IN THE LAND CLAIMS COURT OF SOUTH AFRICA
(HELD AT RANDBURG)

Case number: **LCC 156/2009**

Matter decided: 19 April 2012

In the matter between:

THE MHLANGANISWENI COMMUNITY Claimants

and

THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	First defendant
MALAMALA RANCH (PTY) LTD	Second defendant
EYREFIELD (PTY) LTD	Third defendant
CHARLESTON NORTH (PTY) LTD	Fourth defendant
CHARLESTON FARM (PTY) LTD	Fifth defendant
HELEN LYNNE WESTCOTT	Sixth defendant
CAROLINE CORMACK	Seventh defendant
RODRICK BEAUMONT	Eighth defendant
MICHAEL BEAUMONT	Ninth defendant

JUDGMENT

Gildenhuys J:

Introduction

[1] This is a claim for the restitution of rights in land under the Restitution of Land Rights Act No. 22 of 1994 ("the Act"). It relates to the land on which the MalaMala

Game Reserve, a world renowned eco-tourism destination, is situated. Several parties lodged claim forms under section 14 of the Act. By agreement between those parties and the Regional Land Claims Commissioner of Mpumalanga, the various claims were consolidated into a single claim in the name of the Mhlanganisweni community. The Mhlanganisweni community is not the name of an indigenous community. It is a name given to the group of claimants for purposes of the land restitution process.

[2] Although some of the claim forms include more properties, only the following properties are at issue in these proceedings:

Remaining extent of Mala Mala 359 KU, 1 277,4449 ha in extent;
Mala Mala 341 KU, 1 873,8523 ha in extent;
Remaining extent of Eyrefield 343 KU, 1 489,4185 ha in extent;
Portion 1 of Eyrefield 343 KU, 1 486,7247 ha in extent;
Portion 1 of Flockfield 361 KU, 1 376,9984 ha in extent;
Flockfield 414 KU, 1 665,4064 ha in extent;
Remaining extent of Charleston 378 KU, 1 801,0692 ha in extent;
Portion 1 of Charleston 378 KU, 1 801,0691 ha in extent;
Portion 7 of Toulon 383 KU, 412,1247 ha in extent;
("the MalaMala land")

[3] The MalaMala land constitutes a single land unit, in extent 13 184 hectares. It has an elongated shape and is sandwiched between the Sabi Sand Wildtuin to the west and the Kruger National Park to the east. The boundary with the Kruger National Park is unfenced.

[4] In an attempt to settle the land claim, the Regional Land Claims Commissioner made a written offer to the land owners during May 2008 to purchase the MalaMala land for an amount of R741 056 992. The offer was subject to the approval of the Minister of Land Affairs. The Minister refused to approve the offer, and it fell away.

The referral of the claim to the Court

[5] After settlement negotiations came to nought, the claim was referred to this Court by the Regional Land Claims Commissioner for Mpumalanga in terms of a *Notice of Referral* dated 11 August 2009. Together with the *Notice of Referral* the Regional Land Claims Commissioner delivered submissions under section 14(1) and (2) of the Act, recommending that the land be restored to the claimants.

[6] During December 2010, after the present proceedings had already commenced, the Regional Land Claims Commissioner delivered a *Supplementary Referral* in which he submitted that should the Court find that the State might be required to pay compensation to the land owners of more than R30 000,00 per hectare, it will not be feasible to restore the Mala Mala land. He recommended that in such event the claimants be awarded alternative redress in the form of monetary compensation.

[7] The parties who participated in the proceedings are:

the Mhlanganisweni community, represented by Mr Jansen;

the Minister of Rural Development and Land Reform ("the Minister" or "the State"), represented by Mr Dukada and Mr Mabena;

the land owners, represented by Mr Grobler and Mr Havenga; and

four individuals who hold use, occupation, viewing and traversing rights over portions of the MalaMala land ("the use right holders"), represented by Mr Dodson.

The responses

[8] The participating parties all delivered responses to the referral papers. Some of the responses were supplemented or substituted during the adjudication process.

[9]The claimants stated in their response that the "beneficiary community" in respect of the MalaMala land consistS of approximately 2000 people. They submitted that restitution of their land rights should take the form of restoration of the land. They intend to continue the present use of the land, if restored to them, as a commercial ecotourism destination, and envisaged to enter into an agreement with an "investor/operator" to run the business. The claimants anticipated getting a fixed rental for the land and a small share of turnover from the business.

[10] The Minister did not follow the original recommendation of the Regional Land Claims Commissioner that the land be restored. The last three paragraphs of the Minister's substituted response (paras 3.4, 3.5 and 3.6) read as follows ;

> "The Minister accepts that the claim lodged by the Mhlanganisweni Community for all the properties mentioned above is valid. He further agrees with both the Commissioner and the Land Owners that the claimants are entitled to restitution of the land rights in the property, for which they were dispossessed.
>
> "The value of the property as recommended by the valuers is exorbitant and the State will not afford to acquire those farms in the amount as recommended by the valuers and there is also a question whether the profitability [of the] businesses which have been conducted in those farms are or will be economically sustainable if restoration would have to take place.
>
> "The Minister is therefore submitting that it will not be feasible to restore the properties mentioned above to the claimants. The claimants should be provided with equitable redress in the form as defined in Section 1 of the Restitution Act."

[11] The land owners agreed in their response that that there is a need for restitution of the MalaMala land to the claimants, and furthermore agreed that restitution should take the form of restoration of the land. They submitted that if the land has to be expropriated in order to restore it to the claimants, the just and equitable compensation to which they would be entitled would not be less than R989 057 000, made up as follows:

13 184,1082 ha of land at R70 000,00 per hectare:	R922 887 574
plus improvements:	R 66 169 492
	Total: R989 057 066

The value of R66 169 492 for improvements was agreed between the land owners and the Land Claims Commission.

[12] In their argument at the conclusion of the hearing, however, the land owners submitted that if the MalaMala land has to be expropriated, the compensation payable to them would exceed R30 000.00 per hectare plus the agreed value of the improvements. Inasmuch as the feasibility of restoration hinges on what compensation the land owners are likely to receive, they contended that restoration of the MalaMala land to the claimants would not be feasible.

[13] The four use right holders delivered a response in which they submitted that the disadvantages to be suffered by them, by the land owners and by the general public through the loss of the world-renowned eco-tourism resource and the protected natural environment of the MalaMala land, are disproportionate to the advantages to be gained by the claimants from the restoration of their rights in the land. They therefore prayed that the claim for actual restoration be dismissed, and that the claimants be granted equitable redress in the form and amount which this Court deems appropriate.

The seperated issues

[14] By agreement between the parties we ordered a separation of issues in terms of Rule 57 of the Land Claims Court Rules. The issues to be decided separately, as formulated at a pre-trail conference held on 23 November 2010, are the following:

> "Whether restoration of the claimed land is feasible within the meaning of section 33(cA) of the Restitution of Land Rights Act, 1994, taking into account:
>
> (i) the ballpark amount of equitable compensatrion to which the landowners might be entitled upon expropriation of the claimed land;
> (ii) the amount of any additional equitable relief (over and above the restoration of the land) which might be awarded to the claimants;

(iii) whether the State can reasonably be expected to pay the aforegoing sums, bearing in mind the circumstances of the dispossession and the state of the claimed land at the time of dispossession;

(iv) whether the claimant community will be in a position to manage the claimed land in a sustainable manner, as to maintain its present ecological and conservation status, in the event of the claimed land being restored to it;

(v) the size and membership of the claimant community;

(vi) the sustainability and benefits which can be derived by the claimant community from restoration; and

(vii) any other relevant factors."

[15] The Minister recorded at the pre-trail conference of 23 November 2010 that the State will oppose restitution by way of restoration of the MalaMala land, unless the likely compensation to be awarded to the landowners upon expropriation of the land would not exceed R30 000,00 per hectare, and the community satisfies the Commission or the Court that, in the event of the land being restored, it would be in a position to utilise the land sustainably.

[16] The standing of the claimants (who grouped together under the name Mhlanganisweni Community for purposes of the restitution process) was not put in issue by any of the parties, nor was the validity of their restitution claim. We will therefore assume, without deciding, that the claim is valid and that the claimants are entitled to prosecute it.

The requirement of feasibility

[17] Restitution of rights in land under the Act can be by actual restoration of the land, or by equitable redress. Equitable redress can be the granting of a right in alternative state-owned land, or the payment of compensation.The principal issue to be decided in these proceedings is whether actual restoration of the MalaMala land would be feasible within the meaning of Sec 33(cA) of the Act. Before setting forth the facts and factors which will inform our decision, I will give a short outline of the feasibility requirement.

[18] Previously section 15 of the Act required the Minister of Land Affairs to issue a certificate of feasibility if he was satisfied that the restoration of a right in land in a particular instance would be feasible. Section 15 was repealed by the Land Restitution and Reform Laws Amendment Act No 63 of 1997 because it was perceived to hamper the restitution process. The Court was given the task to decide issues of feasibility, and to that end some new factors were added by the Amendment Act to the list of factors which the Court must consider under section 33 of the Act. The following factors are relevant in the case before us:

> "(cA) if restoration of a right in land is claimed, the feasibility of such restoration
> (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
> (eB) the history if the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land."

In terms of section 33(f) the Court must also consider any other factor which might be relevant and consistent with the spirit and objects of the Constitution.

[19] Dodson J (as he then was) considered the feasibility of restoration in the case of *In re Kranspoort Community* 2000 (2) SA 124 (LCC) in paras [87] to [101] at 170H-177B. He referred in par [90] of his judgment to the definition of "feasibility" in the *New Shorter Oxford English Dictionary as "(t)he quality or state of being feasible", and "feasible" as "(p)ractical, possible; manageable, convenient, serviceable ...".*

[20] According to the *Kranspoort* judgment [par 92], the Court should enquire whether restoration of the land to the claimants is possible and practical, having regard to the following factors:

> "(1) the nature of the land and the surrounding environment at the time of the dispossession;
> (2) the nature of the claimant's use at the time of the dispossession;
> (3) the changes which have taken place on the land itself and in the surrounding area since the dispossession;
> (4) any physical or inherent defects in the land;
> (5) official land use planning measures relating to the area;
> (6) the general nature of the claimant's intended use of the land concerned."

[21] The factors listed in the *Kranspoort* judgment is not a *numerus clausus*. Further factors were considered in subsequent Court decisions. For instance, in *Haakdoornbult Boerdery CC and Others v Mphela and Others* 2007 (5) SA 596 (SCA), the Supreme Court of Appeal considered whether restoration would result in substantial over-compensation of the claimants.

[22] The issue of feasibility was again considered by Mia AJ in the case of *Baphiring Community v Uys and Others* 2010 (3) SA 130 (LCC). She took into account the costs which the State would have to incur to acquire the land in order to restore it to the claimants, the State's resources, the disruption of the lives and economic activities of the present owners of the land, the ability of the claimants to use the land productively (including the financial resources available to the claimants) and the public interest. Having regard to all these considerations, she then concluded that it would not be feasible to restore the land to the claimants.

[23] Lastly, I need to refer to the case of *Nkomazi Municipality v Ngomane of Lugedlane Community and Others* [2010] 3 All SA 563 (LCC). The case was decided in the context of an application in terms of section 34 of the Act (for an anticipatory order ruling out restoration). The principles applied in that case for determining whether restoration is feasible or not, are also relevant to the case before us. The claimants in the *Nkomazi* case were dispossessed of rural land which has since been built up and is presently urban land. The Court held in paras [27] and [30] of its judgment (at 570b-h) that if the claimed land had to be expropriated at huge and prohibitive financial cost to the State and restored to the claimants who were dispossessed of rural land, the claimants would be substantially overcompensated at public expense.The fact that the claimants intend to use the land, if restored, for the same purpose as its present owners does not counter the overcompensation.

[24] The requirement of feasibility was examined by Prof Jeannie van Wyk in an article "*'Feasibility of restoration' as a factor in land restitution claims*" (2010) 25 SAPL 590. Having concluded that both the *Kranspoort* and the *Baphiring* decisions are cardinal decisions on the feasibility issue, she concluded (at 601):

"What will be more important is whether either or both will set the precedent for many land restitution claims on highly capitalised commercial farms, forestry plantations and game lodges still awaiting court decision. It is especially the current use and production of the land that will have to be taken into account in future when it must be decided whether restoration is feasible. Often development can so radically have transformed the land and increased its value that what will be given back will be too far removed from that which was taken. Ideally the courts will have to take all the factors in both decisions into account to provide a balanced, objective view on whether restoration is feasible or not, without losing sight of the promise of restorative justice that should underpin land restitution."

The witnesses

[25] The case ran over a long period, mainly because the claimants' legal advisors needed time to get their funding in order, to consult with a large group of claimants, to find and negotiate with an operator to manage the eco-tourism business if the Mala Mala land should be restored, and generally to put their case together. There was an inspection *in loco* on 22 November 2010. Oral evidence was taken on 28 March, 31 October, 1 November, 3 November, 4 November, 7 November and 11 November 2011. Argument was heard on 5, 6 and 7 December 2011. A large number of documents, many of them official records, were introduced into evidence. In order to save time, we allowed witnesses to testify out of sequence.

[26] The claimants called three expert witnesses: Dr Adrian Saville, a financial investment officer, Prof PJ Mohr, an economist, Mr Perri Msimane, an educater and chairperson of the Mhlanganisweni Land Claims Committee, Mr Derek Griffiths, a valuer; and five community witnesses: Mr N P Mtileni, Ms T S Mathebula, Ms Eliza Mkhondo, Mr M J Mkase and Mr P (Spook) Sithole. The Minister called Mr George Mathedimosa, an official employed by the Land Claims Commission and Mr J J Steyn, a valuer. The land owners called Mr D N Evans, its chief operation officer, Prof F C de Beer, an historian, Dr M J S Peel, an ecologist and Mr Benau Viljoen, a valuer. The four use right holders called no witnesses, but did present argument.

[27] I do not intend to summarise the evidence of each of the witnesses. Much of their testimony is common cause, or cannot be controverted. Some of it is of little or no

relevance. I will, however, deal with the evidence of the community witnesses called by the claimants in some detail because the relevance and the accuracy thereof were vigorously contested by the defendants.

[28] Conflicting testimony was given on the history of the MalaMala land and the claimants' eviction from the land. On the one hand there is the evidence of the community witness called by the claimants. On the other hand there is the evidence of Prof de Beer and Mr Evans, called by the land owners. As readily conceded by Mr Jansen, the community witnesses were unsatisfactory in a number of ways. Their evidence does establish, however, that groups of black people had been living in the area of the present Sabie Sand Wildtuin, where they grazed their cattle and tilled the soil, and that they were removed from the area. Many of them resettled on nearby trust farms. There is no unanimity on when and under what circumstances they originally settled in the area, exactly where the various groups lived, when and by whom they were dispossessed and the manner of their dispossession.

[29] The claimants' first witness, Mr N P Mtileni, testified that his family was removed from the farm Toulon and resettled at Lillydale, which is in the trust areas. Although the witness was ambivalent on when that happened, it is evident that it must have been before the Rattray family acquired any portion of the MalaMala land. Only a small portion of Toulon is part of the MalaMala land. It is doubtful whether the family lived on that portion. Mr Mtileni's evidence is not of much assistance in this matter.

[30] The claimant's next witness, Ms T S Mathebula, testified that she and her parents lived on the farm Charleston. There were also other Shangaan families living on the same farm. She did not make a good impression. Her memory is very poor. She does not know anuthing about her people's history, but insisted that they "originated" from Charleston. It is likely that her family were amongst a number of families who, according to Prof de Beer, settled illegally on Charleston and were evicted by the then owners during 1952/1953. All of that occurred before the Rattrays acquired Charleston.

[31] The third community witness , Ms Eliza Mkhondo, was born in 1945 on the farm Toulon. She testified that her family left Toulon and moved to Justicia, in the trust area. She was too young to remember any details of their sojourn on Touton and the move to Justicia. The move must have been during the early 1950's. Her evidence is not pertinent to the issues before the Court.

[32] The next community witness was Mr MV Mkase. He was, according to his identity document, born in 1927. He testified that he was born "at a place called MalaMala" He said that his family was brutally chased away from MalaMala. The family then moved to Lilydale. Originally he said that he was not present when his family was chased away, since he was working in Springs at the time. Later he changed his evidence, and said that he was present. It became apparent from his evidence that he and his family did not live anywhere on the MalaMala land when they were chased away, but on one of the more westerly farms within the Sabie Sand Wildtuin. His evidence is of little or no assistance.

[33] The last community witness was Mr P Sithole, also known as "Spook" Sithole. He initially testified that he was born on MalaMala and grew up on MalaMala. His family made a living by ploughing and keeping cattle, and never rendered services to any white people. They were chased away from MalaMala by the then owner, Mr Mike Rattray. He insisted that MalaMala was originally owned by his forefathers. He identified himself with the Jongilanga tribe, but knew very little of its background. He said that his parents never talked about the history of their people.

[34] In stark contrast to his evidence in chief, Mr Sithole conveyed in cross-examination that he worked for Mr Campbell (a previous owner of MalaMala) and also for the Rattray family before he was chased away. Investigations by the land owners revealed that Mr Sithole was in fact employed as a cook on the neighbouring farm Londolozi for 25 years, until his retirement during the early 1990's. When confronted with this relevation, Mr Sithole said that after he was chased away from MalaMala he lived in the trust area of Huntington for several years, and thereafter took up employment at Londolozi. That places the date of his eviction from MalaMala at the late 1950's, when many black families were moved from the Sabie Sand Wildtuin to the trust areas.

[35] Mr Sithole furthermore alleged that Mr Loring Rattray (Mike Rattray's father) had already passed away when Mr Mike Rattray chased him away. It is common cause that Mr Loring Rattray only passed away in 1975. At that time Mr Sithole worked at Londolozi. In a declaration made by Mr Sithole and filed by Ms Gilfillan (the claimants' attorney, who has since passed away), he stated that he was dispossessed during the late 1950's. After the Court adjourned on 11 November 2011, an affidavit by Mr Sithole was found in the Regional Land Claims Commissioner's files in which he placed the date of his dispossession in 1957. That was long before the Rattrays obtained any portion of the MalaMala land.

[36] I find Mr Sithole to be an unreliable, if not an untruthful witness. I cannot accept his evidence. In point of fact, Mr Sithole's testimony as a whole puts me in considerable doubt whether he ever lived on any portion of the MalaMala land.

[37] Prof de Beer's account of the history of the Sabie Sand area and its inhabitants over time, supplemented by the evidence of Mr Evans on the role of the Rattrays, was well researched and lucidly presented. It is supported by public records and other documentation introduced as exhibits. Prof de Beer's evidence was not seriously challenged under cross-examination. In setting forth the history of the MalaMala land, I will rely mainly on his evidence, supported by the evidence of Mr Evans insofar as it is uncontraverted, and the pertinent documents before the Court.

The history of the MalaMala area

[38] Deeds Office records show that the farms making up the MalaMala land were first granted to white owners in private ownership during 1869 and 1870. According to Prof. de Beer, the area was at that time occupied by Southern Sotho tribes. It was previously occupied by San people.

[39] The claimants all belong to Shangaan speaking groups who fled from the former Portuguese East Africa (now Mozambique) and settled in the former Transvaal between

1896 and 1906. Their forebears were comparative latecomers to the area. They arrived after it had already been cut up into farms and granted to private white owners.

[40] The Sabi Reserve was proclaimed by the *Zuid-Afrikaansche Republiek* in 1898. It included the southern portion of the present Kruger National Park and also the farms in the present Sabi Sand Wildtuin (including the MalaMala land). The Sabi Reserve was re-proclaimed after the Anglo-Boer war in 1902. The first warden, Stephenson Hamilton, reported in historical writings that the black population in the Reserve was sparse, consisting of small groups, mostly nomadic. In May 1905 all black persons living within the Sabi Reserve became subject to the payment of so-called squatters' rent of £1 per year.

[41] By the early 1920's, the owners of private land within the Sabie Reserve wanted their land to be free from government control. The Sabie Sand farms (including the MalaMala land) were therefore excluded from the future Kruger National Park. Most of them were at that time used for cattle farming. During 1938/1939 farming with cattle came to an abrupt end after an outbreak of foot and mouth disease, which caused all cattle to be destroyed. Some years later, in 1949, the Sabi Sand Wildtuin was formally proclaimed. It included the MalaMala land.

[42] There is evidence that after proclamation, indigenous people have lived on land which is now part of the Sabi Sand Wildtuin, including parts of the MalaMala land. Their numbers were not large. They were mostly (if not exclusively) labour tenants or rent-paying "squatters". As time went by, some of them moved voluntarily to the surrounding trust areas. During 1957/1958 all remaining labour tenants and rent-paying "squatters" were moved from the Sabi Sand Wildtuin. In 1961 the Sabi Sand Wildtuin was completely fenced, preventing free access from the trust areas

The MalaMala land

[43] The first of the MalaMala properties were transferred to the current land owners in 1964, and the last in 1982. Mr Loring Rattray originally ran the land-owning companies

and the eco-tourism business. Mr Mike Rattray took over the management after his father passed away in 1975. His stepson, Mr Evans, is the present chief operation officer. The only persons ever requested by the MalaMala management to leave the land were employees whose employment agreements were terminated. Any labour tenants or "squatters" who previously exercised rights in land had already left by the time the Rattrays arrived.

[44] As stated above, the MalaMala land is located on nine properties. To its east, it shares a common (unfenced) boundary with the Kruger National Park. To its west are properties forming part of the Sabi Sand Wildtuin. The MalaMala land is intersected by the perennial Sand River. Approximately 5% of the MalaMala land is situated west of the river, and the remaining 95% east of the river.

[45] The MalaMala Game Reserve has been established on the MalaMala land. The MalaMala Game Reserve has been established on the land. It contains two commercial and two private camps. The four camps and accompanying infrastructure are located to the west of the river, away from the core wildlife viewing areas. This eco-tourism philosophy, separating human development from the core wildlife areas, is very unusual in South Africa and serves to enhance both the wildlife viewing and the overall safari experience. The land owners claim that the Reserve presents the best big five game viewing on the African continent.

[46] The MalaMala Game Reserve is world renowned. It has been at the forefront of commercial eco-tourism in South Africa from as far back as 1962. The facilities and improvements at the Game Reserve are of world-class standard. More than 95% of its guests are from outside South Africa. It has, over time, won many awards. Since 2005, it has been on the **Conde Nast Traveler** Gold List. In 2010, it received an award from **World Travel** as South Africa's leading safari lodge. It was rated by **Travel and Leisure** in 2011 as the 19th best hotel in the world, in 2010 as the 49th best hotel in the world and in 2009 as the 77th best hotel in the world.

Just and equitable compensation for the expropriation of the MalaMala land

[47] One of the most important factors to be considered when deciding whether restitution by way of restoration of the MalaMala land would be feasible, is the likely amount of compensation which would be payable to the land owners if the land has to be acquired or expropriated. Coupled therewith is the question whether the State can fairly be required the State to pay such amount.

[48] The amount of compensation must conform to sec 25(3) of the Constitution, which requires it to be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -

> "(a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation."

[49] It will not be necessary or appropriate for us to determine the exact amount of compensation to which the land owners might ultimately become entitled if their land should be expropriated. We only need to arrive at a ball-park figure which we can take into account when considering whether restoration of the land would be feasible. The final award of compensation will be made by the Court hearing the land owners' compensation claim. The finding of this Court on a possible amount of compensation can obviously not bind the Court which will in time decide the compensation claim.

[50] Compensation, to be just and equitable, must recompense. The word "compensation", as stated by Southwood (*The Compulsory Acquisition of Rights, 25)* "has a strong connotation of equality between what is given and what was lost." Harms ADP held in *Haakdoornbult Boerdery CC and Others v Mphela and Others* 2007 (5) SA 596 (SCA), par [48], at 610I-611A:

> "The purpose of giving fair compensation is to put the dispossessed, insofar as money can do it, in the same position as if the land had not been taken. Fair compensation is not always the same as the market value of the property taken; it is but one of the items which must be taken into account when determining what would be fair compensation."

[51] The purpose of compensation is to place in the hands of the expropriated owner the full money equivalent of the expropriated property. See the Australian High Court decision of of *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, where it was held (at 571):

> *"Compensation prima facie means recompense for loss, and where an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him."*

In the British decision of *Birmingham City Corporation v West Midland Baptist (Trust) Association (Incorporated),* [1970] AC 874, Lord Morris of Borth-Y-Gest said (at 904):

> "The word 'compensation' would be a mockery if what was paid was something that did not compensate."

The above *dictum* was quoted with approval by Le Grange J in *Sandton Town Council v Erf 89 Sandown Extention 2 (Pty) Ltd* 1986 (4) SA 576 (W) at 579I.

[52] An important circumstance to take into account when deciding just and equitable compensation is the market value of the property. In *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC), par [37] at 316 A-F, the Constitutional Court (*per* Mokgoro J) said the following on the role of market value in the determination of compensation under section 25(3) of the Constitution:

> Section 25(3) indeed does not give market value a central role. Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces. The approach of beginning with the consideration of market value (or financial loss for that matter) and thereafter deciding whether the amounts are just and equitable is not novel. It was adopted by Gildenhuys J in *Ex parte Former Highland Residents: In re Ash and Others v*

Department of Land Affairs [infra]. The Court in that matter did not deal with the interpretation and application of s 12(1) of the [Expropriation] Act but rather with s 2 of the Restitution of Land Rights Act in the context of monetary compensation for dispossession of land. Nevertheless, the Judge pointed out that the market value of the expropriated property could become the starting point in the application of s 25(3) of the Constitution since it is one of the few factors in the section which is readily quantifiable. Thereafter, an amount may be added or subtracted as the relevant circumstances in s 25(3) may require. Actual loss may play a similar role depending on in the circumstances of the case,"

[53] The Constitutional Court chose to follow this approach in the *Du Toit case* because it was the most practical one, but emphasised that it might not be suitable in all cases. It was previously followed by the Supreme Court of Appeal in *Abrams v Allie NO and Others,* 2004 (4) SA 534 at 543H-J and by the Land Claims Court in *Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 LCC par [35] at 40 e-f; *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC) par [23] at 465 a-c and *Mphela & Others v Engelbrecht & Others* [2005] 2 All SA 135 (LCC) at 153 f-i. I will do the same in this matter and begin my evaluation by considering the market value of the MalaMala land. Thereafter I will consider the other relevant circumstances.

The market value of the land

[54] The state originally relied on the valuation of Mr Steyn for its conclusion that the land is worth R30 000,00 per hectare, plus the agreed contributary value of the improvements. His valuation date was 11 July 2007. In his original report, Steyn only valued two portions of Flockfield as at 11 July 2007. He erred in respect of the size of the portions. He subsequently prepared an amplified report and thereafter an updated report. He added 13 further sales to his updated report, all of which occurred after 11 July 2007. Yet the effective date of his date of valuation remained 11 July 2007. He concentrated on sales in ecological areas to the north of the Sabi Sand Wildtuin, which are not comparable to the Sabi Sand area and is less fecund. He did no research whatsoever on price escalations as from 11 July 2007. At the end of his cross-examination, he conceded that valuations of R65 000 and R66 000 per hectare for the MalaMala land (without improvements) could well be correct.

[55] Mr Dukada (for the Minister) very fairly conceded in his heads of argument that "the evidence of the Minister's valuer (Steyn) has no cogent value to the issues to be decided by the Court because it suffers from serious shortcomings". I will disregard his valuation.

[56] Mr Griffiths, who was called by the claimants, valued the MalaMala land at a low of R55 000,00 per hectare (R725 120 000) and a high of R65 000 per hectare (R856 960 000). During cross-examination, Griffiths conceded that the high could be R68 000 per hectare (R896 519 358). To these amounts must be added the agreed value of the improvements (R66 169 492). In his correlation of comparable sales he applied a price escalation rate of 2,5% per year from 2005 until the end of 2011, based on his "experience". The correctness of this rate is questionable. Experience cannot be used as an alternative to proper enquiry, particularly if the necessary data are available.

[57] Mr Viljoen, who was called by the land owners, put the ballpark value of the MalaMala land at a low of R72 000 per hectare (R949 225 790) and a high of R87 000 per hectare (R1 147 017), plus the agreed value of the improvements.
He reached his conclusions after an extensive analysis of comparable sales. It is not necessary for purposes of this judgment to assess the basis of his findings.

[58] Mr Jansen, for the claimants, made the following submissions in his heads of argument (paras 35-37):

> "If the Court finds that just and equitable compensation is market value, then restoration will not be feasible. The value of land in this case, even taking the lower end of the valuations, is simply too far away from the offer of the state to be achievable.
>
> At fifty thousand rand per hectare, the land value alone would be over six hundred and fifty million Rand. Add a further seventy million for improvements, and the minimum compensation payable will be in the order of seven hundred and twenty million rand. Add the realistic possibility that market value could end up being in the region of seventy thousand rand per hectare, then the compensation payable starts approaching a billion rand.

> Compensation at these levels is clearly not feasible for the state, and the issue of market value need not be debated futher as an absolute yardstick. It will then only be relevant to the extent that market value is one factor that must be kept in mind."

[59] I note that none of the parties raised the issue of actual financial loss which the land owners are likely to claim (over and above the market value of the land and improvements) in the event of an expropriation. It is, however, sufficient for purposes of this judgment to conclude, as I hereby do, that the market value of the MalaMala land plus the improvements thereon is not likely to be determined at less than R791 289 492 in the event of the MalaMala land being expropriated. This is the "low" land value presented by Mr Griffiths together with the agreed value of the improvements. As I understand Mr Jansen, he accepts that should the Court find that the likely amount of compensation for the land would be in the region of R725 million, restoration of the land would not be feasible. I will now proceed to consider whether the other circumstances listed in sec 25(3) of the Constitution are likely to require the compensation to be fixed at an amount which is sufficiently less than market value so that the State can, in the public interest, be expected to pay it.

The current use of the land

[60] The current use of the land is eco-tourism. Its use is relevant to the valuation of the land, and the valuers took it into account. It is also relevant to the question of whether restitution of the claimants' rights in land should be by way of restoration of the land, or through equitable relief. I will revert to this later.

The history of the acquisition and use of the land

[61] Mr Jansen submitted that the "historical investment" in the land, adapted for time, is the proper basis for compensation in the present instance. The land owners, so he argued, simply do not need so-called "full compensation", and can rightly be expected to make some compromise; the country and its businesses have made them

considerable amounts of money over the last fifty years, so much so that they have been able to build up a sizeable business empire. I cannot accept this argument. In my view, one should not distinguish between "rich" landowners and others in the determination of compensation.

[62] It was stated by the Mexican jurist Guillermo F. Margadant at a conference of the United Kingdom National Committee of Comparative Law held at Oxford from 2 to 4 August 1990 that awarding rich people less compensation -

> "...violates the principle of equality (rich people should not be considered second-rank citizens in expropriation matters). If public policy favors taxing wealth, this should be accomplished directly under the taxation power, and not through the backdoor, disguised under the cloak of expropriation power."
>
> ["Expropriation in Mexico", contained in Vol 1 of *Compensation for Expropriation: a Comparative Study,* G.M. Erasmus ed, Oxford 1990, *263 at 277]*

A corresponding position was taken by Adv Keith McCall at the same conference, with specific reference to land re-distribution in South Africa. He said:

> "The State's power to expropriate should not be unleashed as a disguised form of taxation. Taxes spread throughout a society are a proper means of financing public acquisitions. The burden should not be placed unjustly and disproportionately onto the shoulders of a few, regardless of the historical reasons which may have led to their acquisition of land."
>
> ["The Use of Expropriation to bring about a Re-Distribution of Land in South Africa", contained in vol II of *Compensation for Expropriation: a Comparative Study*, G.M. Erasmus ed, Oxford 1990, 245 at 274.]

[63] In support of Mr Jansen's submission that historical investment returns ought to form the basis for compensation in the present instance, the claimants' expert witness, Dr Saville, explained on what investment returns would have been available to a South African investor exposed to the major asset classes over the period 1970 to 2010. He concluded that the following yields could be expected ahead of consumer price inflation:

a pure equity investment, 10,3%
a pure bond investment, 2,3%
a pure cash investment, 0,9%
a pure listed real estate investment, 5,5%
a portfolio strategically allocated to the major investment classes, 8,4%.

He described these five asset classes as the "investible universe" for the typical South African investor.

[64] Dr Saville applied these returns to the amounts of what he was told the initial investments of the land owners were in assembling the MalaMala properties over the period 1964 to 1996. Based on dr Saville's calculations, Mr Jansen submitted that an offer by the State of R465 000,00 (for land and improvements) would constitute just and equitable compensation as envisaged in section 25(3) of the Constitution.

[65] The list of "investible asset classes" presented by Dr Saville does not include an asset class for non-residential property, particularly private game reserves used for eco-tourism. The indexes introduced by him were constructed for equity-matched investments, bond-matched investments, cash-matched investments, listed-real-estate-matched investments and an investment portfolio consisting of a mix of the foregoing. Dr Saville conceded under cross-examination that the indexes cannot be used to assess compensation for the expropriation of assets of a class not covered by the indexes. Prof Mohr agreed.

[66] Mr Grobler submitted that the amounts given to Dr Saville as the initial investments by the land owners are incorrect. Exhibits introduced by the land owners indicate an amount of R 69 071 888. Dr Saville used a much smaller figure. I need not decide what the correct amount is, because in my view it would be wrong to apply indexes for returns on investments in different asset classes to calculate compensation for the expropriation of the MalaMala land, irrespectice of what the correct amount of the initial investments might be. Such application would show a hypothetical return which investors in different asset classes would have received on their investments. It is

irrelevant for determining compensation for the MalaMala land. I refrain from commenting on whether, if the asset classes were the same, the historic yields could be utilized to assess just and equitable compensation.

[67] Some attempt has been made to rely on the consumer price index in order to arrive at the present value of the amounts invested by the land owners, . This approach is fundamentally flawed. Both Prof Mohr and Dr Saville testified that the consumer price index is not an investment index. It simply shows the buying power of the Rand, and the changes thereto over time. It is used in the investment domain to ascertain whether a particular investment has kept abreast of inflation.

[68] There has been a suggestion that land owners should be satisfied with a smaller amount of compensation to atone for the racial discrimination which caused the dispossession of the claimants. In this respect, the evidence before the Court shows that the land owners, their directors and members were not responsible for the dispossession of any of the claimants. The dispossessions on which the claimants are constrained to rely, occurred before the present owners acquired the MalaMala land. The only persons asked by the present owners to leave the land are erstwhile employees whose employment contracts have come to an end.

The extent of direct State investment and subsidy in the acquisition and use of the land

[69] There was no direct State investment and subsidy in the acquisition and beneficial capital improvement of the MalaMala land. This factor is therefore irrelevant in the present circumstances.

[70] Mr Jansen (on behalf of the claimants) suggested that the removal of the fence between the Kruger National Park and the MalaMala land is State action which increased the value of the land, and that the land owners should not benefit from such increase. The removal does not constitute "a direct State investment and subsidy in the acquisition and beneficial capital improvement of the MalaMala land". It can therefore

not be taken into account under sec 25(3)(d) of the Constitution. It might, nevertheless, be a relevant factor. I will revert to it later in my judgment.

The purpose of the expropriation

[71] The purpose of the expropriation (if ordered by the Court) will be to acquire the land for restoration to the claimants. It constitutes land reform. In this regard, section 25(8) of the Constitution must be considered. It reads:

> "No provision of this section [*sec* 25] may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)."

[72] It has been argued by legal writers that the intention of making the purpose of an expropriation a factor to be considered in the determination of just and equitable compensation, is to lessen the amount of compensation by relying on sec 25(8). Theunis Roux suggested:

> "It is possible that the amount of compensation required for expropriation could be beyond the state's resources and hence constitute a fundamental impediment to land, water and related reform. In these circumstances, ss (8) could reduce the protection afforded by ss (2) and (3) regarding the amount of compensation to be paid.
>
> ["Property" in *Fundamental Rights in the Constitution* (Davis *et al* ed) 255].

A J van der Walt, on the other hand, stated:

> "..... since the purpose of the expropriation (eg land reform) is already taken into account in justifying the expropriation, it should not be enough to override other factors in determining the amount of compensation."
> [*Constitutional Property Law*, 3rd ed 507]

[73] I see no logical reason why a land owner whose property is expropriated for purposes of land reform, should receive less compensation than a land owner whose property is expropriated for a more mundane purpose, such as a storage dam, a school or a hospital. As stated by A.J. van der Walt [*The Constitutional Property Clause,* 1997, at 162]:

> "..... it is accepted worldwide that land reform is a legitimate part of the state's duties to be undertaken in the public interest ...".

Land reform in the public interest does not rank superior to any other legitimate purpose for which property may be expropriated, and the determination of compensation in cases of land reform must not be different. The fact that the MalaMala land may be expropriated for restoration purposes cannot by itself warrant a smaller amount of compensation than would have been payable to the land owners if the land had been expropriated for any other purpose.

Other relevant factors: the removal of the fence

[74] The removal of the fence between the Kruger National Park and the MalaMala land in 1993 might be a relevant factor to be taken into account in the determination of compensation. The list of factors in section 25(3) is not a closed list. Other factors, if relevant, may also be considered.

[75] The argument around the removal of the fence seems to be that the land owners have benefited from its removal, and consequently should not be compensated for any increase in the value of the land caused by the removal. The reason for taking down the fence in 1993 was an economic one. The fence had fallen into disrepair, and it would have cost about R5 million to rebuild it. The National Parks Board elected not to do so, considering that the land immediately to the west of the Kruger National Park had by that time been converted to nature conservation and eco-tourism. I am not convinced that every fortuity affecting land value, either negatively or positively, should be disregarded in determining compensation for the land. The removal of the fence had nothing to do with land reform, for which purpose the MalaMala land is now sought.

[76] It has furthermore not been established to what extent (if at all) the removal of the fence affected the value of the MalaMala land.The taking-down of the fence had the advantage that previous game migration routes could be restored. From the point of view of owners of private game reserves carrying plenty of game, that advantage was curtailed by the prospect of losing game through migration. This applies particularly to owners who have brought in game at high prices. Even today some game reserves, such as Kapama, have refrained from removing their fences for fear of losing game.

Conclusion: the amount of compensation

[77] In my view, neither the factors listed under section 25 (3) of the Constitution nor any other relevant factor require compensation to be determined at significantly less than market value, should the MalaMala land be expropriated. I must therefore conclude that it is unlikely that any Court would determine the compensation at less than R725 120 000 (being R55 000 per hectare) plus the contributary value of improvements (R66 169 492): in total, R791 289 492. This amount might well, when it is finally determined in expropriation proceedings, turn out to be much larger. It also does not include actual financial loss which the land owners will suffer as a result of the expropriation and is likely to claim. Such a claim was not quantified at the hearing before us.

The feasibility of restoration

[78] Mr Jansen, on behalf of the claimants, conceded that if compensation is likely to be determined at the above figures, restoration of the land would not be feasible. This conclusion is echoed by Mr Dukada, on behalf of the Minister. There are, however, other considerations which might have a bearing on the feasibility of restoration. I will consider them hereunder

Overcompensation

[79] The MalaMala land, having been restored to its pristine wilderness condition east of the Sand river and with the eco-tourism business conducted thereon, is entirely different

from what it was when the claimants were dispossessed. The claimants lost living space, grazing and cropping land. To restore one of the foremost eco-tourism destinations in the country to them, to be acquired at huge and prohibitive financial cost to the State, would amount to substantial overcompensation at public expense. See the judgment of Meer J in *Nkomazi Municipality v Ngomane of Lugedlane Community and Others* [2010] 3 All SA 563 (LCC), paras [27] to [30] at 570b-571b.

[80] The factors listed in sec 33 of the Act militate against over-compensation. Harms ADP said in *Haakdoornbult Boerdery CC and Others v Mphela and Others* 2007 (5) SA 596 (SCA) in par [58] at 613H:

> Neither counsel for the claimants nor for the Minister argued that the Act permits a court to overcompensate through the exercise of a discretion and they were not able to identify any factor which justifies overcompensation."

On the issue of overcompensation, the learned judge said in par [60] at 614C-D:

> I do not wish to be understood as saying that there should be a mathematical calculation in rands and cents or that a measure of overcompensation is necessarily excluded by the Act. On the contrary I believe that a generous approach should be adopted and that a detailed calculation should be discouraged because it makes the restitution process expensive and is counterproductive, and it heightens emotions and leads to costly litigation which both claimants and the present-day owners can ill afford."

[81] In the present case, restoration of the entire MalaMala land to the claimants would be more than "a measure of over-compensation". If the State has in mind to restore more than what the claimants can rightfully claim under the Act, it would constitute land redistribution and not land restitution. The State must use its powers under other legislation to achieve that. See the *Haakdoornbult* judgment, *supra par [61] at 614E.*

The capacity of the claimants to manage the land if it is to be restored

[82] The claimants have indicated that they do not intend to settle on the land, but to continue its use as an eco-tourist destination, in the event of the land being restored to

them. The Court has therefore to be satisfied that the claimant community will be in a position to manage the land in a sustainable manner, so as to preserve its ecological and conservation status, and to run the eco-tourism business on the land. They recognise that they do not have the capacity to manage the land or the business themselves and that they would have to bring in a knowledgeable operator on a joint venture basis.

The Londolozi Co-operation agreement

[83] At the last stage of the hearing, on 5 December 2011, the claimants introduced a written *Co-operation Agreement* entered into between the Mhlanganisweni Community and the Londolozi Game Reserve Trust ("Londolozi"). Londolozi presently conducts an eco-tourism business on properties to the immediate west of the MalaMala land. In terms of par. 7.1 of the Co-operation agreement, the Mhlanganisweni Community, acting on behalf of a communal property association ("the Mhlanganisweni CPA") to be established under the Communal Property Associations Act,1996, must conclude a lease agreement with Londolozi, acting on behalf of a company ("LodgeCo") to be incorporated under the Companies Act, 2008. A draft lease agreement has been annexed to the Co-operation agreement.

[84] The lease will run for 25 years, with an option in favour of LodgeCo to renew it for a further 25 years. The rental consists of a fixed rental component and a variable rental component. The fixed component is R3 500 000,00 for the first year, R7 000 000,00 per year for the second and subsequent years, subject to an annual adjustment for inflation. The variable component is 5% of the accommodation turnover of the business.

[85] The parties to the Co-operation agreement envisaged that the total compensation payable to the land owners upon expropriation of the land could exceed the amount which the State is prepared to offer for the land (R461 520 000). The Co-operation agreement provides (in par 5.2) that LodgeCo shall be entitled, but not obliged, to assist the Mhlanganisweni Community to obtain funds to pay to the land owners the difference between the amount which the State is prepared to fund and the amount of the expropriation award. Such a top-up may present legal and practical difficulties. But be that

as it may, there is no certainty, not even a likelyhood, that the necessary funding for a top-up will be forthcoming. Should the funding take the form of loan finance, the claimants will find it difficult, if not impossible to service and repay the loan.

[86] According to the Co-operation agreement, the eco-tourism business will be run by LodgeCo. The Co-operation agreement provides that Londolozi shall at all times hold a controlling interest in Lodgeco. The Mhlanganisweni Community is obliged to enter into a service level agreement with LodgeCo for the management of Lodgeco and the business. The business must be conducted by LodgeCo in terms of a business plan to be presented to its bankers. LodgeCo must obtain letters of interest from its bankers for the financing of the business plan. The Co-operation agreement is silent on what happens if such letters of interest and/or bank funding cannot be obtained.The terms of the service level agreement and the business plan are not yet in place. Londolozi must furthermore provide LodgeCo with finance to refurbish the infrastructure on the land and to implement the business plan, but it has no obligation to provide any specific amount in this regard.

[87] The rights of the use right holders (the sixth to ninth defendants) are recognised in the lease agreement and must be respected. However, all costs incurred by Lodgeco for providing services to the use right holders in the exercising of their rights are to be for the account of the Mhlanganisweni CPA.

[88] I am not satisfied that the Co-operation agreement provides sufficient comfort that the conservation of the MalaMala land and the eco-tourism business thereon will continue if the land is restored to the claimants. The agreement is too vague and open-ended in many respects, as will appear from what I have stated above.

[89] The transaction with Londolozi will provide the claimants with an income which constitutes a very low yield on the capital which has to be expended by the State to acquire the land. Mr Grobler submitted the following calculation:

Income:		
Fixed rental	R7 000 000	
Variable rental (on the basis of MalaMala income)	R 3 048 372	
Gross rental		R10 048 372
Outgoings:		
VAT	R1 234 011	
Maintenance costs (25% of fixed rental before VAT)	R1 535 087	
Levies: Sabie Sand Wildtuin	R 509 513	
Use right holders	(?)	
Total outgoings		R 3 359 611
Net rental		R 6 688 761

[90] If I assume that the compensation payable by the State for the acquisition of the land will be just R791 289 492, the net annual rental comes to only 0,8% thereof. On the basis that the Mhlanganisweni Community has 2000 members, the share of each member in the annual rental will be R3 344 (before community management and distribution expenses), which comes to R279 per month per member. The State can hardly be expected to pay more than R790 million to achieve such a small income for each community member.

Conclusion: feasibility of restoring the land to the claimants

[91] It was recently said by Majiedt JA (albeit in a different context) in the case of *Mokala Beleggings (Pty) Ltd and Another v Minister of Rural Development and Land Reform and Others* (276/11) [2012] ZASCA 21, as yet unreported:

> "The restitution of land under the Restitution of Land Rights Act 22 of 1994, is not only a constitutional imperative but a highly emotive issue as well. Considerable circumspection, diligence and sensitivity are required on the part of all concerned, ..."

In considering whether the MalaMala land should be restored to the claimants, I will recognise restoration as the preferable form of restitution of rights in land. I will also recognise the umbilical cord which joins any particular community to its ancestral land.

See *Khosis Community, Lohatla, and Others v Minister of Defence and Others* 2004 (5) SA 494 (SCA), paras [30] and [31] at 505E-H.

[92] The primacy of restoration as a form of restitution was confirmed by the Constitutional Court in *Mphela and Others v Haakdoornbult Boerdery CC and Others* 2008 (4) SA 488 (CC) per Mpati AJ in paras [32] and [33], 501D-502A:

> "It seems to me, therefore, that where land which was the subject of a dispossession as a result of past discriminatory laws is claimed, and the claim is not barred by s 2(2) of the Act, the starting point is that the whole of the land should be restored, save where restoration is not possible due to compelling public interest considerations.
>
> .....
>
> "But that said, the dispossessed individual or community is not entitled, under s 25(7) of the Constitution, to restoration of the original property claimed as of right, either in whole or part. The claimant is entitled only 'to the extent provided by an Act of Parliament', which in this instance, is the Act. A court may, for example, in the exercise of its discretion, order the State to pay compensation to the claimant in lieu of the land claimed. The ultimate decision whether the whole or portion only, or whether indeed none of the land, should be restored will depend upon a consideration of the factors enumerated in s 33 of the Act. And as was pointed out in *Khosis Community [supra],* not every factor will be applicable in every claim."

[93] I have already, earlier in my judgment, come to the conclusion that the compensation which the State will have to pay in the event of expropriation, will be at least R791 289 492 in respect of the land and the improvements thereon. It does not include any amount for actual financial loss which the landowners are likely to claim. The eventual compensation could be in excess of one billion Rand. However, for purposes of this judgment, I will regard the amount of R791 289 492 as a ballpark figure of what the eventual compensation might be. Mr Jansen, when arguing the case before us, conceded that if the Court should find that the amount of compensation which the land owners is likely to be awarded, hinges on market value, restoration would not be feasible. It is not in the public interest to pay an amount of R791 million or more to restore the MalaMala land to some 2000 claimants. The amount is far too large. An award of the MalaMala land to the claimants would constitute an immense overcompensation of the claimants.

[94] When the claimants and/or their forebears were dispossessed, they were labour tenants, rent paying squatters or illegal inhabitants. Some of them may have grazed cattle or planted crops on the land. The land was sparsely populated. It was already given out to white owners when the claimants and/or their forebears first settled in the area. At the time the white owners used it for cattle farming or hunting. The umbilical cord which tied the claimants to the land must therefore be weaker than it would have been in the case of a community which has lived on land under indigenous title for generations. The MalaMala land has been entirely transformed from what it was at the time of the dispossessions. The claimants do not intend to return to the land, except as workers in the eco-tourism business. They realise that they do not have the capacity to care for the land and to run an eco-tourism business on their own, and that they would have to bring in an operator to do so.

[95] I am not persuaded that the Co-operation agreement concluded between Londolozi and the claimants provide sufficient certainty that if the land is restored to the claimants, it will continue to be a viable commercial eco-tourism destination. As I have indicated above, the agreement is far too open-ended. Essential issues have not been agreed. It is uncertain whether the requisite funding will be obtained. Lastly, but importantly, the income which the claimants could derive from the transaction is far too low, given the likely costs to the State to acquire the land for restoring it to the claimants.

[96] For the reasons set forth above, my conclusion on the separated issue is that restoration of the MalaMala land to the claimants will not be feasible

Costs

[97] The second to fifth defendants seek a cost order against the State. They do so, firstly, on the grounds of the following shortcomings in the Regional Land Claims Commissioner's investigation of the claim and in its conduct before and during the hearing:

- past failures to comply timeously or at all with orders and directions from the Court;

- inadequate research of the claim;

- alleged distortion of the facts by Mr Mathedimosa in his supplementary report;

- failure to make relevant evidence available, particularly an affidavit by Mr Sithole which only came to light after Mr Sithole was recalled for futher cross-examination;

- failure to properly consult with the claimant community on the various options available to it in choosing what form of restitution it will pursue. No proper minutes of meetings were kept. The files of the Regional Land Claims Commissioner contain very scant details of the consultation process.

[98] Lastly, the second to fifth defendants rely on the untenable position originally adopted by the State in accepting a valuation made by Mr Steyn during 2007 of only two portions of the MalaMala land, ignoring the other valuations which it has obtained for the rest of the MalaMala land. The other valuations were not only for almost double the amount per hectare, but were also in line with separate valuations obtained by the land owners. Mr Steyn was not even asked to update his valuation to reflect the value of the land as at the date of the hearing. His valuation was patently wrong and we had no option but to reject it. To its credit, the State did not persist in this untenable position. It was abandoned in its substituted response.

[99] In the past, it was not the practice of this Court to make costs orders in restitution matters unless there were special circumstances which warranted such orders. The reason for this practice was that litigation in restitution matters are "in the genre of social litigation". See *Department of Land Affairs v Witz; in re various portions of Grassy Park* 2006 (1) SA 86 (LCC) at 102A. The practice was modified after the Constitutional Court decision in *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC). It was held in that case per Sachs J (in par [56] of the judgment, at 256I-257A):

> ".....the general point of departure in a matter where the State is shown to have failed to fulfil its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the State should bear the costs of the litigants who have been successful against it, and

> ordinarily there should be no cost orders against any private litigants who have become involved." [My underlining]

[100] The principles adopted in the *Biowatch* case have been followed by this Court in the matter of *In re Kusile Land Claims Committee: Land Restitution Claim, Midlands North Research Group and Others* 2010 (5) SA 57 (LCC) and a number of subsequent cases. It was held in the *Kusile* matter that a claim for the restoration of rights in land is a claim against the State and that a landowner who opposes such a claim on his property, opposes a demand by the claimant that the State acquire or expropriate the property in order to award it to the claimant. Both the landowner and the claimant are

> ".....in litigation with the State, represented (in this case) by the RLCC. Where the position taken by the RLCC was shown to be untenable, costs should be awarded against the Commission. This approach is in line with the judgment in the *Biowatch* case ...." (Kusile, *supra,* par [35], at 70F-71A).

[101] In the case before us, the State was represented by the Minister. The position adopted by the Minister at the hearing was not, in my view, untenable. He did not seek a finding that the compensation which might be awarded to the claimants conform with the valuation by Mr Steyn. The valuation was used in settlement negotiations prior to the referral of the claim to the Court. After the referral, the Minister took the position that the value of the MalaMala land as recommended by "the valuers" is exorbitant and that the State cannot afford to acquire the land at such amount. I do not understand why the Minister called Mr Steyn to give evidence, since the Minister in his substituted response and also during argument at the end of the hearing, adopted the position that restoration of the MalaMala land is not feasible.

[102] The litigation before us centred on the role of market value in the determination of compensation, on the quantification of market value and on the feasibility of restoration. The Minister did not make common cause with the claimants on these issues. The land owners did not have to protect their interests against any position taken by the Minister during the trial, but against the contentions of the claimants. In the circumstances of this case, the *Biowatch* and *Kusile* decisions do not support a cost order against the State (as represented by the Minister).

[103] On the other hand, if the manner in which the Commission investigated and presented the restitution claim to the Court is grossly inadequate or flawed, that might constitute a reason for making a cost order against the State. It was held in the *Kusile* case (in par [38], at 72C-D):

> "The Commission, as an organ of State, bears an obligation to ensure that the work of this court is not impeded by inadequate investigation and that time is not unnecessarily spent on claims which, in the form in which they were referred to the court by the RLCC, can manifestly not succeed."

[104] In the case before us, although the investigations and presentation by the Commission leaves much to be desired, I cannot find any wilful distortions, deliberate omissions or gross dereliction of duty by the Regional Land Claims Commissioner or his staff. It will be unmerited to make a cost order against the State just because the work of the Commission was not up to standard. I might add that the substandard work did not significantly impede the adjudication of the claim. In these circumstances, the practice of not making a cost order should prevail.

[105] The sixth to ninth defendants do not seek any cost order. For the reasons set forth above, I will make no cost order. Any interlocutory cost order already made will remain in force.

Order

[106] The following order is hereby made:

1. It is declared that the restoration of the following properties to the Mhlanganisweni Community will not be feasible within the meaning of section 33(cA) of the Restitution of Land Rights Act, 1994:

   Remaining extent of Mala Mala 359 KU

Mala Mala 341 KU

Remaining extent of Eyrefield 343 KU

Portion 1 of Eyrefield 343 KU

Portion 1 of Flockfield 361 KU

Flockfield 414 KU

Remaining extent of Charleston 378 KU

Portion 1 of Charleston 378 KU

Portion 7 of Toulon 383 KU.

2. No order is made as to costs.

A Gildenhuys
Judge of the Land Claims Court

I agree

C E Loots
Acting Judge of the Land Claims Court

I agree

M Wiechers
Assessor

Appearances:

For the claimants

Mr C R Jansen

instructed by

Gilfillan Du Plessis Inc

For the first defendant

Mr N Dukada SC

with him

Mr M Mabena

instructed by

The Office of the State Attorney, Pretoria

For the second to fifth defendants

Mr G L Grobler SC

with him

Mr H S Havenga SC

instructed by

Larson Falconer Inc

For the sixth to the ninth defendants

Mr A Dodson SC

instructed by

Bowman Gilfillan