

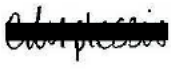


**THE LAND COURT OF SOUTH AFRICA
HELD AT MTHATHA**

Case No: LCC28/2020

Heard: 14 – 16 May 2025

Delivered: 21 July 2025

(1)	REPORTABLE: Yes ☒ / No ☐
(2)	OF INTEREST TO OTHER JUDGES: Yes ☒ / No ☐
(3)	REVISED: Yes ☐ / No ☒
Date: 21 July 2025 	

In the matter between:

NOTHEMBA MKUTUKA

First Applicant

NOMTSHA MKUTUKA

Second Applicant

and

THE MINISTER OF LAND AFFAIRS

First Respondent

ZITHEMBILE MKUTUKA

Second Respondent

THE LAND CLAIMS COMMISSION

Third Respondent

**MRS PONA, LAND CLAIMS
COMMISSOINER**

Fourth Respondent

ORDER

1. The late filing of the amended notice of motion and the supplementary affidavit is condoned.
2. The application for review is dismissed.
3. The matter is remitted to the Eastern Cape Regional Land Claims Commission for final determination, within 30 days of this order, in accordance with the provisions of the Restitution of Land Rights Act.

JUDGMENT

DU PLESSIS J

Introduction

[1] This matter arises from a protracted dispute over the compensation awarded pursuant to a successful community land claim in terms of the Restitution of Land Rights Act 22 of 1994 ("the Restitution Act"). The original dispossession occurred in 1977, when the Mkutuka family along with many other families that form part of the Mlungisi Community were forcibly removed from property R319 in White City, Mlungisi (Queenstown), to Ezibeleni.¹

[2] The core of the dispute is the entitlement to the outstanding compensation following a partial payment made to the late Ms Novillage Mkutuka ("Novillage"), who purportedly lodged a restitution claim in 2003. Novillage passed away in 2010 after receiving 50% of the amount awarded. The present application concerns the distribution of the remaining 50%.

[3] The applicants are Ms Nothemba Mkutuka ("Nothemba") and Nomtsha Mkutuka ("Nomtsha"), daughters of the late Mr Jeremiah Mkutuka ("Jeremiah") and Novillage. They seek an order declaring that the Second Respondent, Mr Zithembile Mkutuka ("Zithembile"), was unlawfully registered as a beneficiary of the restitution

¹ The forced removals were implemented in terms of section 2 of the Natives (Urban Areas) Consolidation Act 25 of 1945 and by Proclamation Notice no 600 of 1962).

award and is not entitled to any portion of the outstanding amount. They contend that he is not the biological child of either Jeremiah or Novillage and assert that his registration was fraudulent.

[4] The matter has a complex procedural history, which will be outlined below.

[5] To facilitate the understanding of the various issues, this judgment is structured in three parts. First, it sets out the relevant background facts concerning the restitution claim and the subsequent settlement relating to the Mlungisi community. Second, it addresses the procedural points in limine raised by the parties. Third, it considers the substantive merits of the claim. A final, ancillary issue concerns the role and conduct of Mr Mbebe, who purported to represent the applicants during the earlier stages of the litigation.

Background facts to the claim

The forms on record

[6] A community claim was lodged before 1998. There is limited information available regarding this claim. However, attached to Zithembile's affidavit is an unsigned "section 42D agreement". It stipulates that the "claimant family" would receive R139,281. There was a reference to 50% financial compensation and 50% development. The form indicates Nothemba (clause 1.8) as the representative of the family claim and, therefore, the claimant. The agreement also indicates that this is part of the Mlungisi community claim, which was settled in May 2003.

[7] The agreement stipulates that the State shall pay R69,640 as settlement of the claim, divided as per Annexure A. It is not clear what Annexure "A" refers to; however, immediately following this agreement in the file is a verification specification form from the Commission on Restitution of Land Rights ("The Commission"), listing the applicants and the Third Respondent as direct descendants of Jeremiah. Nothemba signed this form in her capacity as a representative of the family on 4 and 5 October 2011.

[8] This was accompanied by a "Family Tree Affidavit" (Annexure 1), also signed by the Nothemba on 5 October 2011. The affidavit stated that the direct descendants of the late Jeremiah Mkutuka included his spouse, Novillage Mkutuka, and his children: Nothemba, Nomthsa, and Zithembile Mkutuka. Although neither this affidavit nor the accompanying verification affidavit was commissioned, both were signed and formed part of the documentation accepted by the Commission at that stage. There is also a power of attorney by Nomthsa appointing Nothemba as her lawful agent concerning the property.

[9] These documents provided the foundation for the Commission's decision to register Zithembile as a beneficiary under the Mkutuka portion of the Mlungisi claim.

[10] Nothemba thereafter disposed of an affidavit (at the police) stating that she and Nomthsa are the only children of the late Novillage. The date is somewhat unclear, but it appears to be November 5, 2011. A few dates later, on 21 November 2011, Zithembile deposed of an affidavit (at the police) stating that he is the son of Jeremiah. This appears to be where the disagreement began.

The payment of compensation and the engagement with the Commission

[11] Fifty per cent of the compensation was paid to Novillage around 2004. It is unclear whether this was related to the section 42D settlement, but given that the community claim was settled the year before, I would presume so. This could, however, not have been done in terms of the forms that Nothemba signed, as the signing of the forms only took place in 2011. The remaining amount of R69,640.40 remained undistributed at the time of Novillage's passing in 2010.

[12] The applicants approached the Commission around 2011 to inquire about the status of the remaining funds. The timelines surrounding this, and whether this happened before or after they filled in the forms, are unclear. In response, Ms Pona of the Regional Land Claims Commission informed the applicants that Zithembile had been registered as a 50% beneficiary of the remaining compensation. This information came as a surprise to the applicants, who claimed that they had not authorised his inclusion and disputed his entitlement to the restitution funds.

[13] Despite having previously acknowledged Zithembile as a descendant in the verification documentation, the applicants now contended that he was not a biological child of Jeremiah and that his inclusion was based on misinformation or fraud. They asserted that he had been listed without their knowledge or consent.

[14] On 14 February 2012, Mr Mbebe, purportedly representing the applicants, wrote a letter to Ms Pona warning her not to pay money to Zithembile. Instead, Ms Pona invited the parties for a consultation to resolve the dispute.

The start of litigation

[15] Instead of attending such a consultation, the applicants launched an urgent application under case number 399/2012 in the Mthatha High Court, seeking to interdict the payment of compensation to Zithembile. That application was later withdrawn after the Commission gave written assurances that no payment would be made until the dispute was resolved.

[16] On 1 March 2012, the applicants initiated a new application in the Mthatha High Court under case number 475/2012. This application, which forms the basis for the current matter, sought declaratory relief that Zithembile's registration was unlawful and fraudulent. They alleged that, as the biological children of Jeremiah and Novillage, they were the sole rightful heirs of Novillage in terms of a purported will, and thus exclusively entitled to the outstanding compensation.

[17] On 14 May 2012, Ms Pona filed an answering affidavit. She confirmed that the names of all beneficiaries, including that of Zithembile, had been supplied to the Commission by the local Land Claims Committee. She also noted that the Commission does not verify paternity or inheritance disputes, but merely records the names presented to it by recognised community structures. Ms Pona further indicated that she had requested that an internal inquiry be conducted to resolve the dispute, but that the applicants' litigation strategy overtook this.

[18] On 15 July 2013, the applicants filed replying affidavits in which they reiterated their stance that Zithembile is not entitled to benefit from the claim and should be

excluded from the list of heirs. They argued that, as heirs of Novillage, they alone were entitled to the balance of the restitution funds.

[19] The applicants argued that the Commission's decision was made unlawfully and sought judicial review of it. The matter remained dormant for several years thereafter. During this period, the applicants engaged with the Land Claims Commission. During this engagement, the Regional Land Claims Commission sent a letter dated 25 June 2019 (in response to a letter of 8 July 2010 that is not on the record), which stated that 50% of the compensation would be allocated to Novillage's heirs and the remaining 50% to Jeremiah's descendants, including Zithembile. This letter later became the subject of the amended notice of motion in which the applicants challenged it as an administrative action under PAJA.

[20] In May 2021, the matter was transferred to the Land Court by order of Brooks J. Zithembile filed an answering affidavit in May 2021 after the matter was transferred to this Court, asserting that he is the son of the late Jeremiah, born of a relationship with Ms Evelyn Ntshanga ("Evelyn"). He stated that although not born of the marriage, he was raised in Jeremiah's household, bore the Mkutuka surname, and was treated as a son. Novillage cared for him; his father was the person who accompanied him during his initiation ceremony and negotiated his lobola. He knows he is not the son of Novillage, and he does not lay claim to her inheritance. He asserts that he is entitled, as a descendant of Jeremiah, to 50% of the claim, in terms of s 2 of the Restitution Act.

[21] In an explanatory affidavit, he further elaborated on the delays and procedural confusion surrounding the matter. He attributed much of the disarray to the involvement of Mr Mbebe and the organisation known as Public Defenders, which purported to represent the applicants. Mr Mbebe's involvement became increasingly controversial. Though not a legal practitioner, he had engaged the Commission on behalf of the applicants and appeared in correspondence and processes as if representing them formally. This issue will be addressed separately at the end.

[22] In response, the applicants assert that nobody has confirmed Zithembile as the child of Jeremiah and Novillage, and that he is entitled to 50% of the estate as

Jeremiah's child. They outline their position as follows: they are 100% beneficiaries and heirs of their mother's estate. They reference section 2(3) of the Restitution Act. Based on that, they state that Zithembile does not qualify in Jeremiah's estate. Since Jeremiah died before Novillage, she inherited his entire estate (one joint estate), which they now inherit.

[23] They furthermore point out that Zithembile did not attend the meeting of the people who were removed to lodge their compensation claims.

[24] At the first hearing correctly set down before this Court in Randburg on 5 March 2024, Mr Mbebe failed to appear. After hearing the respondents, the following order was granted by Cowen DJP:

16.1.1. The application is dismissed with costs on a party and party scale.

16.1.2. The matter is remitted to the Eastern Cape Regional Land Claims

Commissioner to:

16.1.2.1. Verify the beneficiaries of the late Jeremiah Mkutuka in respect of compensation for his dispossession; and

16.1.2.2. Resolve any dispute regarding compensation that may ensue in terms of the Commission's internal dispute resolution processes within thirty days of the order.

[25] During subsequent case management meetings, it became apparent that Mr Mbebe is not an admitted legal practitioner. It was accordingly agreed that the matter should proceed afresh, once the applicants had secured legal representation. The court is indebted to Mr Mhlawuli, who agreed to represent the applicants on a pro bono basis.

[26] At a pre-trial conference held on 28 February 2025 before Cowen DJP, Mr Mbebe confirmed that he was not an attorney, but ran an organisation called Public Defenders. He relied on section 38 of the Constitution to justify his appearance. Cowen DJP indicated that, while she would hear argument on that point, her preliminary view was that only admitted legal practitioners are entitled to represent parties in the Land Court. The applicants then undertook to secure legal representation.

[27] Mr Mhlawuli subsequently came on record. At the following case management meeting on 20 March 2025, he indicated that he was not yet in a position to make concrete proposals, having been briefed only recently. On 26 March 2025, Cowen DJP raised concerns about the procedural history of the matter, the earlier order dismissing the application, and the existence of a disputed settlement agreement. It was suggested that the matter be reargued de novo and that the hearing be held in the Eastern Cape. Given the modest quantum of the claim, Cowen DJP offered to assist the parties in pursuing a settlement through mediation, but also indicated that she would not be in a position to preside over the hearing should that fail. Mr Msiwa SC, on behalf of the respondents, indicated that settlement was not possible based on the existing papers.

[28] A further meeting was held on 2 April 2025. Cowen DJP reiterated the view that, in light of the irregular representation previously and in the interests of fairness, the matter should proceed afresh. Mr Mhlawuli was still considering the procedural options. Mr Msiwa SC maintained that the alleged settlement agreement was tainted by fraud and sought to ventilate that issue through oral argument. It was agreed that heads of argument would be filed on 23 April 2025 (applicants) and 2 May 2025 (respondents), and the matter was set down for hearing in Mthatha on 15 and 16 May 2025.

[29] On 25 April 2025, and contrary to a directive of this Court, the applicants filed an amended notice of motion instead of heads of argument. The case was thereby transformed into a review application under the Promotion of Administrative Justice Act² (PAJA). The applicants contended that the letter sent on 25 June 2019 by the Land Claims Commission to allocate 50% of the outstanding compensation to Zithembile is a "decision" for purposes of PAJA, and thus constituted administrative action, reviewable on grounds including error of law, procedural unfairness, failure to investigate a material fact, lack of authority, and possible bias arising from the shared representation of parties.

² 3 of 2000.

[30] On 7 May 2025, a final pre-trial conference was held. The applicants delivered a supplementary affidavit, which the respondents objected to. Nevertheless, both parties indicated that they were ready to proceed. The applicants argued that oral evidence was unnecessary, while the respondents maintained that it was necessary to resolve factual disputes surrounding the purported settlement and the affidavits.

[31] Following these developments, the Judge President reallocated the matter to me, and I presided over the hearing in Mthatha.

[32] A hearing was conducted in Mthatha on 14 to 16 May 2025. The parties made submissions on the procedural and substantive issues, including the validity of the amended notice of motion, the nature of the decision under review, the eligibility of the second respondent as a beneficiary, and the proper interpretation of “descendant” under the Act. The Court also heard arguments on the implications of the applicants’ late-stage reliance on PAJA and the irregular role played by Mr Mbebe in earlier proceedings.

[33] The relief sought in the amended notice of motion was extensive. It included the removal of the Second Respondent from the list of beneficiaries, an order directing that he undergo paternity testing, and an instruction to the Commission to pay the remaining compensation to the applicants. They further requested an exemption from the obligation to exhaust internal remedies.

[34] Although the applicants initially sought wide-ranging relief, including ordering a paternity test, expunging the second respondent from the list of beneficiaries, and directing payment of the outstanding compensation, they ultimately narrowed their case to a review application under PAJA. The only relief that persisted was the review and setting aside of the alleged administrative action (the June 2019 letter), as well as condonation for late filing, exemption from the duty to exhaust internal remedies, and costs. As the hearing progressed, it became clear that the compensation issue ultimately falls to be decided by the Regional Land Claims Commissioner.

[35] This narrowing of the relief sought also narrowed the Court’s enquiry and the relevance of certain factual disputes that were previously central to the case. The role

of this Court became limited to clarifying the applicable legal framework and its application to the facts of this case.

[36] Before addressing this issue, the points in limine raised by both parties must be addressed.

Points in limine

[37] The respondents raised three points in limine. Firstly, that the parties were incorrectly cited, and secondly, that there is no "decision" to review (PAJA is not applicable). Lastly, the issue of the purported settlement agreement, and whether evidence should be led on the purported settlement agreement between the applicants and the Zithembile.

Citation of the parties

[38] There was some debate over the correct citation of the parties. The respondents, relying on Ms Pona's answering affidavit filed in 2012, point out that only the Second Respondent is cited correctly, and no order is sought against him. They assert that the parties are not cited correctly. This will specifically become a problem, they state, when the court grants an order in favour of the applicants – they will not be able to enforce it because the parties cited do not exist.

[39] Although the parties have been incorrectly cited, their identities were ascertainable from the context. The addresses and the roles set out in the affidavits lead me to conclude that the intended parties were the Minister of Land Reform and Rural Development, the Regional Land Claims Commission, and Ms Pona, the person alleged to have made the decision in the office of the Regional Land Claims Commission. This is also clear from the descriptions in the founding affidavit. When I asked Mr Msiwa SC who instructed him, it became evident that the parties the applicants intended to cite were before the court and were duly represented.

[40] In response to the respondents' objection to the citation of parties, the applicants brought an application from the bar in terms of Rule 22(7). Rule 22(7) states that

"[t]he Court may, on application by any party during the hearing of a case, grant an amendment of any document envisaged in subrule (1) on conditions (also relating to costs) which it considers just."

[41] The rule reflects a purposive, substance-over-form approach to procedural justice, allowing courts to cure technical defects where doing so is just and facilitates finality. In particular, the absence of prejudice to any party and the need for closure in protracted litigation are relevant factors that I considered.

[42] I am accordingly satisfied that the parties before court were, in substance, the correct respondents. The addresses, contextual descriptions, and legal representation confirm this. It is, therefore, just to allow the amendment, particularly where the citation error appears to stem from the early procedural defects probably caused by Mr Mbebe, who was not a legal practitioner and who played a central role in initiating this litigation.

[43] This point in limine accordingly fails.

Was the 25 June 2019 letter a "decision"?

[44] The applicants contend that the letter of 25 June 2019, which sets out how the Commission envisaged the claim to be paid, constitutes a 'decision' for purposes of section 1 of PAJA and is thus susceptible to judicial review. Section 1 of PAJA defines "administrative action" as:

"any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or

[...]

which adversely affects the rights of any person and which has a direct, external legal effect”.

[45] From this definition, the elements of an administrative action are

- a. a decision
- b. by an organ of state (or a natural or juristic person)
- c. exercising a public power or performing a public function
- d. in terms of any legislation (or in terms of an empowering provision)
- e. that adversely affects rights
- f. that has a direct, external legal effect
- g. and that does not fall under any of the listed exclusions

[46] In this instance, there is a disagreement on whether the letter of 25 June 2019 constitutes a "decision", defined as:

"any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—[...]"

[47] For a decision to qualify as a "decision", a measure of finality is required in the administrative action, especially where the administrative process is multi-staged.³ In other words, the process must be finalised before one can evaluate it against the requirements of PAJA.

[48] While the phrase “proposed to be made” may appear not to imply finality of a “decision,” this must be read alongside the further requirement that the action must have a direct, external legal effect. That additional element reinforces the need for finality. A mere proposal, lacking legal consequence, would generally not meet this threshold and thus would not constitute administrative action.

[49] The letter proposes an allocation of compensation among the descendants of Jeremiah. The final determination can only be made once the Commission has

³ Hoexter & Penfold *Administrative Law in South Africa* (2021) p 324.

properly resolved the dispute between the parties. It attempted to do so by inviting parties to attend a consultation to resolve the dispute. That process has not occurred, for reasons outlined earlier. As such, no final or binding decision has been made. The letter merely represents the Commission's provisional stance or working opinion, not a definitive administrative act with external legal effect on the parties' rights or entitlements. Ms Pona, in the oral evidence that she gave in court, again confirmed that the dispute must still be settled.

[50] Seen in the context of this matter, the letter of 25 July 2019 does not constitute a "decision" as contemplated in PAJA. It reiterates the stance of the 2012 letters. The dispute still needs to be resolved. The applicants must cooperate.

[51] There is, therefore, no administrative action that can be reviewed.

Condonation for late filing

[52] Having reformulated their case as a review, the applicants wanted to submit a supplementary affidavit. They referred to Rule 35 of the Land Court, which states that in review applications, parties may add to their papers after obtaining the record. Since no records were available, they argued they were entitled to a supplementary affidavit to address this issue as well. Mr Mhlawuli argued that accepting the supplementary affidavit would serve "the interests of justice." While this may be true, the concept of "interest of justice" remains somewhat abstract. Mr Mhlawuli did not specify which principles or facts would make this abstract concept more concrete in this case. Without such principles or facts, the "interest of justice" remains an unanchored idea.

[53] Be that as it may, I do not have an issue with allowing the filing of the supplementary affidavit, nor do the respondents. Mr Mhlawuli's contention that now, with the amended notice of motion and the supplementary affidavit, and absent a reply thereto, the matter is in a sense unopposed, cannot hold. In assessing the issues, the court considered the record as a whole and evaluated the issues holistically.

Settlement agreement and oral evidence

[54] The question of whether oral evidence should be led regarding the disputed settlement agreement and accompanying affidavits was raised as early as 28 February 2025. The respondents consistently requested oral evidence. While the applicants submitted that it was unnecessary, they indicated a willingness to proceed if so directed. Cowen DJP deemed it important in the case at the time.

[55] In the final pre-trial minute of 7 May 2025, the parties identified the witnesses to be called, confirming their preparedness.

[56] The issue of whether oral evidence should be heard regarding the purported settlement agreement was raised on the first day of the hearing. The applicants submitted that this agreement was no longer relevant, as they did not rely on it for any relief, and that it would not assist the court in determining what is now review proceedings. They argued that there was nothing for the court to resolve and that pursuing oral evidence would unduly prolong the matter.

[57] On the first day of the hearing, the respondents indicated their intention to lead oral evidence regarding the purported settlement agreement, alleging that it was procured fraudulently and involved a non-admitted legal representative. After hearing the argument, I ruled, without committing myself to a final view, that oral evidence would be allowed, as only once the evidence was heard could its relevance be properly assessed. Given the recent amendments to the notice of motion and the resulting uncertainty, I deemed it necessary to serve the interests of justice, as it ensures that relevant evidence is considered, rather than unfairly excluded.

[58] In hindsight, I am satisfied that the purported settlement agreement does not effectively resolve the remaining core issues in this matter. The allegations that the agreement was fraudulently induced and Mr Mbebe's role in it might be necessary for other purposes, but not for this application. Mr Mbebe is not a party to these proceedings, and no legal relief is sought against him. In these circumstances, it is neither necessary nor appropriate for this court to make any finding on the validity or

enforceability of the purported settlement agreement. That issue falls outside the scope of the relief sought.

The law

[59] The main question is: Who is entitled to the outstanding compensation awarded in respect of the land claim lodged? This question is not one the Court can answer definitively based on the current record without usurping the statutory functions of the Commission. That function falls squarely within the mandate of the Regional Land Claims Commission to investigate and determine such disputes under the Restitution Act. What I aim to do is to clarify the legal framework in which the decision must be made.

The Restitution of Land Rights Act

[60] The starting point is section 25(7) of the Constitution that provides that:

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

[61] The Restitution of Land Rights Act was promulgated to give effect to this. When considering this matter, it is important to recall the purpose of the Act and the broader objectives of restitution. The Act is an attempt to remedy some of the injustices of the past, specifically those arising from racially discriminatory laws and practices that deprived people of their rights in land.

[62] The inquiry would have to start with "who is the claimant"? Section 2 sets out who is entitled to restitution:⁴

“2. Entitlement to restitution —

⁴ Before its amendment by the Land Restitution and Reform Laws Amendment Act 18 OF 1999, the section read: 2. Entitlement to restitution —

(1) A person shall be entitled to restitution of a right in land if—

(a) he or she is a person or community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices or a direct descendant of such a person; and

[...]

- (1) A person shall be entitled to restitution of a right in land if—
 - (a) he or she is a person dispossessed of a right in land after 19 June, 1913 as a result of past racially discriminatory laws or practices; or
 - (b) it is a deceased estate dispossessed of a right in land after 19 June, 1913 as a result of past racially discriminatory laws or practices; or
 - (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who—
 - (i) is a direct descendant of a person referred to in paragraph (a); and
 - (ii) has lodged a claim for the restitution of a right in land; or
 - (d) it is a community or part of a community dispossessed of a right in land after 19 June, 1913 as a result of past racially discriminatory laws or practices; and
- [...]
- (3) If a natural person dies after lodging a claim but before the claim is finalised and—
 - (a) leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate, in his or her capacity as the representative of the estate, alone or, failing the executor, the heirs of the deceased alone; or
 - (b) does not leave a will contemplated in paragraph (a), the direct descendants alone, may be substituted as claimant or claimants.
- (4) If there is more than one direct descendant who have lodged claims for and are entitled to restitution, the right or equitable redress in question shall be divided not according to the number of individuals but by lines of succession.”

[63] The correct interpretation of section 2 of the Restitution Act is crucial to the dispute. The first key point is that the critical moment for determining who may institute a claim and under which section (i.e. 2(1)(a) – (c)) is the moment of dispossession, not when the claim is made. The reason for that will become evident below.

[64] Section 2(1)(a) entitles a person directly dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices to claim restitution. This refers to a person who has personally experienced dispossession and lodged a claim on time. If such a claimant dies after lodging a claim, section 2(3)⁵

⁵ (3) If a natural person dies after lodging a claim but before the claim is finalised and—
 (a) leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate, in his or her capacity as the representative of the estate, alone or, failing the executor, the heirs of the deceased alone; or
 (b) does not leave a will contemplated in paragraph (a), the direct descendants alone, may be substituted as claimant or claimants.

provides for the substitution of the executor or direct descendants, depending on the testamentary arrangements.

[65] Section 2(1)(b) applies to a scenario where the entity dispossessed was not a living person, but a deceased estate. This is then the scenario where the registered owner died before the dispossession, and the estate was still in existence at the time of dispossession. The right to restitution then vests in the estate itself and is then subjected to the estate administration process.⁶

[66] Section 2(1)(c) addresses the situation where the dispossessed person would have qualified under section 2(1)(a), but died without lodging a claim. In such cases, the direct descendants may claim instead of a dispossessed person who died without lodging a claim (and would otherwise be entitled to claim under (a)), provided that no other ascendant who is a direct descendant has already claimed. Section 1 of the Act states that "direct descendant" of a person "includes the spouse or partner in a customary union of such person, whether or not such customary union has been registered."

[67] Dodson J in *Mayibuye I-Cremin Committee Re: Sub 121 of Farm Trekboer, District of Klip River KwaZulu-Natal commonly known as "Cremin"*⁷ clarified that in terms of the Act, "direct descendant" does not carry the same meaning as intestate heirs. He stated that:

'A further indication that "direct descendant" in s 2(1) of the Act was not intended to have the meaning contended for by Mr Rutsch is the definition of "direct descendant" [i.e. an intestate heir of such a person] in s 1 of the Act. That expressly includes as a direct descendant the spouse or partner in customary union of the person originally dispossessed. This suggests that where a meaning other than the usual meaning was to be included in the term "direct descendant", it was expressly provided for. No express provision whatsoever is to be found in the Act for the inclusion of intestate heirs as direct descendants. The use of the word "direct" to qualify "descendant" is also used elsewhere in legislation and in the law of testamentary succession and is in

⁶ *In re Former Highlands Residents 2000 (1) SA 489 (LCC)* para 16.

⁷ (LCC28/96) [1997] ZALCC 8 para 36.

my view also a pointer to the adoption of the more usual meaning of descendant ie blood relations in the direct line of descent (subject, of course, to the express inclusion of spouses and partners in customary union as pointed out above).'

[68] The qualifications in (c)(i) and (ii) pertain to situations where, for example, the children of a dispossessed person have already made a claim, which disqualifies the grandchildren from claiming as well, presumably to avoid overlapping claims by successive generations, and introduces a lineal hierarchy in the assertion of restitution rights.

[69] Subsections 2(1)(a) – (c) thus deal with individual claims in various forms. Section 2(1)(d) enables a community to claim, if the community complies with the definition of "community" in section 1, namely "any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group" (own underlining). It is essential to note that the land is held in common, not by a group of individuals who have combined their individual claims.

[70] Such a community claim may be lodged by a person who represents the community.⁸ The Act allows for such claims to be brought on behalf of groups, and

⁸ Section 10 of the Restitution Act

10. Lodgement of claims

(1) Any person who or the representative of any community which is entitled to claim restitution of a right in land, may lodge such claim, which shall include a description of the land in question, the nature of the right in land of which he, she or such community was dispossessed and the nature of the right or equitable redress being claimed, on the form prescribed for this purpose by the Chief Land Claims Commissioner under section 16.

(2) The Commission shall make claim forms available at all its offices.

(3) If a claim is lodged on behalf of a community the basis on which it is contended that the person submitting the form represents such community, shall be declared in full and any appropriate resolution or document supporting such contention shall accompany the form at the time of lodgement: Provided that the regional land claims commissioner having jurisdiction in respect of the land in question may permit such resolution or document to be lodged at a later stage.

(4) If there is any dispute as to who legitimately represents a community for the purposes of any claim under this Act, the regional land claims commissioner having jurisdiction may in the manner prescribed in rules made by the Chief Land Claims Commissioner in terms of section 16, in order to have a person or persons elected to represent the community-

(a) take steps for drawing up a list of the names of the members of the community;

(b) direct that a meeting of such community be convened and an election be held at that meeting;

(c) take such other steps as may be reasonably necessary for the election.

(5) In any election in terms of subsection (4) all members of the community of 18 years or older shall be entitled to vote.

settlements reached under this section often take the form of negotiated agreements in accordance with section 42D of the Act. Section 42D(2) deals with the compensation of such claims:

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

[71] Such claims (and the settlements) frequently raise questions of group membership.⁹

[72] The community usually holds rights independently of its members, with the community itself as the primary rights holder, which claims restitution and receives the award in its name as an entity in its own right, not as a representative of multiple individuals. For this reason, it is not necessary to establish who the direct descendants of the originally dispossessed individual community members are, as the claims are not made by them. What is important is to identify the community membership and its associated rules.¹⁰

[73] This is how section 2(1)(a) – (d) operates. The question is, under which section does the claim in this case fall?

On the facts

[74] The section 42D agreement states that:

(6) In making the rules contemplated in subsection (4), the Chief Land Claims Commissioner shall have regard to the cultural values of the community.

⁹ See for example *Mazizini Community v Minister of Rural Development and Land Reform* [2020] 3 All SA 318 (SCA).

¹⁰ See for instance *In re Kranspoort Community* 2000 (2) SA 124 (LCC) para 34 dealing with the changing members of a community.

“The claimant is a member of the Mlungisi Community Claimants and accepts the terms and conditions of the section 420 Framework Agreement entered into between the Mlungisi Community Claimants of Queenstown, duly represented by their chairperson, Mr. G Pindani and the State dated 04 May 2003.”

[75] The framework agreement is not attached. The agreement states that its objective is to establish the framework and basis for settling this individual's claims. The paragraph refers to "community claimants" and not the community as an entity. However, after this, there is little clarity on how the commission envisioned the claims to be paid. The documents that follow the section 42D settlement agreement were submitted with the agreement and appear to indicate at least some intention to adhere to the logic of section 2, with Nothemba acting as the claimant on behalf of the family.

[76] There is no information about Novillage's claim. The presumption is that this would be a claim in terms of section 2(1)(a), which provides for restitution to the person who was dispossessed. A further presumption is that she received 50% of the claim as they were married in community of property. Since the compensation was paid before her death, no other part of section 2 becomes relevant. The funds received were part of her deceased estate, and any remaining assets at the time of her passing were to be distributed following the applicable succession laws.

[77] Jeremiah's descendants are entitled to claim for his dispossession under section 2(1)(c), if my presumption in the previous paragraph is correct, for his half. This is because he was dispossessed while alive, but died before he could institute a claim. Only his direct descendants, as contemplated in section 2(1)(c) read with section 1, could bring the claim on his behalf. These include children and customary law wives. Since Novillage and Jeremiah were married in terms of common law, she would not qualify as a descendant of Jeremiah. There is uncertainty around this, however, as the "family tree affidavit" describes that Novillage is a descendant (as the spouse) of the late Jeremiah. This might be the root of the misunderstanding. In that case, Novillage's claim might not be a claim in terms of section 2(1)(a), but a claim in terms of section 2(1)(c), or both.

[78] Section 2(1)(c) states *who* may claim for restitution. It does not, however, clarify *how* the compensation is to be divided. Absent a settlement agreement or express arrangement, I assume that the default position is that the compensation is to be shared equally among all the qualifying descendants. Alternatively, the division may be governed by the terms of a settlement agreement or by an agreement reached among the claimants. In this case, neither party relied on the purported settlement agreement between the parties.

DNA testing

[79] Central to this case is who qualifies as a direct descendant of Jeremiah. The list originally included his children, Nothemba and Nomtsha, as well as Zithembile, whose status is disputed. Zithembile asserts that he was raised by Jeremiah, given his surname, and treated as a son under customary and social practice, such as accompanying him to initiation and lobola negotiations. If these facts are confirmed, even in the absence of a biological connection, he may still qualify as a descendant under a purposive reading of section 2(1)(c), consistent with the objectives of the Act to redress past injustice in a context-sensitive manner.

[80] A purposive reading of the Act, consistent with its remedial intent, must inform how we understand the term “descendant.” On the version most plausibly supported by the evidence, the second respondent at the very least grew up in Jeremiah’s household from a very young age, and Jeremiah performed the roles and responsibilities of a father to him. That understanding likely informed the first applicant’s initial decision to include him as a descendant on the signed claim form.

[81] Such an interpretation is reinforced by the information on the removal certificate, which indicates that Novillage, Nothemba, and Zithembile were dispossessed of their rights in the land alongside Jeremiah, who was the owner. Their rights might be different, but the dispossession is not. Put differently, Zithembile was a product of the same dispossession and suffered the same as other members of the household.

[82] He was an adult at the time they were dispossessed, and most probably also suffered the trauma of losing a home and being displaced. If the purpose of the Act is to restore dignity and redress harm to those displaced by apartheid-era policies, then the second respondent falls squarely within that remedial intention. A purposive reading would therefore not unduly elevate the biological connection between Zithembile and Jeremiah, but assess the situation as a whole. Such a reading would recognise Zithembile as part of the family claim, as he was on the forms filled out by Nothemba in October 2011.

[83] The task of confirming this fall to the Regional Land Claims Commissioner, who is the designated decision-maker in terms of the Act. The Court does not seek to usurp that function. However, to avoid future confusion and in the interest of finality, this Court considered it appropriate to clarify the legal framework to guide the Commission in its determination.

Family dispute

[84] Upon reviewing the files, it became evident that this matter, although presented to the Court as an application for review, was, at its core, a family dispute. Nitpicking the descendant issue and requiring invasive DNA testing overlooks the purpose of the Act and appears to be a symptom of another underlying family dispute, to which the court is not privy. While this Court acknowledges the inquisitorial powers it holds under its enabling legislation, those powers are not without bounds. The Court remains bound by the rules of evidence and may only consider evidence properly placed before it in accordance with the notice of motion and accompanying affidavits. As such, the court is not empowered to intervene in or resolve underlying family tensions that fall outside the scope of the relief sought, even if those tensions are driving the conflict.

[85] Such disputes might be better resolved through mediation, which allows parties to examine the relational and historical factors behind their legal conflict. If the parties had been able to address the core issues within the family via mediation, it could have opened up space for resolving the legal dispute that ended before the court.

Mr Mbebe

[86] A central figure in this family dispute was Mr Mbebe. His involvement is also a separate issue that arose early in the proceedings, which, although not directly related to the restitution claim itself, has significantly influenced the conduct of the parties. As Nomthsa's boyfriend, he appeared to have taken an active role in pursuing the matter on behalf of the applicants. While Mr Mbebe denies ever misrepresenting himself as a legal practitioner, his involvement has raised concerns, especially considering that he is not a party to these proceedings.

[87] Mr Mbebe engaged with the Regional Land Claims Commission on behalf of the two sisters and also appeared in court either on their behalf or representing them. However, none of the court documents were signed by him. For instance, the original notice of motion listed SG Mbelu & Co as the applicants' attorneys. However, he addressed a letter to the Land Claims Commission on 14 February 2012, stating that "[w]e act on the instruction of the abovementioned person", apparently in the form of a letter of demand.

[88] In his affidavit, Zithembile stated that:

"I am advised that there is nothing legally called B.F Public Defenders in Mthatha according to any legislation. The court is invited to protect the public from the professional thuggery by the so-called entity which postulates itself as a legal firm of attorneys or whatever. I am advised that for a firm of attorneys to practice, such firm must have a fidelity certificate amongst other things. Mr Mbebe has no colour whatsoever to practice in the thuggery manner he does with impunity to the public. I do not know if he is a public defender in terms of which law because he has no legal qualification entitling him practice either as attorney or as an advocate.

[...]

In our localities he postulates, masquerades himself and misrepresents himself as an attorney, whereas he was a warder at Wellington Prison, Mthatha."

[89] Zithembile also asserts that, in his capacity as Nomthsa's boyfriend, Mr Mbebe intends to derive benefit from this claim. The relationship between Zithembile and Mr Mbebe is strained. This tension was apparent during Zithembile's testimony, when Mr

Mbebe raised an objection regarding the manner in which Zithembile addressed and referred to him.

[90] The question is, absent a formal complaint, what is the *court* to do regarding Mr Mbebe?

[91] When I explained in court that section 33 of the Legal Practice Act¹¹ provides that only admitted and enrolled legal practitioners may appear on behalf of another person in legal proceedings, he responded that he had no desire to become a legal practitioner and that he had been assisting clients in court for 30 years. When I advised him that such conduct is not permitted, he invoked section 38 of the Constitution, which deals with legal standing. This reflects a misunderstanding of the law: legal standing refers to a person's right to approach a court in their own interest or the interest of others under defined circumstances, whereas the right of appearance is the regulated entitlement to represent another person in legal proceedings. These are conceptually and legally distinct.

[92] The right of appearance is regulated against the norms and standards laid out in the Legal Practice Act. These norms and standards regulate the profession and ensure that the public is protected from conduct and practices that fall outside the Act (and its regulations). This matter is so important that section 93(2) of the Legal Practice

¹¹ 28 of 2014.

Section 33. Authority to render legal services. — (1) Subject to any other law, no person other than a practising legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward—

(a) appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear; or

(b) draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.

(2) No person other than a legal practitioner may hold himself or herself out as a legal practitioner or make any representation or use any type or description indicating or implying that he or she is a legal practitioner.

(3) No person may, in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless that person is a practising advocate, attorney, conveyancer or notary, as the case may be.

(4) A legal practitioner who is struck off the Roll or suspended from practice may not—

(a) render services as a legal practitioner directly or indirectly for his or her own account, or in partnership, or association with any other person, or as a member of a legal practice; or

(b) be employed by, or otherwise be engaged, in a legal practice without the prior written consent of the Council, which consent may not be unreasonably withheld, and such consent may be granted on such terms and conditions as the Council may determine.

Act makes it an offence punishable by conviction or a fine for any person contravening section 33.

[93] Absent such protection, the public risks paying money to untrained lawyers who may provide poor legal advice, potentially saddling a party with a debilitating cost order and other dire consequences of losing a case. Such a member of the public would have no recourse against such a person, as they are not subject to the Legal Practice Act or the disciplinary processes of the profession.

[94] It is unclear who must enforce this rule, as section 4 of the Legal Practice Act states that the South African Legal Practice Council, established in terms of the Act, only exercises jurisdiction over legal practitioners and candidate legal practitioners. Still, since the objectives of the Act include enhancing and maintaining the integrity and status of the legal profession, achieving this objective may involve taking appropriate steps against individuals to protect the profession's integrity. Additionally, any legal practitioner who becomes aware of such a contravention arguably has a duty, as a member of the legal profession, to guard the integrity of the profession and lay the appropriate charges with the Police.

[95] As there was no formal complaint before this Court, it would be improper of me to make a finding against Mr Mbebe. However, also I am duty-bound to bring this to the attention of the Legal Practice Council, which will determine the appropriate steps to be taken against Mr Mbebe and the attorneys who assisted him in this matter and possibly others. A copy of this judgment will also be sent to the registrar of the High Court in Mthatha.

Conclusion

[96] If the applicants had attended the consultation in 2012, 13 years of legal wrangling and mounting legal costs could have been spared. My only hope is that once this judgment is delivered, Nothemba, Nomthsa, and Zithembile will cooperate and assist the Regional Land Claims Commissioner in finalising the claim.

[97] While this litigation came at a great cost for the state, it does not warrant a cost order against the applicants.

Order

[98] Accordingly, the following order is made:

1. The late filing of the amended notice of motion and the supplementary affidavit is condoned.
2. The application for review is dismissed.
3. The matter is remitted to the Eastern Cape Regional Land Claims Commission for final determination, within 30 days of this order, in accordance with the provisions of the Restitution of Land Rights Act.

WJ du Plessis
Acting Judge of the Land Court

Date of hearing: 14 – 16 May 2025

Date of judgment: 21 July 2025

For the applicants: SR Mhlawuli, attorney with right of appearance
in the High Court

For the respondent: PV Msiwa SC instructed by MT Mlola Attorneys
Inc