment Bill.

(r) Various public advertisements were placed during the period of 30 April 2018 to 4 May 2018, and public hearings in all nine provinces took place between 18 June 2018 and 3 July 2018.

(s) The Portfolio Committee has been in the process of considering the submissions and has also called for further submissions.

[16] Parliament submits that the failure to enact a new Amendment Act was not due to its remissness but, rather, the inadequacy of the time afforded to it. It contends that the legislative process is at an advanced stage and the actual extension sought is short and finite. Lastly, it contends that the extension will not change the status quo, in that the interdict will remain intact and the Commission will continue with the assessment of the old claims. Parliament undertakes to submit progress reports monthly in the event that the extension is granted.

[17] Parliament submits that this Court has the power in terms of section 172(1)(b) of the Constitution to make a just and equitable order, which in this instance would be the granting of the extension. Parliament accepts that the factors set out in *Teddy Bear Clinic* must be met for a just and equitable order to be issued in terms of section 172(1) and contends that such factors have been met in this instance.[16]

[16] *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* [2015] ZACC 16; 2015 JDR 1198 (CC); 2015 (10) BCLR 1129 (CC) (*Teddy Bear Clinic*) at para 12.

[18] The Communities support the relief sought by Parliament. They submit that it is in the interests of justice that the extension be granted, and that this Court has the power to grant this relief.[17] If the extension is granted, they argue that there will be no prejudice to any of the parties who have already submitted interdicted claims or who wish to submit claims in the future. If Parliament does not enact a new Amendment Act by its proposed deadline of 29 March 2019, the Communities ask that this Court lift the interdict and allow the Commissioner to process the interdicted claims concurrently with the old claims.[18]

Submissions by the LAMOSA respondents

[19] The LAMOSA respondents oppose the application. They submit that, in line with the principle of finality of judgments, the Order was final, and this Court is *functus officio* and no longer has the power to grant the relief sought by Parliament. Furthermore, the LAMOSA respondents submit that Parliament filed the application three days after the expiry of the 24-month period in which it was required to act. They equate Parliament's request for an extension to a request for an extension of the suspension of a declaration of invalidity that has expired. They submit that because the application was filed three days after the expiry of the 24-month period, it is beyond this Court's powers to extend a period that has expired. Accordingly, they contend that Parliament is absolutely barred from seeking a variation of the Order, and that paragraph 7 of the Order is now in effect.

[20] The LAMOSA respondents contend that even if there is no absolute bar arising from the 24-month period having expired and the Court does have a discretionary power to vary such an order, this power may only be exercised in exceptional circumstances. They submit that Parliament has not shown that any exceptional circumstances exist to warrant the exercise of that discretion. Further, they argue that Parliament has failed to meet two of the criteria set out in *Teddy Bear Clinic*, as it has

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[17] The Communities rely on *Minister for Transport v Mvumvu* [2012] ZACC 20; 2012 JDR 1757 (CC); 2012 (12) BCLR 1340 (CC) at para 6.

[18] More on this alternative remedy later.

not provided an adequate explanation for the delay and it is unlikely that it will correct the defect in the proposed time.

[21] The LAMOSA respondents submit that since Parliament has failed to enact a new Amendment Act within the period stipulated, the responsibility to determine the fate of the interdicted claims now shifts from Parliament to this Court.

Characterisation of this application

[22] It is correct that the Order did not suspend the declaration of invalidity of the interdicted claims. Paragraph 3 of the Order explicitly stated that the declaration of invalidity would take effect from the date of judgment.[19] However, paragraph 4 suspended the processing of the interdicted claims until: (1) Parliament enacted a new Amendment Act re-opening the period of lodgement of land claims envisaged in section 25(7) of the Constitution; (2) pursuant to paragraph 6 of the Order, the old claims were finalised before the enactment of a new Amendment Act; or (3) in the event that Parliament failed to enact a new Amendment Act within 24 months of *LAMOSA 1* (as it has done), the Commissioner or an interested party approached this Court for an appropriate order on the processing of the interdicted claims, as per paragraph 7 of the Order.

[23] Since Parliament has failed to act within the 24-month period, what is at issue is the Court's invitation in *LAMOSA 1* to interested parties to seek an appropriate order on the processing of interdicted claims. Now the only question is what constitutes a just order in relation to those interdicted claims that had been kept in abeyance? Before determining this question, it is apposite at this stage to deal with the submissions on behalf of the LAMOSA respondents that this Court is *functus officio* and no longer has the power to grant the relief sought by Parliament. I proceed to consider this question.

[19] See *LAMOSA 1* above n 5 at para 86.

Is this Court functus officio?

[24] The LAMOSA respondents submit that the Order is final, and that this Court is *functus officio* and no longer has the power to grant the relief that Parliament seeks. I do not agree. The Supreme Court of Appeal in *Firestone* articulated the principle of *functus officio* as follows:

> "The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased."[20]

[25] The Supreme Court of Appeal went on to acknowledge that it is assumed that courts do have the discretion to vary their orders, albeit that this discretion must be exercised sparingly.[21] This principle has been confirmed by this Court.[22]

[26] Further, the Order contemplated that a further order may be made by this Court at a later stage, in that it envisaged an appropriate order on the processing of the interdicted claims. It is similar to the order in *Zondi 1*, which reserved the right for interested persons or organisations to apply to this Court for a further suspension of the declaration of invalidity of the legislation in question and / or any other appropriate further relief during the specified period of time.[23] In the sequel to that decision, *Zondi 2*, the Court stated:

> "It is not uncommon for a court to make an order and reserve to itself the power to vary the order made. In the past this Court has reserved its authority to reconsider

[20] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A); [1977] 4 All SA 600 (A) (*Firestone*) at 306F-G. This authority has been quoted with approval in cases such as *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) (*Ntuli*) at para 22; and *Ex Parte Minister of Social Development* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at para 30.

[21] *Firestone* id at 309A.

[22] See *Ntuli* above n 20 at para 23; and *Ex Parte Minister of Social Development* above n 20 at para 31.

[23] *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) (*Zondi 1*).

> orders for costs or vary the period of suspension of a declaration of invalidity or made further appropriate orders. Thus in *Steyn*, the Court allowed the Minister of Justice and Constitutional Development to apply to it for an order varying the terms stipulated in the order or extending the period of suspension provided in the order. Such orders expressly contemplate that the order made may be varied if the circumstances warrant it. By their very nature such orders are therefore not final. Neither the principle of finality nor the doctrine of *functus officio* arise in relation to such orders. Those who are bound by these orders know in advance that the order is not final.
>
> Thus where a court, in its order, adds a paragraph similar to paragraph (*g*) [of the original order in that instance], the court is, in effect, making it plain that the order it has made is not to be understood as final. And an order of this kind does not preclude the court from reconsidering the matter in relation to which it has reserved the authority to reconsider. In paragraph (*g*) this Court expressly reserved to itself the power to vary and extend further the period of suspension of the declaration of invalidity. It follows therefore that paragraph (*e*)(2) of the original order of this Court is not final and the period of suspension contemplated therein may be varied and extended if circumstances so warrant."[24] (Footnotes omitted.)

[27] Accordingly, given that in this instance the Order has reserved this Court's power to make further appropriate orders, the principle in *Zondi 2* applies. In this regard, Parliament is also an interested party, as it seeks an extended opportunity to enact the legislation that the Order envisaged.

Is this an application for an extension of the suspended order?

[28] The LAMOSA respondents contend that, although there was no suspension of the declaration of invalidity, the act of interdicting the processing of the interdicted claims until either the enactment of a new Amendment Act or the final processing of old claims operated like a suspension of a declaration of invalidity, in that the processing of the interdicted claims was suspended. Further, although paragraph 7 of the Order did not envisage an extension of the 24-month period and set out what is to

[24] *Zondi v MEC, Traditional and Local Government Affairs* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) (*Zondi 2*) at paras 49-50.

happen if Parliament fails to enact the legislation within the 24-month period, Parliament's application is similar to a request for an extension of a suspension of a declaration of invalidity, in that it is requesting to extend the operation of the interdict against the processing of the interdicted claims until 29 March 2019.

[29] This Court has wide discretionary powers (as encapsulated in section 172(1)(b) of the Constitution) to make any order that is just and equitable. Indeed, it is under this provision that we consider this application. Given that this application is analogous to an application for an extension of a suspension of a declaration of invalidity, it is pursuant to the powers granted to us under section 172(1)(b) that we can consider the principles related to extension applications to assist us in determining a just and equitable remedy. Therefore, it is necessary to assess whether a case for an extension has been made. It is here that we look to this Court's jurisprudence on the extension of a suspension of a declaration of invalidity to assist us.

[30] Before doing this, however, it must be noted that, regardless of the remedy provided by this Court, nothing will preclude Parliament from legislating afresh in relation to the processing of the interdicted claims.

Applicable legal principles

[31] The relevant principles relating to whether this Court should grant an extension of the interdict against the processing of the interdicted claims pursuant to its powers to grant a just and equitable remedy, and under what circumstances, are laid out in numerous cases.[25]

[32] In *Sibiya*, an order was sought to extend the time period within which the respondents were required by this Court to report on steps taken to ensure that death sentences imposed before 1995 were set aside and replaced with appropriate

[25] See *Ntuli* above n 20; *Sibiya v Director of Public Prosecutions, Johannesburg High Court* [2006] ZACC 22; 2006 (2) BCLR 293 (CC); *Ex Parte Minister of Social Development* above n 20; *Zondi 2* id; and *Teddy Bear Clinic* above n 16.

sentences. This Court held that applications for extensions of time "must be granted if that course is considered by this Court to be in the interests of justice".[26] It further held that the interests of justice were triggered predominantly by the need for the information by the Court in supervising the larger project of commuting death sentences after *Makwanyane*.[27]

[33] In *Ex Parte Minister of Social Development*, an application for the extension of the suspension of a declaration of invalidity was lodged on the eve of the date of expiry of the period of suspension without a satisfactory explanation for why it was not brought earlier. This Court held:

> "This judgment must not be understood as suggesting that even if the applicants had approached the Court timeously, the extension would have been refused. In [*Zondi 2*], the applicant approached the Court 15 days before the expiry of the period of suspension, but the Court was nevertheless prepared to extend the period to allow the matter to be argued later. In this case, the applicants approached the Court very late and left the Court with no time to consider extending the period of suspension before its expiry. In all the circumstances of this case, the lateness in approaching the Court, viewed against the lack of any explanation for the delay, the application must be dismissed."[28]

[34] In *Zondi 2*, this Court reiterated the principle that it has wide discretionary powers to extend an order varying a period of suspension of a declaration of invalidity, but that this power should be exercised very sparingly.[29] The Court provided a number of factors that may be relevant in exercising this power:

> "[T]he sufficiency of the explanation for failure to comply with the original period of suspension; the potentiality of prejudice being sustained if the period of suspension were extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project

[26] *Sibiya* id at para 7.

[27] *Sibiya* id, referring to *S v Makwanyane* [1995] ZACC 3; 1995 (2) SACR 1 (CC); 1995 (6) BCLR 665 (CC).

[28] *Ex Parte Minister of Social Development* above n 20 at para 60.

[29] *Zondi 2* above n 24 at paras 45 and 47.

> and prevent chaos. What is involved is the balancing of all relevant factors bearing in mind that the ultimate goal is to make an order that is 'just and equitable'."[30]

[35] The Court reiterated the warning in *Ntuli* against the variation of an order of invalidity that may have the effect of "reviving" an Act that was previously impugned.[31] This Court criticised the explanation for the delay, as the "dates [in explaining the delay] were . . . either not specified or only specified in vague terms such as 'during early August' or 'by the end of July'."[32] The Court held:

> "Reasons that justify or at least explain failure to meet the time limits in the court order, must be set out fully, candidly, timeously and in a manner that conforms with the Rules of the Court. Those responsible for drafting remedial legislation should not assume that as a matter of course and in the public interest an extension of the time period will be granted. If a proper case for extension is not made out in an appropriate way, then the drafters of the new legislation must be aware that they run the risk of the request for an extension of the period of suspension being refused."[33]

However, the Court in that instance noted that on the balancing of various factors, the public would suffer prejudice if the order for suspension were not extended, and accordingly granted the extension.[34]

[36] In *Teddy Bear Clinic*, the Acting Speaker of the National Assembly applied for an extension of a previous order[35] in which sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[36] were declared inconsistent with the Constitution and invalid. The declaration of invalidity was suspended. The

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[30] Id at para 47.

[31] Id at paras 42-3.

[32] Id at para 56.

[33] Id at para 59.

[34] Id at para 65.

[35] See *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (1) SACR 327 (CC); 2013 (12) BCLR 1429 (CC).

[36] 32 of 2007.

application for extension occurred before the lapse of the period of suspension.[37] The respondents did not oppose the application and acknowledged the efforts by Parliament to finalise the process. The delay was, however, necessitated by another requisite amendment to the relevant Act that was to be considered and rectified simultaneously. Before granting the extension, this Court stated unequivocally that when Parliament fails to correct the defects during the period of suspension, an application requesting an extension must be made before the suspension period expires.[38] The Court held that the following factors have to be considered before an application for an extension is granted in terms of section 172(1)(b) of the Constitution—

(a) the sufficiency of the explanation for failing to correct the defect within the period of suspension;

(b) the prejudice likely to be suffered if the suspension is not extended;

(c) the prospects of correcting the defect within the extended period; and

(d) the need to promote a functional and orderly state administration for the benefit of the general public.[39]

In the present case, Parliament must show that the order it seeks would be just and equitable in light of these factors.

Assessment

[37] Given that Parliament's application here is analogous to an application for an extension of a suspension of a declaration of invalidity, the factors and considerations outlined in the cases above must be considered in the assessment of this application. Parliament approached this Court three days after the expiry of the 24-month period. Parliament knew in March 2018 that it would not be able to meet the 24-month deadline and finalise the process for the enactment of a new Amendment Act. Yet it

[37] *Teddy Bear Clinic* above n 16 at para 1.

[38] Id at para 11.

[39] Id at para 12. See also *Electoral Commission of South Africa v Speaker of the National Assembly* [2018] ZACC 46; 2019 (3) BCLR 289 (CC) at para 70.

only brought an application after the 24-month period had expired. This application was not made promptly. However, this is not the only fault in Parliament's actions.

[38] Upon application of the *Teddy Bear Clinic* factors, it is evident that there are no exceptional circumstances justifying the order sought by Parliament. First, there has been an inordinate delay by Parliament in enacting a new Amendment Act, and the periods of delay have largely been unaccounted for, both in explanation on the papers and during oral argument. Where explanations have been offered, they have been insufficient. Overall, Parliament took no action for almost 11 of the 24 months provided by this Court. When Parliament did act, the process was very slow. The tardiness of Parliament is unacceptable. Given that a lot of emphasis is placed on facilitating public participation as the reason for more time being needed, it is useful to note that such participation only truly commenced 18 months after *LAMOSA 1* was handed down. The explanation for the delay is wholly insufficient.

[39] The second factor that has to be taken into account is whether the process for the enactment of a new Amendment Act will be finalised by 29 March 2019. In this regard, the LAMOSA respondents filed further documents reflecting the processing of the draft Amendment Bill as at 23 October 2018.[40] These documents show that nothing has been done in relation to the draft Amendment Bill since 5 September 2018, when the Portfolio Committee adopted an amended version of the Bill. By 23 October 2018, the draft Amendment Bill had still not been considered by Parliament, and during oral argument, it was conceded by Parliament that as at the date of the hearing,[41] this was still the case. Further, no explanation has been provided about Parliament's proposed ability to meet the deadline considering that it closed for recess in December and re-convened only in February 2019. This means that Parliament would have had a month from February 2019 to finalise the process at the National Assembly and for the NCOP to consider the draft Amendment Bill and enact it. There is no indication that Parliament will treat the draft amendment Bill with any

[40] See [15] for discussions on the draft Amendment Bill.

[41] The matter was heard on 6 November 2018.

urgency. It has failed to provide a clearly stipulated timetable. It is evident that the prospects of enacting a new Amendment Act within the proposed timeframe, if the extension is granted, are unlikely.[42]

[40] Further, in *LAMOSA 1*, the challenge related to the NCOP's processes, where there was inadequate public participation. The new Amendment Bill is yet to be referred to the NCOP to engage in public participation processes at that level. As highlighted in *LAMOSA 1*, it would be more prejudicial to the public to have this process rushed than it would be not to grant the extension. Rather, if the extension is not granted, the public, especially those parties who have submitted interdicted claims, will not be without remedy.[43] In any event, and as stated above, nothing will prevent Parliament from enacting the legislation if the extension is not granted.

[41] Finally, based on the principles in *Sibiya* and section 172(1)(b) of the Constitution, it would not be in the interests of justice to grant an extension. That order would not be just and equitable under the circumstances. The application for an extension must accordingly fail. However, this Court is still tasked with providing a just and equitable remedy in respect of the interdicted claims. It is thus necessary to consider the counter-application and a remedy in respect of the interdicted claims.

Counter-application

[42] In *LAMOSA 1*, this Court issued an order in which it reserved the power to make an appropriate further order regarding the processing of new claims in the event that Parliament failed to enact legislation by 28 July 2018. Any interested party was also afforded the opportunity to approach this Court for such an order. The wide

[42] The new Amendment Bill has lapsed pursuant to Rule 33 of the National Assembly Rules. See Claasens "The Restitution of Land Rights Amendment Act has lapsed in Parliament – what this means for Makhasaneni and other communities" *Land and Accountability Research Centre* (29 January 2019), available at http://www.customcontested.co.za/the-restitution-of-land-rights-amendment-act-has-lapsed-in-parliament-what-this-means-for-makhasaneni-and-other-communities/. Parliament has recently re-introduced the new Amendment Bill.

[43] See below.

remedial powers of this Court, as elucidated by section 172(1)(b), allow it to grant any order that is just and equitable. In *LAMOSA 1*, this Court said:

> "It seems to me that a just and equitable remedy is to interdict the settlement, and referral to the Land Claims Court, of all new claims, whether competing with the old or not. Our wide remedial power under section 172(1)(b) of the Constitution permits us to do so. Even though the new claims have been kept alive, the reality is that the Restitution Act under which they were lodged has been found to be invalid."[44]

[43] This Court has held that its orders must be interpreted in context and in terms of the judgment as a whole.[45] Thus paragraph 7 of the Order must be interpreted against the backdrop of *LAMOSA 1* and the context in which the claims were interdicted. The reasons for freezing the interdicted claims submitted under the repealed Amendment Act were articulated in *LAMOSA 1*. It is apposite at this stage to set out what this Court said:

> "In the circumstances, it seems unjust to invalidate the claims that have been lodged already. Section 172(1)(b)(i) of the Constitution gives this Court a discretion to make a just and equitable order, including an order limiting the retrospective effect of the declaration of invalidity. I consider it to be just and equitable that the order of invalidity should take effect from the date of judgment. That will leave new applications already lodged when judgment is handed down intact. If the Court were to declare the Amendment Act invalid without limiting the retrospective effect of the declaration, the lodged new applications would cease to exist. The new applicants' right to restitution would be extinguished with the Amendment Act because the right to restitution in section 25(7) only exists 'to the extent provided by an Act of Parliament'.
>
> The applicants are asking for a suspension of the declaration of invalidity for 18 months, with accompanying prayers for: a mandamus that the Commissioner continues to settle or refer to the Land Claims Court all land restitution claims filed by 31 December 1998, notwithstanding that a claim has been lodged under the

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[44] *LAMOSA 1* above n 5 at para 89.

[45] *Cross-Border Road Transport Agency v Central African Road Services (Pty) Limited* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) at para 22.

> amended Restitution Act in respect of the same land; the grant of permission to the Commissioner to continue accepting new applications under the amended Restitution Act; and an interdict that claims lodged under the amended Restitution Act not be investigated or processed in any manner.
>
> I am loath to grant the suspension prayed for. That is so because it will have the effect of heaping more new applications on the Commissioner when there are difficulties regarding how to handle those that have been lodged already. The prospective declaration of invalidity I propose means no new applications will continue being filed after judgment, which would have been the case if we were to suspend the declaration of invalidity. In a manner of speaking, all affected parties get something. First, no further new applications can be lodged, thus diminishing the number of claims filed under the impugned Act. This ameliorates the situation that troubles the applicants. Second, new applications that have already been lodged are not invalidated."[46] (Footnotes omitted.)

[44] The remedial powers exercised in *LAMOSA 1* kept the interdicted claims alive, despite the repealed Amendment Act that they were founded on being declared invalid, on the basis that it was just and equitable to do so. Given this, the question of whether it is within this Court's powers to make any order now regarding the interdicted claims poses no realistic hurdle. The only consideration that needs to be taken into account is what is just and equitable. It is also important that any answer must be given against the backdrop as to why the interdicted claims were kept alive and why the suspension in respect of processing the interdicted claims was ordered in the first place.

[45] It is clear that Parliament has not completed its task of enacting a new Amendment Act within the period of time provided in *LAMOSA 1*. Accordingly, paragraph 7 of the Order is activated. It must be noted that paragraph 7 contemplates an "appropriate order on the processing of [interdicted] claims". The Commission and other interested parties, including the LAMOSA respondents and the Communities, acquired the right to apply for an order in terms of paragraph 7. However, the

[46] *LAMOSA 1* above n 5 at paras 86-8.

Commissioner, who was, in terms of paragraph 7, obligated to approach this Court, chose to abide the decision of this Court, rather than apply for an order on the processing of the interdicted claims.

[46] Instead, the Commission filed an affidavit providing an update of its progress in processing old claims since *LAMOSA 1*. From this report, the need for this Court to craft an appropriate order for the processing of the interdicted claims is clear. The Commissioner's affidavit provided the following information:[47]

(a) As at 31 March 2018, there were 5 757 outstanding old claims that had not yet been processed.

(b) 4 601 of these outstanding old claims are at the fourth phase of processing, that is, negotiating a settlement. In the event that these claims cannot be administratively settled in terms of sections 42D and 42E of the Restitution Act, they will have to be referred to the Land Claims Court in terms of section 14 of the Restitution Act.

(c) Between 1 April 2016 and 31 March 2018, the Commission settled 1 654 rural and urban claims, at a total cost of over R5 billion.

(d) 163 383 interdicted claims have been received, but these claims have not been processed beyond mere acknowledgement.

[47] Unfortunately, the Commission did not provide insight into the peculiarities and challenges that it encounters in its work. Nor did it indicate how those should inform this Court's decision on the processing of the interdicted claims. However,

[47] The LAMOSA respondents have criticised the information provided by the Commissioner on the following grounds: (1) the information provided by the Commission is only as at 31 March 2018 and the Commission provides no explanation for why it has not provided this Court with more recent statistics; (2) when *LAMOSA 1* was heard, there were 8 257 claims and as at 31 March 2018, there were still 5 757 outstanding old claims, of which 1 131 were still at the "screening and categorisation" stage; (3) the Commission did not address the 17 000 - 20 000 claims that have been settled but are not finalised because court orders have not been implemented; and (4) the Commission did not provide an estimate for how long it would take to finalise the outstanding old claims. Assuming it continues to settle claims at the same rate it had between 1 April 2016 and 31 March 2018, it will take another seven years to settle the outstanding old claims. However, the report by the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (High Level Panel) estimates that based on recent performance and the most publicly available work plans of the Commission, it will take between 35 and 43 years to finalise all outstanding old claims.

given the information provided by the Commission, it is imperative for this Court to provide an appropriate remedy in relation to the processing of the interdicted claims.

[48] On the other hand, the counter-application by the LAMOSA respondents has been launched precisely for that purpose. The relief sought can be categorised in three parts, namely: (1) the main relief; (2) the constitutional challenge to section 6(1)(g); and (3) alternative relief. The first issue to consider is, in light of the relief proposed by the LAMOSA respondents, what would an appropriate order look like?

Main relief and alternative relief

[49] Regarding the main relief sought, the LAMOSA respondents seek an order to the following effect—

(a) that the interdict against processing the interdicted claims continues until either: (1) all old claims are settled or referred to the Land Claims Court; or (2) an interested party approaches the Land Claims Court, Supreme Court of Appeal or this Court to grant permission to begin processing interdicted claim(s);

(b) that interdicted claimants (those who hold interdicted claims) may only be admitted as interested parties before the Land Claims Court in respect of proceedings involving old claims to the extent that their participation contributes to the rejection or establishment of the old claim, or to any other issue that the presiding judge allows to be addressed in the interests of justice;

(c) that notwithstanding the provisions of section 11(5)[48] and 11(5A)[49] of the Restitution Act, no interdicted claimant will be entitled to relief:

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[48] Section 11(5) provides:

> "(a) If after an order has been made by the Court as contemplated in section 35 or an agreement has been entered into as contemplated in sections 14(3) or 42D, it is shown that another claim was lodged in terms of this Act in respect of the land to which the order or agreement relates, any interested party may apply to the Court for the rescission or variation of such order or the setting aside or variation of such agreement.
>
> (b) The Court may grant such an application, subject to such terms and conditions as it may determine, or make any other order it deems fit."

(i) altering or varying:

(a) the relief in section 35[50] of the Restitution Act in respect of a finalised old claim;

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[49] Section 11(5A) provides:

> "Where an appeal is pending in respect of an order of the Court contemplated in section 35, an application for the rescission or variation of such order under subsection (5) shall be made to the Constitutional Court or the Supreme Court of Appeal, as the case may be."

[50] Section 35 reads:

> "(1) 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.
>
> (2) The Court may in addition to the orders contemplated in subsection (1)—
>
> (a) determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant;
>
> (b) if a claimant is required to make any payment before the right in question is restored or granted, determine the amount to be paid and the manner of payment, including the time for payment;
>
> (c) if the claimant is a community, determine the manner in which the rights are to be held or the compensation is to be paid or held;
>
> (d) . . . . . .
>
> (e) give any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders;
>
> (f) make an order in respect of compensatory land granted at the time of the dispossession of the land in question;
>
> (fA) make appropriate orders to give effect to any agreement between the parties regarding the finalisation of the claim;
>
> (g) make such orders for costs as it deems just, including an order for costs against the state or the Commission;

(b) the terms of an agreement concluded in terms of section 42D[51] of the Restitution Act; or

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(3) An order contemplated in subsection (2)(c) shall be subject to such conditions as the Court considers necessary to ensure that all the members of the dispossessed community shall have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community.

(4) The Court's power to order the restitution of a right in land or to grant a right in alternative state-owned 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.

(5) . . . . . .

(5A) . . . . . .

(6) In making any award of land, the Court may direct that the rights of individuals to that land shall be determined in accordance with the procedures set out in the Distribution and Transfer of Certain State Land Act, 1993 (Act No. 119 of 1993).

(7) An order of the Court shall have the same force as an order of the Supreme Court for the purposes of the Deeds Registries Act, 1937 (Act No. 47 of 1937).

(8) . . . . . .

(9) 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.

(10) An interested party which is of the opinion that an order of the Court has not been fully or timeously complied with may make application to the Court for further directives or orders in that regard.

(11) 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 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.

(12) The Court may, upon application by any person affected thereby, or of its own accord—

(a) if a person is, in the circumstances contemplated in subsection (1), registered as a preferential claimant, rescind or vary the order contemplated in that subsection;

(b) correct patent errors in any order or judgment."

[51] Section 42D reads:

(c) an award in terms of section 42E(1)(a) or (b)[52] of the Restitution Act,

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"(1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 31 December 1998, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:

(a) The award to the claimant of land, a portion of land or any other 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 in question; or

(ii) the Minister is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;

(b) the payment of compensation to such claimant;

(c) both an award and payment of compensation to such claimant;

(d) . . . . . .

(e) the manner in which the rights awarded are to be held or the compensation is to be paid or held; or

(f) such other terms and conditions as the Minister considers appropriate.

(2) If the claimant contemplated in subsection (1) is a community, the agreement must provide for all the members of the dispossessed community to have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of such community to the members of the community.

(3) The Minister may delegate any power conferred upon him or her by subsection (1) or section 42C to the Director-General of Rural Development and Land Reform or any other officer of the State or to a regional land claims commissioner.

(4) The Director-General of Rural Development and Land Reform may with the consent of the Minister delegate to any officer of the state or a regional land claims commissioner any power delegated to the Director-General under subsection (3).

(5) Any delegation under subsection (3) or (4) may be made either in general or in a particular case or in cases of a particular nature and on such conditions as may be determined by the Minister or the Director-General of Rural Development and Land Reform, as the case may be, and the Minister or the Director-General is not thereby divested of any power so delegated.

(6) Expenditure in connection with the exercise of the powers conferred by subsection (1) shall be defrayed from moneys appropriated by Parliament for that purpose.

(7) The provisions of subsections (1) to (6) and section 42C shall apply *mutatis mutandis* in respect of an agreement entered into before the commencement of the Land Restitution and Reform Laws Amendment Act, 1999, in terms of which a claimant has waived any or all of his or her rights to relief under this Act."

[52] Section 42E(1)(a) and (b) provide:

unless the Land Claims Court, Supreme Court of Appeal or Constitutional Court in exceptional circumstances orders otherwise; or

(ii) awarding them land or a right in land that is subject to a pending claim for restoration by an old claimant;

(d) that the Commissioner must report bi-annually to the Land Claims Court on the progress of processing and finalising old claims and a number of aspects related thereto, including the nature of constraints faced by the Commission in meeting its anticipated completion date; and

(e) that the Land Claims Court may make any order that will expedite processing old claims.

[50] In the alternative, the LAMOSA respondents submit that, in the event that this Court is not inclined to rule finally on the matter of substantive prioritisation between old claims and interdicted claims, it would be appropriate to add a caveat to the relief outlined under (c) above, whereby that relief could be deviated from in the event that Parliament enacts legislation determining otherwise.

[51] The LAMOSA respondents contend that the main relief also gives rise to, and confirms, the interpretation of the Land Claims Court in *Amaqamu* that old claims must be prioritised and interdicted claims can only be considered to the extent that

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"(1) The Minister may purchase, acquire in any other manner or, consistent with the provisions of section 3 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), expropriate land, a portion of land or a right in land—

(a) in respect of which a claim in terms of this Act has been lodged, for the purpose of—

(i) restoring or awarding such land, portion of land or right in land to a claimant who is entitled to restitution of a right in land in terms of section 2; or

(ii) providing alternative relief as contemplated in section 6(2)(b); and

(b) in respect of which no such claim has been lodged but the acquisition of which is directly related to or affected by such claim, and which will promote the achievement of the purpose contemplated in paragraph (a)."

they assist in the finalisation of old claims.[53] The Land Claims Court in *Amaqamu* noted:

> "This leaves the question whether new claimants should be ignored in their entirety in the adjudication of old claims. The parties were ad idem that new claimants who intend to advance claims that, if they could be dealt with by this court, would compete with or overlap land claimed under old claims presently being adjudicated by this court, do have an interest in the outcome of such litigation. The interests may be tenuous and the potential assertion thereof unclear, but as long as the lodging of the new claims is not invalidated, its existence cannot be denied. Courts must take cognisance of those whose interests may be affected by its judgments. In the light of the fact that this court is unable to consider the validity or otherwise of the new claims, the potential participation of new claimants in existing proceedings relating to old claims must of necessity be restricted to the question whether the old claim can be validly contested by a new claimant. In practice this court will therefore only be able to admit new claimants to participate in the proceedings before it who contest the old claimants' right to restitution of the land that is the subject matter of the old claim. New claimants will only be allowed to challenge the right of the old claimants to restitution of all or part of the land concerned. Essentially such claimant will therefore fulfil the role of an amicus curiae to assist the court in determining the question whether the old claimant has established a case or not.
>
> Should the new claimant recognise the right to restitution of the old claimant while intending to advance a claim over the same land by the enforcement of the new claim, such claimant's interest may be too tenuous to admit his or her participation in the proceedings."[54]

This approach, in the circumstances, seems correct.

[52] Parliament does not contend much in response to the counter-application, save to reiterate that the question of prioritising old claims or interdicted claims should be left to Parliament. The Communities oppose the counter-application. First, they

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[53] *In Re Amaqamu Community Claim (Land Access Movement South Africa and Others as Amici Curiae)* 2017 (3) SA 409 (LCC) (*Amaqamu*) at para 54.

[54] Id at paras 56-7.

contend that the relief encroaches on the separation of powers, in that the Court will be legislating on the prioritisation of old claims or interdicted claims. Second, the Communities contend that the relief proposed by the LAMOSA respondents will severely prejudice them, given that the old claims will not be finalised for approximately 43 years.[55] The Communities will only have an opportunity to submit new claims when a new Amendment Act is enacted.

[53] The Communities also propose alternative relief in the event that the Court dismisses the application and the counter-application and Parliament does not enact a new Amendment Act by 29 March 2019. In brief, the Communities ask that this Court lift the interdict and allow the Commissioner to process the interdicted claims concurrently with the old claims. In the event of a conflict between old claims and interdicted claims, the relevant Regional Claims Commissioner must refer the claim subject to the conflict to the Land Claims Court for it to make a just and equitable decision, as required by sections 33 and 35 of the Restitution Act, on a case-by-case basis.

Assessment

[54] With this in mind, the question to be asked is would it be just and equitable for this Court to grant the order sought that has the effect of excluding Parliament on the processing of new claims? Would it not be more appropriate to defer to Parliament's powers to enact legislation determining otherwise?

[55] In my view, the main relief sought by the LAMOSA respondents is overly broad and cannot be granted for two reasons. First, it goes against the purpose and ambit of paragraph 7 of the Order. The purpose of paragraph 7 was to protect the interdicted claims, in light of the declaration of invalidity of the Act in terms of which they were made, while Parliament enacted a new Amendment Act. This would provide a procedure for the processing of the interdicted claims and the prioritisation

[55] See above n 47 for the pronouncement by the High Level Panel.

of claims. The interdict against the Commission allowed Parliament time to enact a new Amendment Act and granted the Commission an opportunity to make strides in processing the old claims. It is presently unclear when Parliament will enact a new Amendment Act and, for this reason, it would be unfair to perpetuate the interdict against processing the interdicted claims until all old claims have been referred to and finalised by the Land Claims Court. Although Parliament always retains the right to legislate otherwise, I am of the view that this right must be explicit in any remedy that this Court provides.

[56] The second is that the main relief sought by the LAMOSA respondents would require this Court to dabble in the work of legislating, to an extent that would be beyond the ambit of paragraph 7 of the Order and this Court's powers, to determine the final procedure of processing old and interdicted claims. Paragraph 7 limits that exercise to the procedure regarding the interdicted claims. The LAMOSA respondents want this Court to make a final order to the effect that the interdicted claims must wait until the old claims are processed. That process may take a long time, which could span into a number of years. Furthermore, the interdicted claimants cannot be awarded land which is subject to an old claim. The LAMOSA respondents seek that this position be made final and not subject to further legislative amendment.

[57] This Court has held that its powers under section 172(1)(b) are restrained to the extent that they do not allow this Court to traverse into the terrain of the other arms of government.[56] Thus the broad extent of the powers under section 172(1)(b) must be balanced with the separation of powers principle. A just and equitable order under paragraph 7 of the Order must not enter into the realm of legislating. The order, if granted, will remain intact and will not be changed once Parliament enacts a new Amendment Act. In *ITAC*, this Court said:

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[56] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at para 45.

> "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."[57]

[58] In the result, the main relief sought, which does not make provision for any legislative amendment, cannot be granted. However, the alternative relief proposed by the LAMOSA respondents does have merit.[58] It solves the problems outlined above. It also creates a default position for regulating the old claims and interdicted claims and allows the Commission to consider the interdicted claims, albeit to a limited capacity. This would limit the prejudice outlined by the Communities, as the processing of claims would, in theory, be faster. If the remedy provides for the prioritisation of claims, this provides a way forward for the processing of claims to go faster than against leaving the interdicted claims frozen. It also allows for the interdicted claims to be considered to the extent that it assists in the processing of old claims. Furthermore, the alternative relief proposed traverses a middle ground, in that the Court provides relief pursuant to paragraph 7 of the Order and determines the process regarding the prioritisation of claims, but does not do so without deferring to Parliament's legislative powers to determine otherwise in the future. It has the effect of being flexible and equitable, in that it allows Parliament to depart from this position by passing new legislation regarding the prioritisation.

[59] The alternative relief, while lifting the supervisory role of this Court, still makes provision for appropriate judicial oversight by the Land Claims Court, which is tasked with dealing with land claims. The Commissioner will be required to file

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[57] *International Trade Administration Commission v SCAW South Africa (Pty) Limited* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*) at para 95.

[58] See [50].

reports on a range of aspects, including both constraints and the solutions thereto, and the Land Claims Court will have the necessary expertise to assist where need be. This will ensure accountability by the Commissioner and the opportunity for the Commission to reflect on its progress in this arduous process.

[60] Accordingly, there is merit in granting the alternative relief. I would, however, add the caveat that Parliament may at any time enact legislation determining otherwise. Therefore, it is not necessary to consider the relief proposed by the Communities.

[61] There is one last aspect that must be considered.

Constitutionality of section 6(1)(g) of the repealed Amendment Act

[62] In *LAMOSA 1*, this Court held:

> "In the face of the prospective order of invalidity, a question arises as to when and how the preserved new claims that compete with old claims will be considered. The effect of the prospective nature of the declaration of invalidity is to keep alive the contentious section 6(1)(g) of the Restitution Act insofar as the disposal of the old and preserved new claims is concerned. In terms of this section the Commission must 'ensure that priority is given' to old claims. This raises all the problems that the applicants are complaining about and brings about uncertainty that may be prejudicial to claimants whose claims were lodged by 31 December 1998. Because the Amendment Act has been declared invalid in its entirety, I do not find it necessary to grapple with what exactly section 6(1)(g) means merely for purposes of how it should apply to old and preserved new claims. It seems to me that a just and equitable remedy is to interdict the settlement, and referral to the Land Claims Court, of all new claims, whether competing with the old or not. Our wide remedial power under section 172(1)(b) of the Constitution permits us to do so. Even though the new claims have been kept alive, the reality is that the Restitution Act under which they were lodged has been found to be invalid. The interdict is consonant with this reality. In the face of the declaration of invalidity, there cannot be much cause for complaint for keeping the new applications in abeyance. Also, the question how new claims

> should be dealt with whilst there are outstanding old claims is fraught with imponderables. It is best left to the legislature to resolve."[59] (Footnotes omitted.)

[63] The constitutionality of section 6(1)(g) was deliberately not decided in *LAMOSA 1*. The *effect* of this section was kept alive in order to keep the interdicted claims alive. However, section 6(1)(g) itself suffered the same fate as the rest of the repealed Amendment Act – it is constitutionally invalid. The same considerations that applied in *LAMOSA 1*, including in relation to section 6(1)(g), are still relevant in this application. Further, given that this Court has now determined the way forward in respect of the interdicted claims, it is not necessary to pronounce any further on this section. Parliament must deal with this aspect.

Costs

[64] The LAMOSA respondents were compelled to approach this Court as a result of the failure of Parliament to enact the required legislation within the prescribed time period and the Commission's failure to comply with its duty to lodge an application in accordance with paragraph 7 of the Order. They have achieved limited success and are thus entitled to their costs. It follows that Parliament must pay the first to sixth respondents' costs, including the costs of two counsel.

Conclusion

[65] The link between land and dignity and the realisation of other constitutional rights, as highlighted in *LAMOSA 1*, is indicative of the magnitude of the restitution process and what could be achieved. Any further delays in this process will hinder the realisation of constitutional rights. We cannot afford to jeopardise the practical and symbolic outcomes of land restitution. The land reform process, if administered appropriately and expeditiously – and with the guiding lights of our Constitution – can still have the potential to be a catalyst for structural change in our society.[60]

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[59] *LAMOSA 1* above n 5 at para 89.

[60] Hall "Land reform for what use? Land use, production and livelihoods" in Hall (ed) *Another Countryside* (Institute for Poverty, Land and Agrarian Studies, Cape Town 2009) at 23.

[66] The continued delay in the proper processing of land claims is having a debilitating effect on the land reform project. An expeditious land restitution process will not only increase the number of claims settled, but could also contribute to a wider, more striking consciousness that centres on the constitutional values of equality and dignity, and give rise to ideals of social justice, identity, the stimulation of economic activity, the promotion of gender equality and a contribution towards the development of rural livelihoods.[61] This judgment aims to give guidance towards the realisation of those values and ideals.

Order

[67] The following order is made:

1. The application by the applicants for an extension is dismissed.
2. The counter-application by the first to sixth respondents is upheld to the following extent, subject to the Parliament of the Republic of South Africa legislating otherwise:
   (a) The Commission on Restitution of Land Rights (Commission) is prohibited from processing in any way any claims lodged in terms of section 10 of the Restitution of Land Rights Act 22 of 1994 (Restitution Act) between 1 July 2014 and 28 July 2016 (interdicted claims) until the earlier of the dates when—
      (i) it has settled or referred to the Land Claims Court all claims lodged on or before 31 December 1998 (old claims) by way of a referral of the claim in terms of section 14; or
      (ii) the Land Claims Court, upon application by any interested party, grants permission to the Commission to begin processing interdicted claims, whether in respect of the whole or part of the Republic of South Africa and whether

[61] Id at 28. See also Walker above n 3 at 34. See also Pienaar "Restitutionary Road: Reflecting on good governance and the role of the Land Claims Court" (2011) 3 *PELJ* 30 at 34.

in respect of part or all of the process for administering an interdicted claim.

(b) Until the date referred to in paragraph (a), no interdicted claim may be adjudicated upon or considered in any manner whatsoever by the Land Claims Court in any proceedings for the restitution of rights in land in respect of old claims, provided that interdicted claimants may be admitted as interested parties before the Land Claims Court solely to the extent that their participation may contribute to the establishment or rejection of the old claims or in respect of any other issue that the presiding judge may allow to be addressed in the interests of justice.

(c) Notwithstanding the provisions of section 11(5) and 11(5A) of the Restitution Act, no interdicted claimant shall be entitled to any relief having the effect of—

  (i) altering or varying—

    (a) the relief granted to any claimant in terms of section 35 of the Restitution Act in respect of a finalised old claim;

    (b) the terms of an agreement concluded in terms of section 42D of the Restitution Act; or

    (c) an award in terms of section 42E(1)(a) or (b) of the Restitution Act,

  unless the Land Claims Court in exceptional circumstances orders otherwise; and / or

  (ii) awarding to such interdicted claimant land or a right in land that is subject to a pending claim for restoration by an old claimant.

(d) The Chief Land Claims Commissioner must file a report with the Land Claims Court, to be dealt with as the Judge President of that Court may deem fit, at six-monthly intervals from the date of this order, setting out—

(i) the number of outstanding old claims in each of the regions on the basis of which the Commission's administration is structured;

(ii) the anticipated date of completion in each region of the processing of the old claims, including short-term targets for the number of old claims to be processed;

(iii) the nature of any constraints, whether budgetary or otherwise, faced by the Commission in meeting its anticipated completion date;

(iv) the solutions that have been implemented or are under consideration for addressing the constraints; and

(v) such further matters as the Land Claims Court may direct;

until all old claims have been processed.

(e) The Land Claims Court may make such order or orders as it deems fit to ensure the expeditious and prioritised processing of old claims.

3. The applicants are jointly and severally ordered to pay the costs of the first to sixth respondents, including the costs of two counsel.

For the Applicants:	T Motau SC and G Ngcangisa instructed by the State Attorney
For the First to Sixth Respondents:	A Dodson SC, M Bishop and M Tsele instructed by Henk Smith and Associates, Legal Resources Centre and Webber Wentzel
For the Seventh to Tenth Respondents:	M Dewrance SC and M Musandiwa instructed by Lawyers for Human Rights