



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

Case no: LCC 16/2020

In the matter between:

**BAKGATLA BA MOCHA
(MAUBANE)**

First Plaintiff

**BAKGATLA BA MOCHA
(PHOPOLO MALOKA)**

Second Plaintiff

and

**BAKGATLA BA MMAKAU BA
MOKGOKO**

First Defendant

**THE PRESIDENT OF THE
REPUBLIC OF SOUTH AFRICA**

Second Defendant

**COMMISSIONER OF LAND
CLAIMS COMMISSION**

First Interested Party

**REGIONAL LAND CLAIMS
COMMISSION, LIMPOPO**

Second Interested Party

**SOUTH AFRICAN HUMAN
RIGHTS COMMISSION**

First amicus curiae

CONTRALESA

Second amicus curiae

Concerning

Zandfontein 31JR and Bultfontein 174
JR

Reportable

Coram: COWEN DJP sitting with Assessor SJ MLANGENI

Heard: 11-15 August 2025 & 2 September 2025

Delivered: 20 November 2025

Summary: Restitution of Land Rights Act 22 of 1994; Proclamation 69 of 23 March 1990 declared inconsistent with the Constitution and invalid to the extent that it confers power to control and manage property under customary law; extent of property defined and restored as restitution.

ORDER

1. It is declared that the precise boundary of Portion A, referred to in Order 4 of the order of this Court of 27 February 2025 is depicted on the diagram attached as Annexure B as ABCDEFGHJKLMNO (Portion A).
2. Save in respect of Portion A, it is declared that the Proclamation made in Government Notice 69 of 23 March 1990 is inconsistent with the Constitution of Republic of South Africa and invalid to the extent that it confers on the first defendant the power to control and manage the property to which it relates under customary law.
3. The declaration of invalidity in Order 2 above operates from the date of this order.

4. Zandfontein 31 JR is restored to the Bakgatla Ba Mocha (Ba Maubane) in the form of ownership.
5. Save for Portion A, Bultfontein 174JR is restored to the Bakgatla Ba Mocha (Ba Maloka) in the form of ownership.
6. The Commission on the Restitution of Land Rights and the Minister of Rural Development and Land Reform are directed to take such steps as are necessary to facilitate the transfer of ownership of the aforementioned properties, respectively, to the Ba Maubane and Ba Maloka, or such entity as they may nominate, and should any dispute arise in connection therewith the parties may approach the Court for further relief.
7. There is no order as to costs.

JUDGMENT

COWEN DJP

Introduction

[1] This case concerns restitution claims of the first and second plaintiffs, respectively, the Bakgatla ba Mocha Ba Maubane (the Maubane) and the Bakgatla Mocha Ba Maloka (the Maloka) lodged under the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). Although the referred claims concern numerous farms, the dispute currently before Court is about two claimed properties, being

Zandfontein 31R (Zandfontein) and Bultfontein 174JR (Bultfontein). The Maubane claim Zandfontein and the Maloka claim Bultfontein.

[2] The first defendant is the Bakgatla ba Mmakau ba Mokgoko (the Mokgoko) who assert an interest over both properties, centrally arising from various Proclamations made in terms of the Native Administration Act 38 of 1927 (the 1927 Act), the Bantu Authorities Act 68 of 1951 (the 1951 Act) and the Bophuthatswana Traditional Authorities Act 23 of 1978 (the 1978 Bophuthatswana Act). The Commission for the Restitution of Land Rights (the Commission) is represented in these proceedings by the first and second interested parties.

[3] The dispute has been ventilated in trial proceedings in two stages. During 2024, the parties ventilated much of Part A of the proceedings, which dealt centrally with a dispute over whether the plaintiffs were dispossessed of their rights in land in respect of Zandfontein and Bultfontein as a result of past racially discriminatory laws and practices.

[4] On 27 February 2025, this Court delivered a detailed judgment (the first judgment) making the following order:

1. The questions a) whether the plaintiffs were dispossessed of rights in land in respect of Zandfontein 31JR and Bultfontein 174JR after 19 June 1913 as a result of past racially discriminatory laws and practices and b) the status and constitutional validity of Proclamation No 1727 of 21 November 1958, Proclamation 10 of 20 June 1986 (the 1986 Proclamation) and Proclamation 69 of 23 March 1990 (the 1990 Proclamation) are separated from the issue of remedy, which is to be determined in Part B.
2. It is declared that the Bakgatla Ba Mocha (Ba Maubane) were dispossessed of rights in land in respect of Zandfontein 31JR after 19 June 1913 as a result of past racially discriminatory laws and practices and are entitled to restitution under section 2 of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act).

3. Subject to Order 4, it is declared that the Bakgatla Ba Mocha (Phopolo Maloka) were dispossessed of rights in land in respect of Bultfontein 174JR as a result of past racially discriminatory laws and practices and are entitled to restitution under section 2 of the Restitution Act.
4. Order 3 does not apply to the Portion of Bultfontein 174JR described in 1944 as Portion A of Bultfontein 472 and measuring two thousand and seventy-nine (2079) morgen, four hundred and forty (440) square roods (Portion A).
5. The question whether the 1990 Proclamation is inconsistent with the Constitution is postponed for further hearing following joinder of relevant functionaries.
6. Any dispute about the precise boundaries of the dispossessed land as a result of changes to the boundaries or descriptions of the properties over time may be ventilated in Part B.
7. There is no order as to costs.

[5] After the first judgment was delivered, the matter was placed under case management with a view to ensuring its expeditious finalisation. Initially, steps were taken to ensure that relevant functionaries were joined as contemplated by Order 5 (read with paragraphs 103 and 104 of the first judgment). This resulted in the joinder of several parties and service of the papers on them. The following State parties were joined provisionally:¹ the Premier Mpumalanga, the Premier of Limpopo, the Premier of North West Province, the MEC Cooperative Governance and Traditional Affairs, Mpumalanga Province; the MEC Cooperative Governance, Human Settlements and Traditional Affairs, Limpopo Province and the MEC Cooperative Governance and Traditional Affairs, North West Province (the State parties). The following further parties were also provisionally joined: the Mpumalanga Provincial House of Traditional and Khoi-San Leaders; the Limpopo Provincial House of Traditional and Khoi-San Leaders and the North West House of Traditional and Kho-San Leaders.

¹ This approach was adopted in circumstances where the parties did not know which of the parties so joined had an interest due to the unusual history relating to the location of the properties and the alteration of borders of the former homelands and newly created provinces through the democratic transition.

[6] An opportunity was thereby given to these parties to participate in these proceedings. The State parties elected to join the proceedings, filing a notice to participate. They determined amongst themselves that it was the relevant functionaries from Mpumalanga who were affected and the Premier of Mpumalanga and the MEC Cooperative Governance and Traditional Affairs of Mpumalanga Province filed a notice to abide. None of the other parties elected to participate in the proceedings.

[7] On 30 July 2025, the Court conducted an inspection *in loco* of Bultfontein. During the inspection, it became clear that there is a dispute between the parties about the precise boundaries of the dispossessed land as a result of changes to the boundaries and descriptions of the properties over time. Specifically, there is a dispute about what constitutes Portion A as defined in Order 4: the Portion of Bultfontein 174JR described in 1944 as Portion A of Bultfontein 472 and measuring two thousand and seventy-nine (2079) morgen, four hundred and forty (440) square roods (Portion A). This means that it is necessary to resolve this dispute as contemplated by Order 6. It also became clear to the parties that they wish to lead evidence about remedy, specifically the issue of restorability of the dispossessed land, which the plaintiffs seek in the form of ownership.

[8] Dates were set for dealing with these issues between 11 and 15 August 2025. To facilitate the determination of the dispute about the precise boundaries of the dispossessed land, it was agreed that the Court should call as a witness or witnesses, representatives from the office of the Surveyor-General who had conducted an inspection *in loco* in 2023 over Portion 1 of Bultfontein 174JR. Oral argument was heard virtually in the matter on 2 September 2025.

[9] This judgment, accordingly, deals with:

- a) Whether the 1990 Proclamation is inconsistent with the Constitution and if so, what remedy to grant;
- b) The precise boundary of Portion A;
- c) The issue of remedy (Part B).

[10] This judgment should be read together with the first judgment. Save to the extent necessary, issues traversed there are not dealt with again.

Constitutional validity of the 1990 Proclamation

[11] The first question is whether the 1990 Proclamation² is inconsistent with the Constitution. As explained in the first judgment, the 1990 Proclamation followed upon two earlier Proclamations, Proclamation 1727 of 21 November 1958 (the 1958 Proclamation) and Proclamation 10 of 20 June 1986 (the 1986 Proclamation).³ It was made under ss 2 and 3 of the 1978 Bophuthatswana Act.⁴ Its effect was to a) withdraw the 1986 Proclamation, b) redefine the tribal area of the Bakgatla Ba Mmakau tribe to consist of Bultfontein 174JR and Zandfontein 31 JR (the Remaining Extent and Portion 2) and c) to determine that the Bakgatla Ba Mmakau Tribal Authority shall, in addition to the Kgosi, consist of not more than 15 councillors.

[12] The impact of the Proclamations on land administration is set out in paragraphs 67 to 69 of the first judgment in these terms:

‘[67] The evidence was clear about the impact of the Proclamations on land administration. In short, decisions about land management and control, including land allocations, were made by the Mokgoko and the Maloka and the Maubane required their consent on those matters. Before the Proclamations, they could manage and control the land under customary law under their own Chiefs.

² Proclamation 69 of 23 March 1990.

³ The first judgment deals with the making of these Proclamations at paras 6, 55, 63 to 66.

⁴ These sections are cited in full at fn 80 and fn 81 of the first judgment.

[68] There are many references in the evidence to these impacts. For example, Mr Maubane testified that it was through the Proclamations that the Mokgoko came to ‘administer our land’ but he testified that they believed that they owned it. At a point he mentioned that they had ‘abolished some of their rituals’ (which are connected to the land) and he testified that schools they had to build were built in the Mokgoko’s area – alluding to forced labour. Mr Maubane explained further that the Mokgoko took issue with the Maubane when they sought to allocate land to their own children saying they required their consent.

[69] Mr Maloka explained the impact in idiom saying President Mangope gave the Mokgoko their land: it is as if you were to take my shoe and say, wear one shoe and then I will wear the other shoe. Mr Maloka went on to explain that development took place on Bultfontein – referring to government offices, a hospital and the police station. He testified about home demolition and arrests for trespass. At a later point, Mr Maloka recounted how, after the 1986 and 1990 Proclamations were in place, the Mokgoko ‘had taken all the chieftaincy’, and started to ‘even farm on the graveyard’. On enquiry from the Court, the impact of the Proclamations on land was described in these terms: ‘It made a huge impact because we could not do anything without asking for permission. So, remember back then people used to depend on livestock or cattle. So now if there will be a limit say of nine cattle and then how is one going to survive. ... So now the cattle were taken to another camp which was far from home. It was very difficult to go and fetch cattle and then after that you used to come back and study. ... So we were already oppressed whereby everything that needs to be done you need to get permission Kgosi Mokgoko like ... water you would need permission. Opening a shop, you would need a permission. And none of the applications were approved. We needed to ask permission in our own land. ...’ These aspects were not canvassed in cross-examination.’

[13] In the first judgment, this Court concluded that both the 1986 and the 1990 Proclamations dispossessed the plaintiffs of their rights in land as communities as a result of discriminatory laws and practices.⁵ By the time that these Proclamations were made, the land was designated for communal use and the Native Trust and Land Act 18 of 1936 (the 1936 Act) had been repealed in what was then Bophuthatswana. The finding was made in circumstances where it was common cause that the Proclamations were made without consulting the plaintiffs and without their consent. The Court relied on the following dictum in *Mahonisi*⁶ concluding that the same effects were felt by the plaintiffs:

‘[169] ... The rights in land were lost because it was no longer possible to access or control land held in common with other members of the Mahonisi Community subject to their shared rules of customary law. Access, if any, was now to be determined through the rules of another community and subject to its control, as distorted by colonial and apartheid laws and practices. In the case of the Mavambe, the Mahonisi became a structural minority.’

⁵ See paras 86 and 87.

⁶ *Mahonisi Royal Family and Community and others v Minister of Rural Development and Land Reform and others* [2023] ZALCC 32 (*Mahonisi*).

[14] On the evidence to hand, this Court concluded:

‘[99] What the evidence showed however, is that the power under customary law to take decisions about the management and control of land, including its allocation, were impacted by the Proclamations. Thus, where the Maloka and the Maubane could assert these powers under customary law prior to the 1986 and 1990 Proclamations, those powers then vested with the Mokgoko. It is in this way that the dispossession of rights, which was coercive, occurred. Of course, the authority conferred by the 1986 and 1990 Proclamations extend well beyond the issue of control and management over land.’

[15] What was left open for determination was the constitutional validity of the Proclamations which the plaintiffs challenged. Specifically, the 1990 Proclamation because it had withdrawn the 1986 Proclamation, which is no longer extant. The 1958 Proclamation was applicable only to Portion A. It was in light of the interests of the parties joined in these proceedings that the question of the constitutional validity of the 1990 Proclamation was held over for determination at this stage.⁷ None of the joined parties who participated in the proceedings elected to provide any further evidence, and in the circumstances, the constitutional validity of the 1990 Proclamation stands to be determined on the evidence on record, and the submissions by the parties and the amici.

[16] As indicated in the first judgment, the parties were *ad idem* that this Court has the power to declare the 1990 Proclamation unconstitutional,⁸ and it was contended by and in favour of the plaintiffs that such a declaration was necessary in order to ensure effective restitution of the dispossessed properties. It warrants emphasis that this Court exercises its jurisdiction⁹ in respect of this issue in

⁷ The reasoning for concluding that the parties had an interest is set out from para 90 of the first judgment. See especially para 103.

⁸ In terms of section 24(1)(a) of the Land Court Act 6 of 2023 (the Land Court Act), this Court has all such powers in relation to matters falling within its jurisdiction as are possessed by a Division of the High Court having jurisdiction in civil proceedings at the place where the land in question is situated, including the powers of the High Court in relation to any contempt of Court. The High Court has the power to decide constitutional matters under section 169(1)(a) of the Constitution.

⁹ In terms of section 24(1)(c). This Court is vested with the power to decide any issue in terms of any [other] law, which is not ordinarily within its jurisdiction but is sufficiently connected to a matter within its jurisdiction, if the

circumstances where, as dealt with below, this Court has concluded that the dispossessed land should be restored to the plaintiffs and the contention was made, and is accepted, that there can be no effective restoration of the dispossessed land to the plaintiffs in the absence of a declaration of invalidity being granted.

[17] The parties' main submissions (partly set out in the first judgment) are briefly summarised. The plaintiffs submitted that a Proclamation that continues to dispossess a community of their customary rights in land that was made coercively and without consultation and consent and under racially discriminatory laws and practices would limit at least the rights to dignity (s 10),¹⁰ equality (s 9)¹¹ and cultural rights (ss 30 and 31)¹² protected in the Constitution. The Human Rights Commission supported these submissions and submitted further that other rights are limited too, specifically property rights (s 25)¹³ and

Court considers it to be in the interests of justice to do so. The erstwhile Land Claims Court enjoyed a similar power in terms of section 22(2)(c) of the Restitution Act, should that provision be applicable to these proceedings, an issue not canvassed.

¹⁰ Section 10 of the Constitution reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

¹¹ Section 9 of the Constitution reads:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

¹² Section 30 provides: 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.'

Section 31 provides:

'(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

- (a) To enjoy their culture, practice their religion and use their language; and
- (b) To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

¹³ Section 25 provides:

socio-economic rights such as the right of access to sufficient food and water (s 27(1)(b)),¹⁴ which, it was submitted, is connected to the issue of access to land.¹⁵

[18] There was no attempt by the Mokgoko to justify any limitation of rights. Indeed, during further argument on 2 September 2025, the Mokgoko did not seek to contend that the 1990 Proclamation remains valid in light of the conclusions reached by this Court in the first judgment.

25. Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) 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.

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

(9) Parliament must enact the legislation referred to in subsection (6).

¹⁴ Section 27(1)(b) provides: (1) Everyone has the right to have access to – (a) ...; (b) sufficient food and water; ...

¹⁵ Relying on the following dictum in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) para 85 (footnotes omitted): 'As the Minister pointed out, international law recognises that the content of the right to food has the twin elements of availability and accessibility. The first element refers to a sufficient supply of food and requires the existence of a national supply of food to meet the nutritional needs of the population generally. It also requires the existence of opportunities for individuals to produce food for their own use. The second element requires that people be able to acquire the food that is available or to make use of opportunities to produce food for their own use. In respect of both elements there is a measure of overlap with the state's obligation under section 25(5) of the Constitution to facilitate equitable access to agricultural land, and with the state's obligation under section 24 of the Constitution to conserve the environment.'

[19] I agree that the 1990 Proclamation is constitutionally invalid insofar as it vests in the Mkgoko the power under customary law to control and manage Bultfontein (save for Portion A) and Zandfontein. In my view, its continued operation in the democratic era violates the right to dignity and cultural rights. The Proclamation, moreover, continues to deprive the Maubane and the Maloka of their customary rights to manage and control the land on which they reside. This is in breach of section 25(1) of the Constitution.

[20] I commence with the breach of section 25(1) which prohibits the arbitrary deprivation of property.¹⁶ A ‘deprivation’ entails ‘any interference with the use, enjoyment or exploitation of private property.’¹⁷ The Constitutional Court gave meaning to ‘arbitrary’ in *FNB*¹⁸ holding that a law is arbitrary when it ‘does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.’ The Court set out several factors to establish sufficient reason as follows:

- ‘a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question;
- (b) A complexity of relationships has to be considered;
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected;
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property;
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
- (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason

¹⁶ Above fn 13.

¹⁷ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance (FNB)* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB*) para 57.

¹⁸ *Id* para 100.

is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with “arbitrary” in relation to the deprivation of property under section 25.’

[21] Although the initial dispossession of property rights occurred before the interim Constitution came into force in 1993, the 1990 Proclamation has entailed an ongoing interference with the use, enjoyment and exploitation of the land on which the Maubane and Maloka reside as they continue to be precluded, collectively, from exercising control and management of the land under customary law. This has continued throughout the democratic era and continues to this day. In my view, it cannot be said that there is a sufficient reason for the ongoing deprivation, having regard to the racially discriminatory origins of the Proclamation and the fact that it was made without consultation with and the consent of the Maubane and Maloka, the profound ongoing impact on their communities, their dignity and their developmental aspirations and cultural identities.

[22] In the first judgment, the Court found that the 1986 and 1990 Proclamations dispossessed the Maloka and Maubane of rights in land as a result of racially discriminatory laws and practices in circumstances where they were made without consulting the Maloka and Maubane and without their consent and this resulted in the coerced placement of land of a traditional community under the territorial jurisdiction of another.¹⁹ As indicated above, this conclusion was reached in reliance on *Mahonisi*²⁰ and the evidence in this case.²¹

¹⁹ First judgment, para 86 and 87.

²⁰ Above n 6 para 169

²¹ Above paras 12 to 14.

[23] It was effectively submitted that the ongoing application of the Proclamation during the democratic era, violates the right of the Maubane and Maloka to equality, and more specifically, not to be discriminated against on the basis of their race and culture, inasmuch as it precludes them from exercising control and management of Zandfontein and Bultfontein under customary law. In circumstances where the parties did not address argument on the impact of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, I decline to decide the matter on this basis. However, I am satisfied that to the extent that the ongoing application of the Proclamation continues to preclude the Maubane and Maloka from exercising control and management of Zandfontein and Bultfontein under customary law, it violates their right to dignity.²² And it does so in a manner that negatively impacts on the right of access to sufficient food and water.²³

[24] The 1990 Proclamation also limits the rights of the Maloka and Maubane to participate in the cultural life of their choice and to enjoy their culture under ss 30 and 31 of the Constitution.²⁴ During the proceedings, the plaintiffs testified to their cultural connection to the land and its meaning to their spiritual practices. The deprivation of control and management over their land under customary law also limits these rights.

[25] As mentioned, the Mokgoko did not attempt to justify any rights limitation under section 36 of the Constitution.²⁵ Neither did the Commission or any of the

²² Section 10 of the Constitution. The inextricable link between land dispossession and loss of dignity is canvassed in *Land Access Movement of South Africa v Chairperson, National Council of Provinces* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (*Lamosa*) at para 1 and 63.

²³ Section 27(1)(b) of the Constitution.

²⁴ Section 30 provides: 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.' Section 31(1)(a) provides: '(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, ...'

²⁵ Section 36 of the Constitution reads:

'Limitation of rights'

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and

participating State parties. Contralesa, which participated as a friend of the Court, emphasised the existence of a legislative process to alter the formal recognition of traditional communities and their boundaries, which is traversed in the first judgment.²⁶ For present purposes, the Traditional Leadership and Framework Act 41 of 2003 (the Framework Act) and the Mpumalanga Traditional Leadership and Governance Act 3 of 2005 are relevant.²⁷ As mentioned in the first judgment, the Maloka have lodged a dispute with the Commission on Disputes and Claims in respect of the Mokgoko which has been decided against them, but is currently being ventilated in review proceedings in the High Court. In my view, the existence of these legislative remedies to redress the impact of the Proclamation cannot rescue the Proclamation from constitutional invalidity in respect of the limitations referred to above. In my view, the existence of these processes would be relevant to remedy rather than the justification of rights limitations. In any event, the invalidity is limited to the power of control and management of land under customary law and it is difficult to see how such an ongoing limitation can ever be proportionate given the impact on people's dignity of delays achieving land justice and providing restitution for dispossession.²⁸

[26] Indeed, argument was focused rather on remedy which is to be decided in terms of s 172 of the Constitution. Section 172 of the Constitution provides, in relevant part:

- ‘(1) When deciding a constitutional matter within its power, a court –
 (a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 (b) May make any order that is just and equitable, including –
 (i) An order limiting the retrospective effect of the declaration of invalidity; and

freedom, taking into account all relevant factors, including -(a)the nature of the right;(b)the importance of the purpose of the limitation;(c)the nature and extent of the limitation;(d)the relation between the limitation and its purpose; and(e)less restrictive means to achieve the purpose.(2)Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

²⁶ See paras 90 to 95.

²⁷ Parliament repealed the Framework Act in 2023 and replaced it with the Traditional and Kho-San Leadership Act 3 of 2019 but on 30 May 2023, the Constitutional Court declared that Act to be unconstitutional. The declaration of invalidity was suspended for two years. See para 95 of the initial judgment.

²⁸ *Lamosa* above n 22 para 1 and para 43.

- (ii) An order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.’
- (2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.’

[27] Under s 172(1)(a) of the Constitution, the Court is obliged to declare the 1990 Proclamation invalid to the extent of its invalidity. I have already concluded that the 1990 Proclamation is invalid to the extent that it confers power on the Mokgoko to control and manage the dispossessed land under customary law. However, two further issues concerning remedy arise:

a) The first is whether the declaration of invalidity should operate from the date of commencement of the interim Constitution, being the default position,²⁹ or whether the Court should limit its retrospective effect in terms of subsec 172(1)(b)(i) of the Constitution. The plaintiffs submitted that there should be no limitation on the retrospective effect of the declaration of invalidity. The first defendant submitted that it should operate from the date of the order of invalidity by this Court.

b) The second is whether it is necessary for this Court to refer the declaration of invalidity to the Constitutional Court for confirmation under section 172(2)(a). The plaintiffs and the SAHRC submitted that it is. The Commission submitted that it is not.

Limiting the retrospective effect of the order

²⁹ This flows from the doctrine of objective invalidity the Constitutional Court adopted in *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira v Levin*) paras 26 to 28; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*) para 84; *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) (*Executive Council*) paras 102-106; *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and another (Road Freight Association as amicus curiae)* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) para 20.

[28] On the facts of this case, I have concluded that the declaration of invalidity should be limited and take effect from the date of this Court's order in these proceedings. This is in the interests of preserving completed transactions. First, there is no suggestion in this case that there have been any contested or controversial transactions or allocations on the dispossessed property. The only contested or controversial transactions or allocations are those in respect of property falling within Portion A, which is not part of the dispossessed land under the first judgment.³⁰ Second, section 11(7) of the Restitution Act regulates how persons may transact in respect of land once a property is subject to a land claim. Persons who have acted in accordance with those provisions should enjoy their protection. Where persons have failed to act in accordance with those provisions, the plaintiffs have their remedies under the Restitution Act. Thirdly, the evidence suggests strongly that those living on the dispossessed land are, at least in the main, the Maloka and Maubane themselves.

Referral to the Constitutional Court

[29] During argument, the importance of the issues before this Court was impressed upon the Court and it was suggested that for that reason the order must be suspended and the matter referred by the Registrar to the Constitutional Court for confirmation under section 172(2)(a). It may well be desirable that this matter receives the attention of the Constitutional Court, but that is not the question. The question is whether the provisions of section 172(2)(a) are applicable as a matter of law.³¹ If not, any aggrieved party should seek to approach the higher Courts on appeal in the ordinary course.

³⁰ The boundaries of Portion A are dealt with below.

³¹ See *Mdodana v Premier of the Eastern Cape and Others* [2014] ZACC 7; 2014 (5) BCLR 533 (CC); 2014 (4) SA 99 (CC) (*Mdodana*).

[30] The purpose of section 172(2)(a) is to ensure that the Constitutional Court, as the highest court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of state.³² The section serves to ‘preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other’³³ and the separation of powers.³⁴

[31] In my view, this is not a case that triggers section 172(2)(a) because the Proclamation is not an Act of Parliament, a provincial Act or any conduct of the President. As set out in the first judgment, the 1990 Proclamation was made by President Mangope, the former President of Bophuthatswana under ss 2 and 3 of the 1978 Bophuthatswana Act. It was not contended that the 1990 Proclamation constitutes an Act of Parliament. The SAHRC submitted that the Proclamation must be viewed as a provincial Act placing reliance on *DVB Behuising*.³⁵ The submission, in short, is that an analogy can be drawn between the Proclamation under consideration in that case and the 1990 Proclamation. In *DVB Behuising*, the Constitutional Court considered Proclamation 293 of 1962³⁶ made under the 1927 Act (Proclamation 293). Amongst other things, Proclamation 293 made provision for the establishment by the Minister of Bantu Administration and Development of a kind of township for African citizens in land held by the South African Native Trust. There is no question that Proclamation 293 was treated by the Constitutional Court as, in nature, legislation and to that extent one may consider it to be an ‘Act’. There are, however, two difficulties with this analogy. The first is that where Proclamation 293 is, in nature, legislation, the same cannot

³² *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 55 -56.

³³ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) SA 14; 1999 (2) BCLR 175 at para 29.

³⁴ *Mdodana*, above n 31, para 22.

³⁵ *Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another* [2000] ZACC 2; 2000 (4) BCLR 347 (CC); 2001 (1) SA 500 (CC).

³⁶ Government Gazette 373, 16 November 1962.

be said of the 1990 Proclamation which is, rather, executive or administrative in nature. The second is that, in any event, the fact that a Proclamation may be regarded as legislation does not give it the character of being a ‘provincial Act’ under section 172(2)(a) as an ‘Act’ under that section does not include subordinate legislation.³⁷

[32] The 1990 Proclamation, is best described as *conduct* of the former President of Bophuthatswana. It does not follow, however, that it therefore constitutes ‘conduct of the President’ for purposes of section 172(2)(a) of the Constitution. The President, under the Constitution, is the President of the Republic of South Africa. Former President Mangope of the former Bophuthatswana was at no stage the President of the Republic of South Africa.

[33] The SAHRC submitted that the question remains whether the powers that vested in him in respect of the 1990 Proclamation as President of a former homeland became vested in the President of the Republic of South Africa under the transitional provisions of the interim Constitution 200 of 1993 or thereafter under the Constitution. However, an analysis of those provisions shows that executive and administrative authority in respect of the 1978 Bophuthatswana Act and the 1990 Proclamation vested with the relevant Premier and Province and not with the President of the Republic of South Africa.

[34] Section 235 of the interim Constitution regulated transitional arrangements in respect of executive authorities. Section 235(1) provided that a person who immediately before the commencement of the interim Constitution was the

³⁷ *Mdodana*, above n 31 para 23; *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 11; *Booyesen and Others v Minister of Home Affairs and Another* [2001] ZACC 20; 2001 (4) SA 485 (CC); 2001 (7) BCLR 645 (CC) at para 1; *Minister of Home Affairs v Liebenberg (CCT22/01)* [2001] ZACC 3; 2001 (11) BCLR 1168; 2002 (1) SA 33 (CC) at para 9.

President in a government under a constitution which was in force in an area which forms part of the national territory, continue in office until the President has been elected and assumed office.³⁸ In terms of section 235(5) of the interim Constitution, upon the assumption of office by the President, the executive authority of the Republic would vest in the President and the executive authority of a province would vest in a Premier (once office is assumed).³⁹ Section 235(6) regulated the power to exercise executive authority in terms of laws in force in any area which formed part of the national territory.⁴⁰

³⁸ 235. (1) A person who immediately before the commencement of this Constitution was—
 (a) the State President or a Minister or Deputy Minister of the Republic;
 (b) an Administrator or a member of the Executive Council of a province; or
 (c) the President, Chief Minister or other chief executive or a Minister, Deputy Minister or other political functionary of a government under any other constitutional arrangement which was in force in an area which forms part of the national territory,
 shall continue in office until the person referred to has been elected in terms of this Constitution: Provided that a person referred to in paragraph (a), (b) or (c) shall for the purposes of section 42(1)(e) and while continuing in office, be deemed not to hold an office of profit under the Republic.

³⁹ (5) Upon the assumption of office by the President in terms of this Constitution—
 (a) the executive authority of the Republic as contemplated in section 75 shall vest in the President acting in accordance with this Constitution;
 (b) the executive authority of a province as contemplated in section 144 shall, subject to subsections (8) and (9), vest in the Premier of that province, acting in accordance with this Constitution, or while the Premier of a province has not yet assumed office, in the President acting in accordance with section 75 until the Premier assumes office.

⁴⁰ (6) The power to exercise executive authority in terms of laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of section 229 continue in force after such commencement, shall be allocated as follows;

- (a) All laws with regard to matters which –
 - (i) do not fall within the functional areas specified in Schedule 6; or
 - (ii) do fall within such functional areas but are matters referred to in paragraphs (a) to (e) of section 126(3) (which shall be deemed to include all policing matters until the laws in question have been assigned under subsection (8) and for the purposes of which subsection (8) shall apply *mutatis mutandis*),
 shall be administered by a competent authority within the jurisdiction of the national government ...
- (b) All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126(3) shall –
 - (i) If any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1)(a) or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (8) to a competent authority within the jurisdiction of the government of such province; or
 - (ii) If any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in subsection (1)(c), subject to subsections (8) and (9) be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies: ...'

[35] Under s 144(1), the executive authority of a province vested in its Premier and under s 144(2) ‘(a) province shall have executive authority over all matters in respect of which such province has exercised its legislative competence, matters assigned to it by or under section 235 or any law, and matters delegated to it by or under any law.’ Under s 126(1), the relevant province acquired the legislative competence to make laws for the province with regard to all matters which fell within the functional areas specified in Schedule 6, which included cultural affairs and traditional authorities. That competence was held concurrently with Parliament ⁴¹.

[36] The 1978 Bophuthatswana Act concerned cultural and traditional affairs and the parties confirmed that it was assigned to the provinces. In the result, and under subsec 144(2) and subsec 235(5)(b), executive authority in respect thereof resided with the Premier and the province. Moreover, the power to administer the law resided with the relevant province under section 235(6)(b)(ii). The SAHRC sought to avoid these conclusions by relying on the provisions of section

⁴¹ Legislative competence of provinces

126. (1) A provincial legislature shall, subject to subsections (3) and (4), have concurrent competence with Parliament to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

(2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

(3) An Act of Parliament which deals with a matter referred to in subsection (1) or (2) shall prevail over a provincial law inconsistent therewith, only to the extent that-

(a) it deals with a matter that cannot be regulated effectively by provincial legislation;

(b) it deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;

(c) it is necessary to set minimum standards across the nation for the rendering of public services;

(d) it is necessary for the determination of national economic policies, the maintenance of economic unity, the protection of the environment, the never promotion of inter-provincial commerce, the protection of the common 5 market in respect of the mobility of goods, services, capital or labour, or tew the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole.

4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

(5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.

(6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of subsection (3).

126(3)(a) to (e).⁴² I am unpersuaded that any of these provisions have application to this case.

[37] The commencement of the 1996 Constitution did not alter this position.⁴³ And when regard is had to the current legal framework, it is the Premier who has the power to determine or withdraw a determination of the status of a traditional community or its area of jurisdiction.⁴⁴ Following the process of joinder prior to the recommencement of these proceedings, it was established that at least at this stage, the relevant Premier is the Premier of Mpumalanga.

[38] In light of the above, I am unable to conclude that the President of the Republic of South Africa is responsible for any conduct that requires or, indeed, entitles this Court to suspend and refer its declaration of invalidity to the Constitutional Court under section 172(2)(a). In the result, I decline to do so.

The boundaries of the dispossessed land

[39] As appears above, prayer 6 of the order in the first judgment enabled the parties to ventilate any dispute about the precise boundaries of the dispossessed land as a result of changes to the boundaries and descriptions of the properties over time, during Part B of the proceedings. As indicated above, the dispute that has arisen is the precise boundaries of Portion A of Bultfontein as referred to in this Court's first order. Portion A is described in Order 4 as the Portion of Bultfontein 174JR described in 1944 as Portion A of Bultfontein 472 and measuring two thousand and seventy-nine (2079) morgen, four hundred and forty (440) square roods (Portion A).

⁴² Id.

⁴³ Section 2(2)(b) read with section 14 of Schedule 6.

⁴⁴ See for example ss 3 to 6 of the Mpumalanga Traditional Leadership and Governance Act 3 of 2005.

[40] To assist the Court, Ms Matlala Johanna Phalafala was called as a witness. The Court called her in the exercise of its inquisitorial powers⁴⁵ and with the agreement of the parties. Ms Phalafala is employed as a professional land surveyor at the Limpopo Office of the Surveyor-General, which is part of the Department of Land Reform and Rural Development. She was responsible for preparing a report for a Site Inspection of what is referred to as Portion 1 of the Farm Bultfontein 174JR which took place on 23 November 2023.⁴⁶ For purposes of assisting the Court, Ms Phalafala prepared a supplementary report which clarified the boundaries of Portion A.

[41] After hearing the evidence and considering the relevant documents on record, and after hearing the parties, I accept the evidence of Ms Phalafala. In the result, this Court determines that the boundaries of Portion A are depicted in Annexure B to the report of 23 November 2023 (attached and referred to as Annexure B). Annexure B is SG Diagram No A3868 and describes what was known as Portion A, which was later renamed Portion 1 of Bultfontein. Portion 1 was, however, more recently, subdivided and now comprises Portion 22 (also depicted on Annexure B) and Remainder of Portion 1, which is a split remainder with one part to the north of Portion 22 and one part to the south of Portion 22.

[42] It is helpful to place reliance on Annexure B because it depicts Portion A with reference to an area marked clearly on the diagram as ABCDEFGHJKLMNO and describes that area precisely with reference to its sides, angles and co-ordinates. Moreover it is a diagram of the office of the Surveyor-General which is a document prepared by a registered professional land surveyor and approved by the office of the Surveyor-General. However, to facilitate understanding of how Portion A reflects on the ground, Ms Phalafala prepared a sketch diagram (attached as E2).

⁴⁵ *Mlifi v Klingenberg* 1999(2) SA 674 (LCC) para 110.

⁴⁶ It is found in Exhibit D p 825 and following.

[43] A brief summary of what the evidence demonstrates is warranted.

[44] Bultfontein was originally described as Bultfontein 472. It is now known as Bultfontein 174. The full extent of the property is referred to in these proceedings as Bultfontein but it has been subdivided and portions renamed over time. The document on record that best sets out the various subdivisions is described as Folio 131 Book 5. This document is a historical document and does not originate from the Office of the Surveyor General. However, it shows that title was originally registered in respect of Bultfontein 242 on 23 January 1862 when it was transferred via Government Grant to Mr Hendrik Petrus van der Walt. It then measured 8318 morgen and 558 square roods. In 1914, the property was subdivided into four equal portions, each measuring 2079 morgen and 440 square roods. One of these portions was named Portion A. That portion was transferred in favour of Johannes Bodenstein van der Walt on 31 July 1914 by way of Deed of Partition Transfer No 553/1914. On 15 June 1923, Portion A was transferred to the Government of the Union of South Africa by way of Deed of Transfer 5484 of 1923. It still measured 2079 morgen and 440 square roods.

[45] A further document on record titled South Native Trust Grant No 15195 of 1944 also sheds light on the history of Portion A. That document also does not originate from the Office of the Surveyor General. However, it shows that the following took place:

- a) On 31 August 1936, Portion A vested in the South African Native Trust (the Trust) under the provisions of the section 6(1) of the 1936 Act.
- b) The Trust donated Portion A to the Bakgatla-ba-Makau Tribe of Natives under Chief Saul Mokhoko which donation was accepted by the said tribe on 23 September 1943.

- c) Under Grant No 15195 of 1944, the Minister of Native Affairs, in his administration of the Trust's affairs, granted, ceded and transferred Portion A to the Minister of Native Affairs in trust for the Bakgalta-ba-Makau Tribe under Chief Saul Mokhoko.
- d) Throughout this process Portion A measured 2079 morgen, and 440 square roods.
- e) The extent of portion A is depicted on the diagrams annexed to Deed of Partition Transfer No 5553/1914 and Deed of Transfer 5484/1923.

[46] Ms Phalafala was able to confirm that 2079 morgen and 440 square roods is equivalent to 1781.3582 hectares. She was also able to confirm that it is possible to access copies of Deed of Partition Transfer No 5553/1914 and Deed of Transfer 5484/1923, probably from the Deeds Office in Mpumalanga. However, it transpired that it was not necessary to do so as she was able to confirm under oath that the diagrams that would be attached thereto would correlate with Annexure B (save for Portion 22 being the more recent subdivision).

[47] In evidence, Ms Phalafala explained that the property descriptions changed when the registration system was transferred from Pretoria to the new provinces. In other words it emanated from a new registration division system that was introduced by the office of the Surveyor-General as the custodian of all cadastral documents across all 9 provinces. It was at this time that Bultfontein 472 would have been changed to Bultfontein 174. At the same time, the system changed from labelling portions of Bultfontein in terms of the alphabets to numbers. Thus Portion A became Portion 1. Portion 1 was subsequently subdivided to create Portion 22 with the result that it then became comprised of Portion 22 and the Remainder of Portion 1. Portion 22 has since been consolidated and is now known as the Farm Mmametlhake 712JR. It measures 580, 1952 hectares. The remaining

extent of Portion 1 after the deduction of Portion 22 is 1201.1630 hectares. Together these portions comprise what was historically known as Portion A.

[48] It may be noted that during the course of Ms Phalafala's evidence and the plaintiffs' submissions, much store was placed on the fact that the Maloka dispute that the Mokgoko purchased Portion A in 1923 and it was resultantly contended that the whole of Bultfontein 174JR is dispossessed land. However, the extent of the dispossessed land was determined in the first judgment. Should the plaintiffs be aggrieved thereby, any remedy lies in an appeal.

Restorability: Part B

[49] As relief, the plaintiffs seek restoration of Zandfontein and Bultfontein in the form of ownership and transfer of the properties into their names. The Commission supports the plaintiffs.

[50] What is appropriate property restitution or equitable redress in response to historical dispossession varies and is subject to the specific context.⁴⁷ In context of this case, the relevant considerations point strongly towards restitution of the dispossessed property itself. In this regard, I have given consideration to the factors listed in the now repealed section 33 of the Restitution Act. No argument was addressed as to whether the provision remains applicable to this matter as a pending matter. Nonetheless, I am of the view that the factors referred to in section 33 of the Restitution Act, though repealed, would remain relevant to the issue of remedy whether or not the matter stands to be determined under the law prior to or after the Land Court Act came into force.

⁴⁷ *Concerned Land Claimants Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association and Others* [2006] ZACC 14; 2007 (2) SA 531 (CC); 2007 (2) BCLR 111 (CC) para 26; *Mphela and Others v Haakdoornbult Boerdery CC and Others* [2008] ZACC 5; 2008 (4) SA 488 (CC); 2008 (4) BCLR 675 (CC).

[51] The plaintiffs remain on the properties and have resided there for generations as a community or part thereof, notwithstanding the relentless degradation of their rights in land over time under colonial and apartheid laws and practices. At times they either owned or expended significant resources seeking to own parts of the properties they had occupied since pre-colonial times. This despite suffering the indignity of having acquired the status of labour tenancy on their ancestral lands prior to 1913. There has been no compensation for lost rights either before or after democracy: rather, a perpetuation of the indignities since 1994. In circumstances where the Court is making the aforesaid declaration of invalidity in respect of the 1990 Proclamation, I can see no basis for any social disruption or any impediment as regards feasibility.

[52] Indeed, the primary impediment to such restitution is the 1990 Proclamation. That is dealt with by the declaration of invalidity which serves to ensure that there is effective restitution of rights in land. In my view, justice and equity demand that the dispossessed properties be fully restored to the plaintiffs in the form of ownership. While the plaintiffs did not lose title in all of the dispossessed property, this relief is warranted in view of the history of this matter and the nature of the rights that the plaintiffs have asserted in respect of the dispossessed properties over time.

[53] There was no dispute that the whole of Zandfontein should be restored to the Maubane and it was confirmed in evidence that the first defendant does not have any presence on that property. The only issue raised in this regard was the fact that it is not only the Maubane who reside there. On its own, this cannot defeat a claim for restoration: there is no suggestion that their property rights will not be respected.

[54] As for Bultfontein 174JR, the evidence focused on the part of the property which, as it transpired, forms part of Portion A, now known as Portion 22 and Remainder Portion 1. In this regard, the Maloka seek restoration of the Remainder of Portion 1 which is largely undeveloped land. They seek only compensation in respect of Portion 22, which is in the main made up of the part of the urban area which is occupied by the Mokgoka and not the Maloka. I say in the main because it transpired, not without concern, that there is a small portion of Portion 22 which is in fact occupied by the Maloka, described as Mocha. Nonetheless, under the first judgment, Portion A does not form part of the dispossessed land, and accordingly, the questions of its restorability, or indeed, compensation, do not arise.

[55] As for the rest of Bultfontein, the evidence showed that, as with Zandfontein, the first defendant has no presence there. In this regard, however, Mr Motshekga submitted that the Court should make an order that permits the Maloka to renegotiate all lease or other arrangements concluded in respect of the property. While of general import, the submission was focused on the position in respect a portion apparently leased by Norman Agricultural Holdings. In my view, this approach cannot be entertained. Any lease of the property will, on the principle of *huur gaat voor koop* survive the transfer to the Maloka. If the Maloka wish to renegotiate the lease, or any other transaction for that matter, they will need to do so in the ordinary course. Notably, as canvassed in the evidence, there is a range of State and other entities occupying parts of the property whether in the form of State services (eg a hospital) or businesses.

[56] The property is all State-owned land. From the perspective of the Commission, in the face of a declaration of invalidity of the 1990 Proclamation, there is no impediment to the transfer of the dispossessed properties to the

plaintiffs. In the event that any difficulty arises in respect of the transfer, the parties may approach the Court for further relief.

Costs

[57] This Court only awards costs in special circumstances, dealing as it does with social legislation. There are none in this case. Moreover, it is a case of public significance in which two *amicus curiae* participated to assist the Court. The Court is grateful to them for the valuable assistance.

Order

[58] The following order is made:

1. It is declared that the precise boundary of Portion A, referred to in Order 4 of the order of this Court of 27 February 2025 is depicted on the diagram attached as Annexure B as ABCDEFGHJKLMNO (Portion A).
2. Save in respect of Portion A, it is declared that the Proclamation made in Government Notice 69 of 23 March 1990 is inconsistent with the Constitution of Republic of South Africa and invalid to the extent that it confers on the first defendant the power to control and manage the property to which it relates under customary law.
3. The declaration of invalidity in Order 2 above operates from the date of this order.
4. Zandfontein 31 JR is restored to the Bakgatla Ba Mocha (Ba Maubane) in the form of ownership.

5. Save for Portion A, Bultfontein 174JR is restored to the Bakgatla Ba Mocha (Ba Maloka) in the form of ownership.
6. The Commission on the Restitution of Land Rights and the Minister of Rural Development and Land Reform are directed to take such steps as are necessary to facilitate the transfer of ownership of the aforementioned properties, respectively, to the Ba Maubane and Ba Maloka, or such entity as they may nominate, and should any dispute arise in connection therewith the parties may approach the Court for further relief.
7. There is no order as to costs.



S COWEN
DJP Land Court

I agree.



S J MLANGENI
Assessor, Land Court

APPEARANCES:

For the plaintiffs: MS Motshekga instructed by Noko Ramaboya Attorneys Inc

For first defendant: M Ntshangase instructed by SC Mdhluli Attorneys Inc

For the Commission: Mr Mathebula, State Attorney, Tshwane

For the first *amicus curiae*: L Phasha instructed by the South African Human Rights Commission

For the second *amicus curiae*: written submissions prepared by N Nonkonyana

ANNEXURE E2

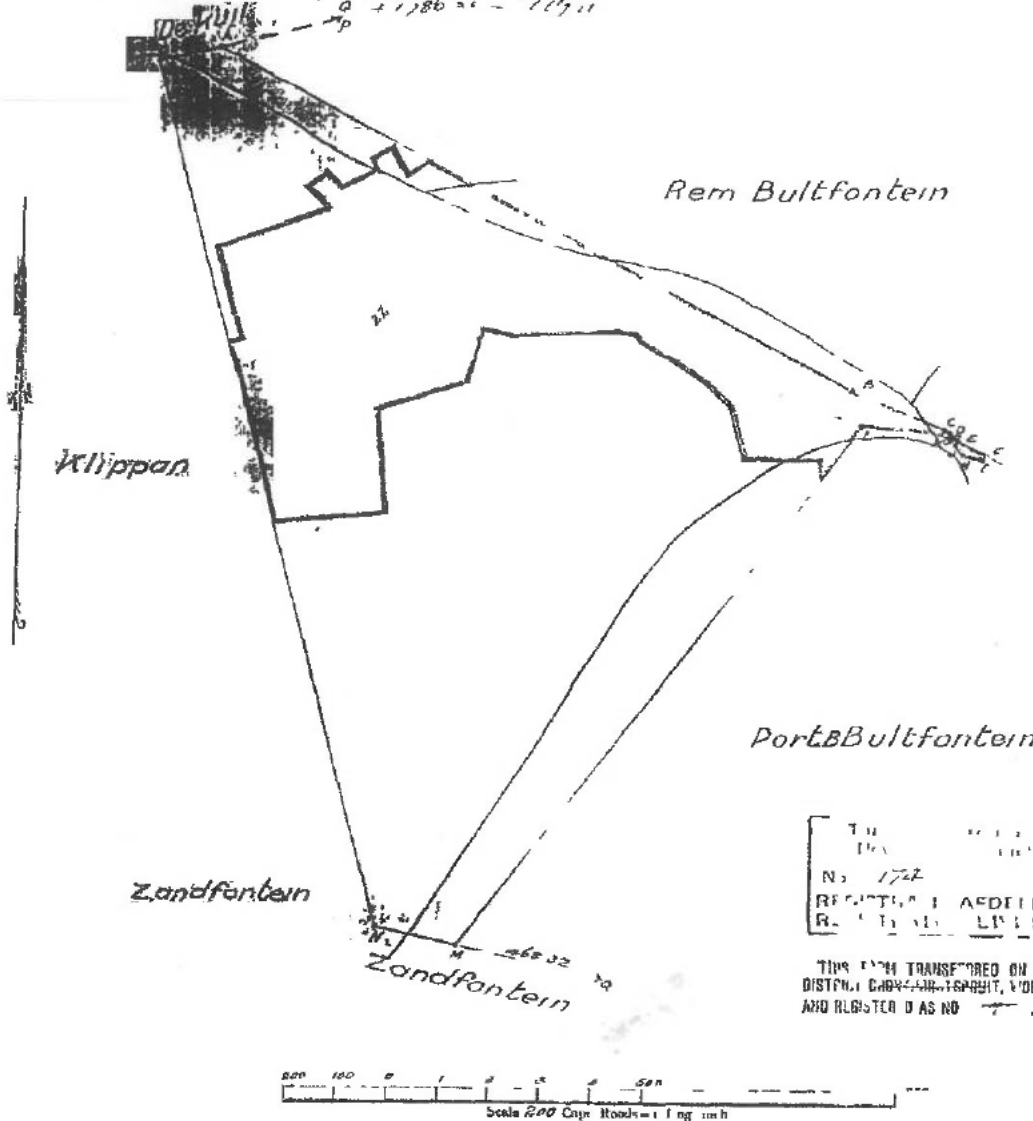
THE FIGURE ABCDEFGHIJKLMNO REPRESENTS THE REMAINDER OF PORTION 1 OF THE FARM BULTFONTEIN NO. 174-JR VIDE DIAGRAM SG NO. A3868/1911



ANNEXURE B

S G. No. A. 2868

SIDES	ANGLES	(b) CO ORDINATES (a)
AB 136.32	136.32	A 36357.1
BC 136.32	136.32	B 3008.46
CD 170.77	170.77	C 2931.11
DE 167.46	167.46	D 2623.77
EF 167.46	167.46	E 2911.11
FG 136.32	136.32	F 2931.11
GH 136.32	136.32	G 2623.77
HJ 136.32	136.32	H 2911.11
KL 136.32	136.32	K 2931.11
LM 136.32	136.32	L 2623.77
NO 136.32	136.32	N 2911.11
OA 136.32	136.32	O 2931.11



The above Figure lettered A B C D E F G H J K L M N O

242.4 Square Rods of Land being

portion A

BULTFONTEIN N° 472

represents
of the Farm 242.4

framed by Surveyor W H Gilfillan in Sept 1887

dated 17/3/1910 made in favour of H P D Wolt

Ward Elandsriver Province of Transvaal Bounded as indicated above

and have been properly erected according to Law

Surveyed in August 1911

by me

Land Surveyor

5148
K. Williams
K. Williams

Approved

W. H. Gilfillan
Surveyor-General

This Diagram belongs to Deed of Transfer No

made this day in favour of

Batgolla R. - Mat in 5552

(Rep of K. Williams)

Registrar of Deeds

Deeds Office,
Pretoria

Diagrams

30 MAY 1912