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**IN THE LAND COURT OF SOUTH AFRICA
HELD AT RANDBURG**

Case numbers: LCC 115/2008

LCC 026/2007

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

DATE 4 February 2025

SIGNATURE

In the matter between:

CINDI FAMILY

PLAINTIFF

Concerning R[...] 4[...], Standerton district municipality, Mpumalanga

and

**MINISTER OF RURAL DEVELOPMENT AND LAND
REFORM**

FIRST DEFENDANT

CASPARUS JANSE VAN RENSBURG

SECOND DEFENDANT

MARTHA MARIA GEYSER

THIRD DEFENDANT

**THE REGIONAL LAND CLAIMS COMMISSIONER:
MPUMALANGA**

PARTICIPATING PARTY

JUDGMENT ON RULE 30(6) APPLICATION BY LANDOWNERS

This judgement is delivered by upload to the digital data base of the court and by transmission email to the parties on 3 February 2025

SPILG, J

INTRODUCTION

1. The issue before the court is whether or not the claimant community, which is the Cindi family, had agreed to settle their land claim in respect of certain properties collectively described as the Farm Rondavel (*“the farm”*) owned by Mr van Rensburg and Ms Geyser. The landowners contend that the claimant agreed to accept equitable redress instead of restoration.
2. The matter comes to this court by way of a court order which, at the instance of the landowners, effectively compelled the Regional Land Claims Commissioner, Mpumalanga (*“RLCC”*) to refer the claim to this court. In consequence of the referral the claimant community became the plaintiff and the landowners were cited as the second and third defendants.
3. The landowners raised the issue of settlement by way of a Rule 30 (6) notice of application¹ in which the following relief was sought:
 - a. Declaring that the land claim lodged in respect of the Rondavel farm has been settled on the basis that the plaintiff has opted for restitution in the form of equitable redress and no longer claims restoration of any rights in respect of the farm;
 - b. The landowners are released from further participation in the referral action

¹ Rule 30(6) provides:

“Insofar as may be practical, a party must deliver prior notice of all information, admissions, directions and orders which he or she will seek at a conference.”

- c. Declaring that the farm is no longer subject to the restrictions in section 11(7) of the Restitution of Land Rights Act 22 of 1994
 - d. Directing the RLCC to withdraw the Government Gazette publication relating to the farm
 - e. In the event that the plaintiff and the Minister of Rural Development and Land Reform (who is the first defendant) are unable to agree on the amount of compensation or equitable redress payable to the plaintiff, then the latter shall be entitled to enroll the action for determination of the quantum of its claim and for appropriate orders for payment or the granting of other redress
 - f. The Minister and the RLCC pay the costs, including certain enumerated costs relating to the claim on the ordinary party and party scale
 - g. The plaintiff claimant, the Minister and the RLCC pay the cost of the application itself on the scale as between attorney and client
4. The application is opposed by the claimant. The State Attorney, on behalf of the two organs of state, being the Minister and the RLCC, did not file any papers but did attend the hearing

THE SUBMISSIONS

5. The landowners rely on a series of communications between them, the plaintiff and the State, which they contend amount to a settlement or compromise of the claim in terms of which the plaintiff agreed to accept equitable redress and not restitution in the form of the restoration of rights in land the effect of which thereby released the landowners' farm from the claim. The only issue arising out of the referral would therefore be the nature and quantum of the equitable redress- an issue solely between the plaintiff and the State.

6. The claimant relies on two submissions which it avers negates a settlement or compromise.

The first is that while there may have been discussions which indicated that the claimant was amenable to financial compensation from the State as opposed to restoration of the properties claimed, neither the State nor the plaintiff were *ad idem* that the matter would be settled in this fashion; More especially because no offer had been made by the State regarding financial compensation and it was certainly not clear that any such offer would be forthcoming. At best there may have been a promise to contract but nothing more.

The second is that, for there to be an agreement, the plaintiff would have to waive its right to restoration. This it argues would have required a clear and unequivocal intention on its part, which was absent.

BASIC PRINCIPLES

7. The following principles appear to be relevant in order to determine whether there was a binding agreement between the landowners and the plaintiff;
 - a. there must be an offer and unqualified acceptance of its terms (save where a counteroffer in turn is met with an unqualified acceptance)
 - b. the parties must be capable of concluding a binding agreement in respect of the subject matter.

In the present case, this requirement fell away. However the court considers that sight should not be lost of this critical consideration, which arises in cases where no agreement between the parties *inter se* can be given effect to because the subject matter is governed by legislation which the court must apply and which in its terms requires the concurrence of an organ of State.²

² See e.g. *Blou Bul Boorkontrakteurs v McLachlan* 1991 4 SA 283 (T) 284; LAWSA Contract at para 330

- c. In determining whether there is a binding agreement the reliance theory prevails in that *“whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”*³

In order to apply, the party relying on a contract must have been led to believe that consensus was actually achieved; not that the other party was still continuing with negotiations.

- d. In determining whether there is a binding agreement, the court can have regard to relevant background and surrounding circumstances ⁴

8. In regard to waiver, the following applies:

- a. the party relying on a waiver must demonstrate that the other party evinced a clear and unequivocal intention to waive the right, the existence of which it was fully aware it enjoyed. ⁵
- b. In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and another* 2009 (4) SA 529 (CC) at paragraph 81 Kroon AJ confirmed that waiver *“is first and foremost a matter of intention”*; the test is objective (ie an application of the reliance principle) , the alleged intention being judged by its outward manifestations from the perspective of the other party, as a reasonable person.⁶

³ *Smith v Hughes* (1870) 6 QB 597 607. The reliance theory was accepted in *Sonap Petroleum SA (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A)

⁴ See *KPMG Chartered Accountants v Securefin Ltd* 2009 4 SA 399 (SCA), per Harms DP at para 39 on the inclusion of *“surrounding circumstances”* and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 2 SA 494 (SCA) per Wallis JA at para 12 on the proper method of interpretation of contracts and the cases which have followed them

⁵ *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and another* 2009 (4) SA 529 (CC) at paragraph 81

⁶ See also *Road Accident Fund v Mothupi* 2000 4 SA 38 (SCA).

- c. The onus is strictly on the person asserting a waiver and a court takes cognisance of the fact that “*persons do not as a rule lightly abandon their rights. Waiver is a question of fact and is difficult to establish.*”⁷
 - d. Waiver of a right can take place not only expressly but “*by conduct plainly inconsistent with the intention to enforce it*”.⁸
9. Prof Reinecke deals in vol 12(2) of LAWSA at para 160 in some detail with various aspects of what may amount to a waiver or an election.⁹

Essentially there are different views; the one being that waiver takes the form of an agreement in terms of which a right is abandoned while the other view is that it may amount to an election which does not require agreement but is a unilateral act.

10. The author suggests that waiver which requires agreement is more in the form of a release. As such it requires that the person who waives is fully aware of the right being waived and must have communicated it to the other party (who in turn must have been aware of the right in question). This situation is said to arise where the other party is the debtor. In such a case the creditor is said to offer to waive a right which the person who owes the obligation accepts and that it is appropriate to characterise the legal position in this way when dealing with the “*abandonment*” of rights involving a relationship of debtor and creditor.
11. The author also refers to the other view which considers that waiver does not require consensus but is a unilateral juristic act in cases where;

“a person has an election between inconsistent remedies, such as upholding or cancelling a contract on the ground of misrepresentation, he or she may

⁷ Lufuno at para 81

⁸ Id.

⁹ The subject matter under which the general principles of waiver were being considered is Insurance.

decide unilaterally which course to take. By choosing one alternative, he or she is said to have waived the other.”¹⁰

It is argued that in this type of case the person takes a deliberate decision, with full knowledge of the material facts, to abandon the right and the abandonment becomes effective when the other party becomes aware of it. The author contends that this unilateral act can only apply

“to rights and legal competences other than personal rights involving an ordinary debtor and creditor relationship ...”¹¹

In such a case an election is made, which unlike waiver is “*a unilateral juridical act by which a party exercises a choice between inconsistent alternatives.*”¹²

12. These different views may come down to whether the relationship is one which originally involved reciprocal obligations or whether it was founded on an independent right or interest (including to a remedy) accruing in law. Since the outcome in the present case will yield the same result it is unnecessary to deal in greater detail with these different views, save to observe that circumstances may not allow for a clear timing delineation if, for instance, the person had a remedy exercisable independently of the relationship with the other party (such as a real right or interest in land derived from statute which falls outside an ordinary debtor creditor relationship) but agrees to waive that remedy because, by not doing so, obligations may realistically arise in the future *vis a vis* that other party (such as adverse cost orders).

BACKGROUND FACTS

13. This case proceeded to trial with the holding of an inspection *in loco* conducted by the court; namely, the assessor Mr Maodi and myself. The inspection was held over a period of two days from 10 to 11 February 2021.¹³

¹⁰ LAWSA vol 12(2) at para 160

¹¹ *Id.*

¹² *Id.*

¹³ The inspection *in loco* is referenced in the judgment of *Cindi Family v Minister of Rural Development and Land Reform and others* 2021 (6) SA 133 (LCC)

14. By that stage, the claimant had already produced its witness statement and expert notices had been exchanged. The experts attended the inspection and gave necessary assistance to their clients. The historians and archeologists had prepared expert notices and their reports prior to the inspection. Shortly after the inspection and prior to the end of February 2021, both the historians and the archeologists had prepared their joint minutes.
15. At the time of the inspection, the dates for the hearing of evidence were already allocated, being from 1 February to 4 March 2022, a period of just over a month.
16. The case was ready to proceed with the hearing of oral evidence on 1 February 2022.
17. The matter however did not proceed on that date, the reason for it not proceeding being germane to the issue now before me as to whether the case had been settled by 12 December 2021 or not. I believe it is correct to observe that by this time, i.e. December 2021, all the parties were fully cognisant of the strengths and weaknesses of their respective cases.

THE COMMUNICATIONS BETWEEN THE PARTIES BETWEEN NOVEMBER 2021 and FEBRUARY 2022

18. It is common cause that on 16 November 2021 the landowners' attorneys addressed a letter to both the plaintiff's attorneys and to the State Attorney who represented the Minister and the RLCC.
19. The letter adopted the position that the outcome of the inspection *in loco* illustrated that the plaintiff would not be able to prove its case and, based on *Macassar Land Claims Committee v Macsand CC & another* 2017 (40 SA 1 (SCA)), the landowners will contend that the plaintiff is not entitled to be restored ownership rights in land because the claimant's ascendants had, at best, been dispossessed of informal rights in land
20. The letter then proposed that the parties consider settling the claim on the basis that the plaintiff seeks restitution by way of equitable redress. If that occurred

then the landowners would fall out of the picture and would not have to spend further costs on trial preparation.

21. The other parties confirmed their agreement to attend a settlement meeting. This took place on 3 December 2021 and was held without prejudice. The meeting discussed the proposals made by the landowners

22. After the meeting, and on 8 December 2021 the plaintiff's attorney advised that

"... our client is prepared to consider equitable redress in the form of monetary compensation."

The e-mail continued:

"The plaintiff reserved his right to proceed to trial on the current dates in the event that the compensation is insufficient, the date of payment is too far in the future or that the State is not in agreement with the landowner's proposal to pay compensation."

23. The e-mail of 8 December concluded that, while the plaintiff did not wish to have the matter removed from the trial roll, in order to avoid preparation costs the RLCC and State Attorney were requested to revert to all the parties with their feedback.

24. It is clear that by 8 December the plaintiff's response to the settlement proposed by the landowners was subject to the former receiving sufficient compensation, payment of compensation to be within a reasonable time and the State being agreeable *"with the landowners' proposal to pay compensation"*.

25. In a follow up letter of 9 December, the landowners' attorneys contended that the plaintiff had to indicate (in terms of their earlier meeting) by 8 December whether it would be prepared to settle the claim on the basis of equitable redress, which the plaintiff's attorney claimed the plaintiff has now done; not that the State had to

indicate by that date whether it would be prepared to settle the claim on that basis.

The landowner's attorney added that it was now for the State to indicate whether they were prepared to settle the case on the basis of equitable redress and that, if the answer is affirmative, the trial in February would not proceed except perhaps on the question concerning the extent of the plaintiff's rights (but that would not involve the landowners).

26. The letter concluded that the plaintiff cannot hold the parties to ransom and keep the trial date open until such time as the family is satisfied with the amount of compensation offered. Furthermore the trial issues had already been separated with the first set of issues being the question of entitlement to restitution (i.e. the merits of the claim) and not the form of restitution. The letter continued, that if the plaintiff and the State could not agree on the amount, then that can be decided in the following hearing, but not during the one set down for February 2022

To this end the landowners' attorneys put the plaintiff on terms that if the State Attorney confirmed that they were willing to settle the claim on the basis of equitable redress, then the matter must be removed from the roll, but if the plaintiff forces the landowners to keep the trial dates open and prepare for trial, they will seek a cost order if the plaintiffs are ultimately unsuccessful

27. it is evident from this correspondence that in response to the landowners' suggested settlement of the matter, the plaintiff was prepared to settle provided three conditions were met; namely, the State agrees to pay compensation, the compensation is sufficient and finally that it is paid within a reasonable time.

The landowners' response was not to accept a settlement on that basis but only on the basis that the plaintiff pursues a claim for equitable redress even if that meant carrying on with the case against the State.

28. At this stage, therefore, a settlement had not been reached, only a counter proposal from the plaintiff which was unacceptable to the landowners who then

sought to put the plaintiff on terms with an agreed settlement confined solely to the two of them and without the plaintiff obtaining at least some commitment from the State as to the parameters under which they would be prepared to settle, be it as to area of land, value of land or both.

29. In short, the substantive point of departure between the landowners (as proposers of the settlement) and the plaintiff, is that the former saw the settlement as only having to concern itself with the relationship between the two of them, whereas the plaintiff was only prepared, at least as appears from the exchanges at that stage, to agree to a settlement where the State was brought into the equation, not as part of a tripartite agreement, but one as between it and the State to which it was agreeable, or at least have received assurances regarding the parameters the State was prepared to negotiate around in respect of a financial compensation claim.

30. It was already evident from the inspection *in loco* that the area of land in respect of which the State would consider paying compensation might no longer be as extensive as the area it had supported when Gazetting the claim.

In these circumstances, it is unlikely that the plaintiff would forgo, as negotiating leverage with the State, the ability to pursue both remedies in the alternative, but rather to only commit itself to equitable redress when it had a fair idea of the parameters to which the State was prepared to commit themselves in turn. Only once the plaintiff obtained clarity as to the parameters which the State were working on in respect of the payment of compensation, would it be in a position to take an informed decision as to whether to forego restoration even if negotiations with the State had not yet resulted in a concluded settlement- that was an option still open for the plaintiff to weigh once it had clarity from the State as to their thinking on the variables involved in computing compensation.

31. The reply from the plaintiff's attorneys, which was also forwarded to the State's representatives. came on 12 January. The full text reads as follows:

“As requested by Ms ... Singh, we together with our counsel, had sent a letter to Ms Singh and Mr Mathebula, on 21 December 2021 concerning your client’s proposal. Our client is in agreement to accept compensation in lieu of restitution. As no urgent response was received a reminder was sent on 6 Jan 2022. We are unable to take this any further without their response,

We both require a response from Ms Singh and Mr Mathebula to avoid preparation and trial costs. They are copied on this e-mail for ease of convenience.”

32. Superficially the letter is unclear. On the one hand the plaintiff indicates that it remains unable to take the matter further without a commitment from the State (the nature of the commitment it sought from the State was not identified). On the other hand the letter states that the plaintiff *“is in agreement to accept compensation in lieu of restoration.”*

33. it is however evident from the 12 January reply that the plaintiff has not expressly, or by necessary implication, removed the conditions under which it would be prepared to settle. To the contrary; the last sentence resolves any ambiguity because it unequivocally states that the plaintiff would still proceed with preparation despite advising that it is agreeable to accept compensation in lieu of restitution. This indicates more clearly that an agreement to accept compensation remains one element of the plaintiff’s proposal. The other element is dependent on events that are taking place between the plaintiff and the State and which require resolution in a way that enables the plaintiff to understand the parameters with which the State is working to formulate an offer of financial compensation.

34. Interpreting the letter of 12 January in the context of the communications as a whole, the relevant circumstances and the stage reached in the progress of the claim, sight should not be lost of the fact that the letter was intended to be read not only by the landowners but also by the State, and with the additional objective of prompting the State to act constructively and expeditiously in giving the plaintiff

the comfort it required before it would commit to abandoning, or electing not to pursue, its claim for restoration and accept monetary compensation instead.

35. I should add that in interpreting all the wording in the communications relied on by the landowners to support the settlement of the claim *vis a vis* it, the court applies the principles of interpretation of documents, including contracts, as set out by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (“NJMPF”) at paras 18 and 19 and later also in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.¹⁴

In *Sasol Gas (Pty) Ltd v Competition Commission of South Africa and Others* [2024] ZACAC 2 at paras 35 and 36 I attempted to summarise the accepted interpretational process by reference particularly to *Bothma-Botha* as follows:

“35. The “unitary” nature of the interpretational task is the common thread running through the judgments of the Constitutional Court and the SCA. It was again emphasised by Wallis JA in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12. The relevant extract reads:

“Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never

¹⁴ See more recently in relation to interpreting statutes *Minister of Police and others v Fidelity Security Services (Pty) Ltd (Sakeliga NPC and others as amici curiae)* 2023 (3) BCLR 270 (CC) at para 34 per Madjiedt and Rogers JJ

very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise' ¹⁵

36. *Ultimately the purpose of interpreting a statute is simply stated; to discern the intention of the legislature having regard to the only form of expressions open to it, namely words which because they are by nature imprecise also requires an understanding of their context which includes legally acceptable factors extrinsic the legislation."*

36. Returning to the communications relied on by the landowners, on 17 January the plaintiff's attorney wrote to the landowners' attorney as follows:

"We have received confirmation today from the RLCC that they are amenable to settle the matter by means of financial compensation hence we have delivered a formal notice of removal from the trial roll. Therefore there is no need for the parties to prepare for trial."

37. The letter clearly indicates that the State has agreed to pay financial compensation and as a consequence that the matter would be removed from the roll and no further preparation would be necessary.

The question which now arises is whether the other two conditions fell away because the plaintiff was removing the matter from the roll, or whether it was removing the matter from the roll because there was no point in going into the merits while negotiations were still pending between the plaintiff and the State, at least in respect of the amount of compensation and the time within which it would be paid.

¹⁵ It is accepted that the method of interpreting a document, whether it be a statute or an agreement, are essentially the same, save of course that s 39(2) of the Constitution brings a consideration of the Bill of Rights into sharper focus when a statute requires interpretation and issues of parole evidence may intrude when discerning the terms of a contract (see *University of Johannesburg v Auckland Park Theological Seminary and another* 2021 (8) BCLR 807 (CC) at paras 88-92 and the cases cited)

38. On the same date the landowners' attorney responded. Its understanding of whether there was an agreement to settle or an abandonment by the plaintiff of its claim for restoration is set out in paragraphs 3 which reads:

"As we understand the position, the claimant no longer insists on physical restoration of rights in land, and now claims alternative redress. The state is willing to settle the matter with the claimant on this basis. As previously discussed, the effect of those two decisions is that the landowners are released from the land claim. For the sake of legal certainty, we are of the opinion that this should be recorded, at least at a pretrial conference with the judge, but preferably in a court order"

(Emphasis added)

39. This paragraph indicates that the landowners' attorney required "*legal certainty*" that the matter had been settled.

40. The plaintiff's attorney immediately replied that it had forwarded the letter to its counsel and to the RLCC for a response.

The fact that the RLCC was asked to respond to the letter is consistent with the court's analysis of the plaintiff's position which still required the involvement of the State before it could commit to an abandonment of the restoration claim. in favour of monetary compensation.

41. This was followed by a deafening silence of over a month which prompted the landowners' correspondent attorneys, on 22 April, to forward to the plaintiff's attorney and the State's representatives a draft court order confirming that there had been a settlement. The letter requested that if the other parties are in agreement with the order, then they should consent to arrange a pretrial conference and have it made an order of court.

42. On 6 May the plaintiff's attorney advised that they could not consider consenting to the draft order until they received a response from the State Attorney concerning equitable redress and added that:

“all discussions to date were premised on the fact that our client would be prepared to consider equitable redress if an offer was made. To date, no offer has been received.”

43. It is therefore evident that the plaintiff's position remained that it was still awaiting some form of offer so that it could understand the parameters governing the basis on which the State was prepared to settle.

44. All subsequent communications reinforce the respective positions taken by the plaintiff and the landowners with regard to what was agreed, the latter contending that the settlement was not dependent on agreement being reached on the amount of compensation because the plaintiff *“... was not prepared to remove the trial on the merits of the claim from the roll until the State confirmed that it would be prepared to settle the claim by paying compensation to the plaintiff which it did. It was only after this confirmation by the RLCC that the plaintiff's attorney removed the matter from the roll.”*

45. To the extent that subsequent events may have a bearing on the matter, the landowners in their affidavit referred to the plaintiff's attorney advising on 28 April 2023 that they were on their way to the farm for a further inspection with the State in order to determine the extent of the rights that the claimant allegedly lost. The landowners assisted and enabling the inspection and mapping exercise to take place,

46. it is also evident from the landowners' affidavit that there were still negotiations taking place between the State's representatives and the plaintiff and that by June 2023, after a further inspection was held on the farm between the State and the plaintiffs, they had:

“... concluded a satisfactory mapping of the land with the department. Unfortunately, they must now present an offer based on that mapping exercise we have no control over how long that will take and it must be approved at various levels within the department however. I will follow up asap and let you know.”

47. When there were no further developments, the landowners called for a pretrial conference. This was held and in the expectation that the entire matter was close to resolution, certain orders were made to expedite the possibility of finalising the claim based on the final mapping of the area. The meeting was to be held between the State and the plaintiff's representatives by no later than 16 February 2024 to negotiate a settlement of the area and the amount of compensation payable. A joint minute was to be prepared if no agreement could be reached and it was also to be forwarded to the plaintiff's attorneys.
48. Pursuant to further requests made by the landowners' correspondent, on 19 February 2024 the plaintiff's attorney advised that settlement discussions were held between the plaintiff and the Department of Agriculture, Rural Development and Land Reform and that agreement was reached that the Department would appoint a valuer to determine the value of the claim so that a settlement offer could be made to the plaintiff. It was indicated that the offer would only be made during March. The impression given was that a strong possibility of settlement existed and the plaintiff's attorney requested the court and the parties to consider new directions which placed the Department on terms by when it was to provide its valuation report, present its offer and finalise a settlement.
49. It is clear that the landowners were compelled to approach this court after receiving an e-mail on 23 February 2024 from the plaintiff's attorney advising that the plaintiff's position remained unchanged in that no settlement had been reached with the State. This was because a valuation report had yet to be provided to the plaintiff.
50. The landowners' position remained that it was of no concern to them whether the valuation was provided or accepted, since the remedy lay in the plaintiff's hands to enroll the matter against the State and pursue a claim for equitable redress.
51. I must respectfully disagree with the plaintiff's understanding of the matter. While that may be its perspective of the situation, it is evident to the court that from the plaintiff's perspective, it needed to have an understanding of at least the area of

land in respect of which the State would be prepared to consider providing compensation, and possibly even the value per hectare, before it made an election to abandon its claim for restoration.

52. While it may not have been necessary to finally settle the claim between itself and the State before electing to abandon its remedy of restoration, it may have been sufficient for the plaintiff's purposes to at least know the minimum area that the State was considering and upon which financial compensation would be determined.

53. The State's representatives have not filed any affidavits in this application. During the hearing of argument, Mr. Mathebula for the State advised that there was still no offer made and that the issue really concerned the size of the land in respect of which the State was prepared to pay compensation.

FINDINGS

54. It appears to the court that in respect of the legal requirements to prove a settlement, as set out earlier the landowner needed to demonstrate that the plaintiff had moved away from the position set out in its email of 8 December to the effect that there would only be a settlement provided three conditions were met. Since the issue is whether there was a settlement or not, the reasonableness of the conditions imposed for a settlement to be concluded are not relevant, provided they constitute conditions and are clearly stated.

55. The evidence which the landowners seek to rely on is that in the letter of 12 December the plaintiff's attorney said that it agreed to settle on the basis of equitable redress and had the matter removed from the trial roll.

56. The court's concern is that this letter is not sufficiently clear to make a finding in favour of the landowners.

57. The letter, read as a whole and in its context, is also consistent with the plaintiff confirming that it was agreeable to accept equitable redress, not that the requirements under which it was prepared to do so, and abandon restoration, had been met at that stage. The reference to there being no point in proceeding with the trial on the allocated dates was not necessarily linked to there being a settlement, but can be seen in the context that the plaintiff was optimistic of the prospects of final settlement and that there was no point in incurring the substantial costs of preparing and running a month-long trial in such circumstances.

58. The court can appreciate that without knowing at least the parameters of the area which the State was prepared to consider for purposes of paying compensation, the plaintiff could not make an informed decision to abandon its claim for restoration and would therefore more likely than not keep its options open, even if only for the purposes of negotiation. There was little to no downside for it doing so, provided it had played its part in pushing the State to provide a valuation report and not frustrating the finalisation of the mapping exercise undertaken by the State to establish the size of the area which it was prepared to consider for purposes of determining compensation.

59. The fact that the landowners' attorney requested "*legal certainty*" from the plaintiff's attorney does pose a problem for the case they are obliged to make out.

60. This is not an ordinary commercial agreement which is sought to be enforced. It is an agreement concluded in the arena of a restitution claim where the State is also a material party, as it is still required to determine the size of the land in respect of which the plaintiff may have had an interest, the value of the land per hectare and then is obliged to provide the funds to pay compensation.

These considerations would reasonably be expected to impact on the plaintiff's position. The plaintiff is unlikely to want to be in a position where the State offers a pittance if it were to already have abandoned its case for restoration. This appears clear enough from the original response from the plaintiff's attorney of 8

December and there is nothing advanced by the landowners to suggest that the plaintiff felt compelled to change its position or why it would do so.

61. Whereas the landowners' attorney sought to impose a settlement on the basis that the only issue that required agreement was that the plaintiff would pursue only a claim for equitable redress and therefore abandon a claim for restoration, it cannot impose the way in which terms are to be constructed on a party who, at that stage, is still seeking as best it can to protect its position, including for the purposes of negotiating a favourable settlement with the State.
62. Before concluding this aspect, had the terms of the settlement as between the plaintiff and the landowner provided that the former would only pursue equitable redress, I can see no difficulty in such an agreement being binding in the context of land restitution legislation, provided that the State was amenable to not insist on restoration (assuming it is entitled to do so in the interests of achieving the true objectives of the Restitution Act). In the present case the point is moot because the State was amenable to equitable redress.
63. The way I consider this case is that the landowners understood the issue to be whether or not the plaintiff would pursue a claim for equitable redress only and thereby abandon its claim for restoration. While the landowners attempted to insist that this had to be the basis of the negotiations, the plaintiff responded that it was (so to speak) not prepared to put all its eggs in one basket but needed to know at least the parameters within which the State was prepared to negotiate compensation.
64. I therefore do not read the withdrawing of the matter from the trial role as unequivocal conduct sufficient to demonstrate that the initial terms under which the plaintiff was prepared to settle (i.e. with the provisos) had changed.
65. Accordingly I find that the landowners have not satisfied the court in relation to a number of material requirements for the consummation of a settlement agreement, compromise or binding election by the plaintiff, which by their nature

involve the abandonment of a right to claim restoration as an alternative to equitable redress. In particular;

- a. the court cannot be satisfied that there was an unqualified acceptance by the plaintiff of the landowners' proposal to settle;
- b. the plaintiff's conduct was sufficiently unclear for the landowners to reasonably conclude that it was amenable to settling without having some understanding from the State attorney of at least the size of the land they were considering for purposes of making a compensation award;

66. It appears that this is a case where any settlement agreement would amount to an abandonment of a right or remedy and therefore it would be necessary for the landowners to show that the plaintiff's conduct was clearly inconsistent with an intention to keep open restoration as an alternative to equitable redress. For the reasons already given I am satisfied that the landowners are not able to produce the necessary evidence to support their contention.

COSTS AND SETTLEMENT

67. At this stage it is premature to make any cost order

68. The principal reason is that the application ought to have precipitated a resolution of the matter between the plaintiff and the State. And going forward, if there is a failure to finalise the matter before further substantial costs are incurred in what will be a trial lasting a month, then there should be consequences for either the State or the plaintiff depending on the reason for the delay in finalising the settlement of the case.

69. If this case is settled before or during the next court hearing, consideration will be given to whether the landowners are entitled to attorney and client costs as from the time they brought the present application, and if so whether the State can be absolved even if it is only partly responsible for delaying the settlement.

70. In saying this, the court respects that the case involves rights issues and not simply personal commercial interests. However the Land Court Act 6 of 2023 and other relevant legislation impacting on the functioning of this court, and which have substantive law implications in addition to procedural ones, consider finding resolution by way of negotiation, including mediation, as conducive to advancing the interests of justice and its administration. At this stage it is unnecessary to consider whether this is a situation where the plaintiff or the State is entitled to pursue the rights issues they contend for if it should be found that a reasonably prudent litigant would have had little difficulty in resolving even the rights issues through negotiation rather than in a lengthy and expensive trial which unnecessarily debilitates not only private resources but State resources and court resources.

71. At this stage there appears to be no reason to delay the continuation of the trial by directing mediation. The plaintiff and the State should be able to find each other by now, provided there is compliance with the previous court directions.

ORDER

72. In the result the following order is made:

1. The application brought under rule 30 (6) is dismissed
2. Costs are reserved
3. The court is satisfied that the parties have been afforded sufficient time and opportunity to mediate or otherwise settle the claim and that the trial continues, since there are other parties that have a vested interest in securing the finalisation or expeditious determination of the referral
4. A pretrial conference will be held on Thursday 20 February 2025 at 15.30 to determine trial dates and put the plaintiff and the State on terms with regard to any outstanding matters which inhibit one or other party from making an informed decision with regard to the fair settlement of the case.

5. At the trial, or if settled earlier then on the first day set down for the resumption of the trial, the court will hear argument as to who, if anyone, should be responsible for the costs of any other party and on what scale, one of the considerations being whether the matter should have been settled sooner.

SILG, J

DATE OF JUDGMENT AND ORDER:	4 February 2025
FOR PLAINTIFF:	Adv D Whittington Bhayat Attorneys Inc
FOR 2nd and 3 rd DEFENDANTS:	Adv H Havenga SC Van Heerden Schoeman Attorneys
FOR 1 st DEFENDANT & PARTICIPATING PARTY	Mr S Mathebula State Attorney