IN THE LAND COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC 105/2022

Before the Honourable Flatela J

Date of Hearing: 12 June 2025

Date of Judgment: 05 February 2026

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO

05/02/2026 .... [redacted]
DATE SIGNATURE

In the matter between:

TUBATSE ESTATE (PTY) LTD	Applicant
and	
THE CHIEF LAND CLAIMS COMMISSIONER	First Respondent
THE REGIONAL LAND CLAIMS COMMISSIONER: MPUMALANGA	Second Respondent
MAPHANGA COMMUNITY	Third Respondent

PLATSAK (PTY) LTD	Fourth Respondent
KOM-KOM BOERDERY CC	Fifth Respondent
27 TUBATSE LOCAL MUNICIPALITY	Sixth Respondent
OFFICE OF THE VALUER GENERAL	Seventh Respondent
MINISTER OF LAND REFORM AND RURAL DEVELOPMENT	Eighth Respondent
DIRECTOR GENERAL OF THE DEPARTMENT LAND REFORM AND RURAL DEVELOPMENT	Ninth Respondent

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ORDER

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1. The Application is dismissed with costs.

JUDGMENT

FLATELA J:

Introduction

[1] The Applicant, Tubatse Estate (Pty) Ltd, seeks to enforce an oral settlement agreement made with the Regional Land Claims Commissioner (RLCC) for Mpumalanga, the Claimant Community, and various landowners (an agreement to agree). The parties agreed in principle to settle the land claim lodged by the Maphanga Community (the Third Respondents) on the Remaining Extent of the farm Witgatboom Nr 316, Registration Division KT, located in Mpumalanga (the farm).

[2] The Applicant owns Portion 6 of the Farm Witgatboom 316, also known as Extension 40, Burgersdorp, of the remaining extent of the farm. In July 2019, the Applicant agreed to sell its property at a market-related price, for the benefit of the

claimants. It was agreed between the parties that the RLCC would make an offer to purchase the property, and if the offer was acceptable, a written Section 42D agreement would be finalised in accordance with the Restitution of Land Rights Act 22 of 1994 (Restitution Act). The parties did not reach an agreement regarding the purchase price.

[3] The Applicant seeks an order directing the Chief Land Claims Commissioner (CLCC), the RLCC for Mpumalanga, the Minister of Rural Development and Land Reform, and the Director of the Department of Rural Development and Land Reform (the State Respondents) to formalise the existing oral agreement in writing in accordance with section 42D of the Restitution Act and to refer the matter to court under section 14(1) and (2) of the Restitution Act to determine the market value of portion 6 of the Farm.

[4] The application is opposed by the State Respondents and the Claimant Community. Prior to filing their answering affidavit, the RLCC also referred the matter to this court under section 14(1) and (2) of the Restitution Act to determine the market value of portion 6 of the Farm. The referral to determine the market value of the Applicant's property is pending before this court under case number: 105/2022B.

[5] The Fourth and Fifth Respondents shall abide by the decision of this court.

The Parties

[6] The Applicant is Tubatse Estate (Pty) Ltd, a private for-profit company that owns the property known as Portion 6 of the Farm Witgatboom 316, also referred to as Extension 40, Burgersdorp, of the remaining extent of Farm Witgatboom 316, Registration Division KT, Mpumalanga Province.

[7] The First Respondent is the Chief Land Claims Commissioner, established in terms of the Restitution Act. The Second Respondent is the Regional Land Claims Commissioner for the Mpumalanga Province, established in terms of the Restitution Act.

[8] The Third Respondent is the Maphanga Community, a recognised community that has lodged a land claim in terms of the Restitution Act with respect to the farm Witgatboom 316 KT.

[9] The Fourth Respondent is Platsak (Pty) Ltd, a private for-profit company with limited liability, registered in accordance with the laws of the Republic of South Africa. The Fifth Respondent is Kom-Kom Boerdery CC, a close corporation registered in accordance with the Close Corporations Act 69 of 1984. The Fourth and Fifth Respondents are the registered owners of the Remaining Extent of the farm Witgatboom Nr 316, Registration Division KT, Mpumalanga, and the Farm Buffelsdrift No 311, Registration Division KT, Mpumalanga, respectively.

[10] The Sixth Respondent is the Tubatse Local Authority, a municipality established in terms of the Municipal Structures Act 32 of 2000.

[11] The Seventh Respondent is the Office of the Valuer General, established in terms of the Property Valuation Act 17 of 2014 (Property Valuation Act) and its regulations, No. 17 of 2004.

[12] The Eighth Respondent is the Minister of Agriculture, Land Reform and Rural Development. The Ninth Respondent is the Director General of the Department of Agriculture, Land Reform and Rural Development.

The Relief sought

[13] The Applicant seeks the following relief:

"13.1 The First, Second, Eight and Ninth Respondents are ordered to finalise in writing a settlement agreement in terms of section 42D of the Restitution of Land Rights Act, No 22 of 1994, in respect of the land claim of the Third Respondent in respect of Portion 1, 2 and 3 and the Remaining Extent of the Farm Witgatboom 316, Registration Division KT, Mpumalanga Province, which agreement shall include the following:

13.1.1 Portion 6 of the farm Witgatboom 316, Registration Division KT, Mpumalanga Province, also known as Extension 40, Burgersfort, shall be purchased by First, Second, Eighth and Ninth Respondents.

13.1.2 Remaining Extent of the Farm Witgatboom 316, Registration Division KT, Mpumalanga Province, will remain in ownership by the Fourth Respondent, and the land claim of the Third Respondent shall be dismissed in respect thereof.

13.1.3 The purchase price of Portion 6 of the Farm Witgatboom 316, Registration Division KT, Mpumalanga Province, also known as Extension 40 Burgersfort, shall be determined by this Honourable Court in terms of section 14(2)(d) of the Restitution of Land Rights Act, No 22 of 1994.

13.2 The First, Second, Eighth and Ninth Respondents are ordered to finalise such a settlement in writing, signed by all the necessary parties, within one month from the date of this order.

13.3 The First and Second Respondents are ordered to thereafter draft and finalise a referral report in terms of sections 14(1) and 14(2) of the Restitution of Land Rights Act, Nr 22 of 1994, whereby the question of compensation payable in respect of purchase of Extension 40 Burgersfort, is to be determined by this Court in terms of section 22(1)(b) of the Restitution of Land Rights Act, Nr 22 of 1994.

13.4 The above referral report shall be filed with this Court one month after the finalisation, including the signing thereof by all relevant parties thereto, of the settlement agreement in terms of section 42D of the Restitution of Land Rights Act, No. 22 of 1994.

13.5 The First and Second Respondent shall refer the issue of compensation payable for the purchase of Extension 40 Burgersfort to this Honourable Court in terms of section 14(2)(d) of the Restitution of Land Rights Act, Nr 22 of 1994, and the parties shall commence with legal proceedings in terms of the rules of the above Honourable Court, within 2 weeks from date of the referral report.

13.6 First, Second, Eighth and Ninth Respondents shall be ordered to pay the costs of this application, including the costs of two Counsels."

[14] The parties have a longstanding history. I will begin by outlining the factual background of this matter, which led to the oral agreement the Applicant relies on for the relief sought. Thereafter, I will discuss the legal framework governing settlement agreements under section 42D, before analysing the specific facts and their legal implications for the outcome of this application.

Factual Background

[15] The facts are largely undisputed. On 01 April 1998, the late Frans Jackson Maphanga, on behalf of the Maphanga Community, lodged a claim with the RLCC, Mpumalanga, against farm Witgatboom Nr 316, Registration Division KT, Mpumalanga, owned by Platsak (Pty) Ltd. At the time of lodging the claim, the farm had been subdivided into Portions 1, 2, and 3 of the Remaining Extent of the farm. The RLCC accepted the claim as it met the requirements of section 2 of the Restitution Act.

[16] On 28 July 2006, the RLCC gazetted the claim in terms of section 11(1) of the Restitution Act in respect of the Remaining Extent of portions 1, 2, and 3 of the farm Witgatboom.

[17] The Applicant, at the time a developer authorised by the landowners, applied for the establishment of a township on the land under the Development Facilities Act 67 of 1995 (Development Facilities Act). The date this application was made was not specified in the pleadings.

[18] On 1 September 2006, the Limpopo Development Tribunal approved the land development application for the establishment of the Burgersfort Extension 40 Township on the subdivided portion 6 of the farm Witgatboom.

[19] In an effort to settle the land claim against the farm, on 28 November 2006, the RLCC for the Mpumalanga Province, Tubatse Estate (Pty) Ltd (the Developer), Maphanga Community (Claimant Community) represented by Phillip Legwati, the former Deputy Chairperson of the Claimant Community, and Platsak (Pty) Ltd & Kom-

Kom Boerdery CC (Landowner) signed a Memorandum of Understanding (MoU) for the development of the Remaining Extent of the farm Witgatboom, which the Maphanga Community claimed. The MoU was subject to the minister's approval.

[20] The MoU recorded that the parties agreed to regulate the basis upon which the property will be developed and to define their respective rights, obligations and compensation.

[21] The MoU involved the RLCC supporting township development under the Development Facilitation Act. Some of the terms of the agreement were as follows:

a. The Claimant Community would make the property available to the Developer, authorise property ownership registration in the Developer's name, and consent to the Developer taking necessary steps and signing documents for land development and township establishment.

b. The Developer agrees, subject to approvals and market acceptance, to provide the Claimant Community with 34 erven (stands) at no cost, buy them back from the first income, and offer employment and co-investment opportunities.

c. The Developer undertook to comply with conditions, perform town planning, land survey, legal work, and provide internal services.

d. The Developer is entitled to sell individual erven in the development on the open market and will appoint professional firms to give effect to the above.

e. For the farm Buffelsdrift 311 KT, the plan includes a Golf/Eco Estate with involvement of the Claimant Community through a share of the Management company, training, employment, and land for hydroponics farming.

[22] On 04 July 2007, Mr Mhangwani, the former RLCC Mpumalanga, issued a

section 14(3) certificate under the Restitution Act, read with section 42D, concerning the settlement of the land claim for Portions 2 and 3 of the Farm Witgatboom 316, owned by the Roman Catholic Church, and the Remaining Extent owned by Platsak (Pty) Ltd. He prepared a memorandum seeking approval under sections 42D and 14(3) of the Restitution Act. A request for ministerial approval under these sections was attached to the memorandum.

[23] In reference to the remaining extent of the farm previously owned by Platsak (Pty) Ltd, the memorandum indicated that the claimants chose financial compensation over land restoration. This decision was made because restoring the land was unfeasible, as its perimeter is surrounded by developed properties, including townhouses and lodges, which also result in higher municipal rates. Regarding post-settlement matters, it was noted that Tubatse Estate entered into a joint venture with the claimants to develop the land, and the MoU was attached as annexure 1. It was further stated that the parties agreed as follows:

i. That the developers will pay the claimant a total amount of R6 127 000 (Six million, one hundred and twenty thousand), and 50% of this money will be used for investment opportunities in the development of the land.
ii. The developers will provide the claimant with employment opportunities in infrastructure development within the township, as well as investment in the commercial development of the land, such as office parks and retail shops.
iii. The developer holds a 20% share in a management company that also owns a 20% share in the development of the eco-golf estate. They are responsible for training employee claimants for the people's claim regarding the upkeep of the golf estate, as well as for safeguarding and nurturing the game on the eco-portion of the estate.
iv. The developer has already provided the claimant's community with 5 hectares of land on the farm for a hydroponics system, focusing on cash crops, and later, the development of infrastructure.

v. Regarding the financial implications of the claim, it was recommended that the CLCC approve the amount of R15,318,719.84 as financial compensation for the remaining extent of the Farm.

[24] The former CLCC, Mr TT Gwanya, approved the RLCC's recommendations on 15 October 2007.

[25] On 05 March 2008, Mr Mhangwani wrote a letter to the Applicant advising that the Minister had approved section 42D submissions, including an MoU entered into between the Maphanga Community and the Applicant. The RLCC recommended that an application be lodged with the tribunal in accordance with the Development Facilities Act's requirements.

[26] On 28 March 2008, the Applicant acquired portion 6 of the farm Witgatboom for R 37,500,000.00 (thirty-seven million five hundred thousand rand only) from Platsak (Pty) Ltd.

[27] On 16 September 2008, the Applicant applied to the Limpopo Development Tribunal for the land development for the establishment of the Burgersfort Extension 40 Township on the R/E of the farm Witgatboom.

Complaints lodged by the claimant community regarding the MoU

[28] On 1 March 2011, the Claimant Community sent a letter to the former acting RLCC, Ms I. Seboka, accusing the previous Mpumalanga RLCC and the Project Officer, Mr Mashangwana, who managed the claim, of misrepresenting facts and misleading them regarding their claim. They disputed that they had agreed to accept financial compensation, asserting that the community's claim was for the restoration of its land; the community claimed that the community representative had no mandate to sign the MoU.

[29] On 6 May 2011, the Limpopo Development Tribunal approved Tubatse Estate's amendment of the development application for establishing the Burgersfort

Extension 40 Township on portion 6 of the farm Witgatboom. The application was granted subject to national building regulations and the Township's regulations, which were incorporated into the Applicant's land-use management scheme 2006. It was approved by virtue of local authority notice 228 dated 1 September 2006 and published in general notice 145 of 2012, in the Limpopo Provincial Gazette of 27 April 2012.

[30] On 28 November 2013, the Maphanga Communal Property Association applied under number LCC 167/2013 to declare the MoU of 17 November 2006 invalid, set aside the section 42D Agreement to settle the Maphanga claim, and for the Minister of Land Reform and Rural Development and the CLCC to refer the Maphanga claim to the RLCC for a new decision. The Claimant Community alleged that its representative was not authorised to sign the Mou. A similar application was launched under case no LCC55/2016. The review remains pending before this Court.

[31] On 28 January 2015, the Applicant's valuation Report valued portion 6 of the farm Witgatboom at R 424,000,000.00 (four hundred and twenty-four million rand).

[32] On 1 August 2015, the Property Valuation Act came into force. Under section 2(a) of the Act, one of its objectives is to give effect to the provisions of the Constitution that provide for land reform through the regulation of property valuation.

Agreement to agree

[33] Following the two review applications brought by the Third Respondent and the commencement of the Valuation Act, the parties resumed negotiations to settle the matter. On 29 July 2019, the parties engaged in settlement discussions, resulting in an agreement to settle, which the Applicant described as a new settlement or compromise agreement that replaced the original MoU (an agreement to agree).

[34] The parties agreed in principle that:

a. The RLCC would conduct a feasibility study to assess the viability of restoring portion 6 of the farm Witgatboom for the claimant Community.
b. The Valuer General would evaluate portion 6 of the farm Witgatboom

and determine the purchase price.

c. The RLCC would make an offer to purchase Tubatse Estate's development of portion 6 for the benefit of the Maphanga Community.
d. Should the Applicant find the offer acceptable, portion 6 would be purchased for the valuation price.
e. If the offer is accepted, the Maphanga claim of the R/E of Witgatboom, owned by Platsak and Kom-Kom Boerdery CC, would be withdrawn.
f. The parties would conclude the settlement agreement under section 42D of the Restitution Act.

[35] On 2 October 2019, the Applicant wrote to the RLCC, informing him that it was selling portion 6 to the private buyer at a reasonable, market-related price. An on-site meeting was held among all parties, and it was agreed that the matter would be settled soon.

[36] The RLCC instructed the office of the Valuer General to carry out a valuation of Portion 6 of the farm Witgatboom. On 30 October 2021, the Office of the Valuer-General issued a valuation report, which valued Portion 6 of the farm Witgatboom as grazing land at R11,879,000.00 (Eleven million eight hundred and seventy-nine thousand rand) and at the current use value of R5,757,250. The State Respondents assert that the Applicant failed to provide the Office of the Valuer-General with the necessary information prior to the valuation. However, the Applicant contends that a valuation report was submitted to the Office of the Valuer-General before he issued a final valuation certificate on 25 January 2022.

[37] On 9 February 2022, the RLCC wrote to Tubatse Estate and made an offer of R11,879.00 (eleven million eight hundred and seventy-nine thousand rand) for the acquisition of portion 6.

[38] The parties entered into negotiations following the issuance of the final valuation certificate by the office of the Valuer General, in an attempt to finalise settlement of the land claim, with no results.

[39] On 10 February 2022, Tubatse Estate wrote to the RLCC and offered R

200 000 000.00 (two hundred million rand) for portion 6 of the farm Witgatboom. Meetings were held between the Applicant and the Second Respondent, but yielded no results.

[40] On 26 April 2022, Tubatse Estate issued the notice to institute proceedings against the RLCC in terms of section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

[41] On 15 July 2022, the Applicant launched these proceedings. Initially, they were couched as review proceedings.

[42] On 07 October 2022, the RLCC amended the gazette of the Maphanga claims dated 28 July 2006 to reflect the subdivision of portions 4, 5, 6, 10, 11, 12, 13 and 14 of the farm Witgatboom from portions 1, 2 and 3, as they were gazetted in 2006.

The Applicant's contention

[43] The Applicant contends that a new settlement, referred to as a "compromise agreement," has replaced the original MoU. According to the Applicant, this compromise agreement is essentially an 'agreement to agree,' as outlined in section 42D, and the terms of this agreement were intended to be formalised in writing and signed by all parties involved, subject to formal approval from the Minister in accordance with section 42D of the Restitution Act.

[44] The Applicant asserts that to execute the sale agreement and establish a purchase price for settlement of the land claim, the office of the Valuer General was instructed to provide a valuation of the property's development for the land claim.

[45] The Applicant asserts that the agreement was intended to be formalised in writing under section 42D of the Restitution Act, with the Minister's final approval and signature. The Applicant maintains that the compromise agreement is valid, binding, and enforceable, despite not fully complying with the Alienation of Land Act 68 of 1981 (Alienation of Land Act).

[46] The Applicant argues that, for the purpose of finalising the oral settlement agreement between all parties, a written settlement agreement as specified in section 42D of the Restitution Act should be entered into regarding the purchase of the land. If the parties cannot agree on a purchase price, the court should determine it.

[47] The Applicant argues that the court has the discretion to order specific performance of any agreement, taking into account all relevant facts. It is contended that there are no reasons why the specific performance of the compromise agreement should not be granted for to the following reasons:

a. There is an existence of a valid, binding, and enforceable agreement based on the affidavits and evidence that a compromise agreement with the terms and conditions explained by the applicant was entered into, and that it is "valid, binding, and enforceable.
b. that a compromise settlement agreement was reached on 29 July 2019, supported by evidentiary proof from four witnesses, including three attorneys. The respondents' failure to respond to the letter confirming the agreement and its terms (which implies admission).
c. The lack of real factual disputes raised by the respondents.
d. The third respondent's admission of most of the contents of the compromise agreement.

[48] The Applicant asserts that the principles of interpretation, including consideration of the parties' circumstances and subsequent conduct, are crucial to determining the agreement's effect. The court must consider the language, context, purpose and background of the agreement, while avoiding interpretations that lead to insensible or unbusinesslike results.

Review under the Promotion of Administrative Justice Act 3 of 2000(PAJA)

[49] In the same papers, the Applicant sought to review the State Respondent's actions under PAJA. The Applicant relies on sections 6(2)(g) and 6(3) of PAJA. The Applicant asserts that the refusal to take any action or decisions, particularly

concerning the finalisation of the section 42D agreement, constitutes grounds for review under section 6(2)(g) of PAJA for failure to make a decision. The First, Second, Eighth, and Ninth Respondents had a legal duty to draft and present the section 42D agreement for signature, given the time elapsed since the compromise agreement was entered into.

[50] The Applicant contends that it filed a notice under Rule 32(5) for the record and reasons for non-decisions, but neither was provided. Under section 5(3) of PAJA, the administrator's failure to provide adequate reasons gives rise to a presumption, in the absence of contrary evidence, that the administrative action (the refusal to act) was taken without good reason. The Applicant submits that no other internal remedy was available, making the immediate institution of this application necessary.

[51] The Applicant asserts a common law right to specific performance of the settlement agreement, supported by PAJA provisions, to compel the other parties to sign the written section 42D agreement.

[52] The Applicant further asserts that condonation for any potential delay in filing the application should be granted, as the delays were caused by the First and Second Respondents' refusal to make decisions or take action, rendering section 6(3) of PAJA applicable.

The Respondents' pleaded case.

[53] The Respondents raised a point in *limine* as follows: (a) The court lacks jurisdiction because the RLCC amended the gazette of the claim due to the subdivision of portions 4, 5, 6, 10, 11, 12, and 14 of the farm Witgatboom from portions 1, 2, and 3 after they were gazetted in 2006; and the process of accepting representations regarding the gazetted portions of the farm Witgatboom is ongoing; (b) The Applicant failed to identify the basis for this court to interfere with the process of amending the gazette, negotiations, and mediation.

[54] The Respondents contend further that the Applicant's application ought to be dismissed on the following grounds:

i. Tubatse Estate's reliance on the Memorandum of Understanding (MOU) of 17 November 2006 to compel the finalisation of the Section 42D Agreement lacks merit because the MOU was subject to further approval by the Chief Land Claims Commissioner and the Minister.
ii. The Maphanga Community Property Association (CPA) has reneged on the MOU, having filed two pending applications (LCC 167/2013 and LCC 55/2016) seeking to declare the MOU invalid and review and set aside the Section 42D Agreement.
iii. The sale and development of portion 6 contravene Section 11 (7) (aA) of the Restitution Act, as Tubatse Estate failed to provide the Regional Land Claims Commissioner with the required one month's written notice of intention to sell, develop, or rezone the land.
iv. Tubatse Estate's contention that portion 6 is worth R200,000,000.00 has no factual or legal basis, as the Provisional Valuation Certificate of October 30, 2021, valued the grazing land at R11,879,000.00.

[55] The State Respondents contend that the Applicant failed to submit the required documents to the Office of the Valuer-General and did not make representations concerning the land valuation. They assert that the parties are bound by the Office of the Valuer-General's market value and that Tubatse Estate has provided no reason to deviate from it.

[56] The State Respondents contend that the Applicant does not have a right to compel the RLCC to finalise the section 42D agreement with the Maphanga claimants or to prescribe the terms and conditions of that agreement.

[57] The State Respondents further dispute the allegations supporting the relief sought in the amended Notice of Motion and submit that Tubatse Estate has failed to meet the jurisdictional requirements for mandamus. Furthermore, the state argues that the Applicant is not entitled to the interdictory relief sought, as it has not pleaded the requirements for a final interdict compelling the RLCC to conclude the section 42D

Agreement.

[58] The State Respondents further state that the Applicant failed to make out a case for condonation of the late filing of the application. The application did not explain the delay in filing, the degree of lateness, the prejudice, or the prospect of success. Based on the failure to make a case for condonation, the court should dismiss the application for late filing.

[59] These points collectively form the grounds of opposition to Tubatse Estate's application, leading to the submission that the application must be dismissed on both substantive and procedural grounds.

[60] Regarding the point in *limine*, there is no merit in the State Respondent's point in *limine*; this court has broad jurisdiction under section 22 of the Restitution Act to determine all other matters that require adjudication under this Act. Secondly, the Applicant is not relying on the MoU but on an oral agreement concluded by both parties.

Third Respondent's Answering Affidavit

[61] The Maphanga community opposes the amended notice of motion seeking to dismiss their land claim over the Remaining Extent of the Farm owned by Platsak. The Third Respondent contends that it seeks restoration of the entire Remaining Extent, including Portion 6 of the farm. The community seeks equitable redress in the form of compensation for those portions that are not restorable.

Maphanga Community's Position Regarding the Subsequent Oral Settlement Agreement Entered into Between the Parties (Continued)

[62] The Third Respondent confirms that, in an attempt to settle the claim, the parties met at Du Toit Smuts and Partners Attorneys, where they concluded an oral agreement. Minutes taken by the members of the claimant community confirm agreement to purchase the Remaining Extent and restore it to the Maphanga community. The parties agreed that the claim can be divided into two phases:

i. Phase 1 involved the 1700 hectares of the Remaining Extent owned by Platsak, which would be purchased by the CLCC and restored to the community, and
ii. In respect of Portion 6 of the farm Witgatboom, currently owned by the Applicant, the office of the Valuer General would compile a valuation report, and the RLCC would conduct a feasibility study to determine a fair market-related purchase price for the benefit of the Maphanga community.

[63] Having addressed the parties' contention, it is now prudent to outline the statutory requirements governing land restitution.

Statutory Framework

[64] The entitlement to claim restitution of land or equitable redress for property dispossessed after 10 June 1913 is derived from the Constitution.Section 25(7) of the Constitution 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 the Act of Parliament, to restitution of that property or equitable redress.'*

[65] The Restitution Act was enacted to give effect to section 25(7) of the Constitution regarding the restitution of land rights to individuals or communities that were dispossessed of their land as a result of racially discriminatory laws or practices.

The Restitution of Land Rights Act 22 of 1994

[66] Section 2 of the Restitution Act sets out the criteria for entitlement to restitution. It entitles a person or community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws and practices to seek restitution of that right.

[67] Section 6 of the Restitution Act sets out the Commission on Restitution of Land

Rights' general functions. The claim for restitution of right in land is submitted to the RLCC, who is required to, among other things, investigate the merits of the claim, determine whether it has a prima facie case and whether it is not precluded by the provisions of section 2, and assess whether it is not frivolous or vexatious. Once the Commission on Restitution of Land Rights has accepted the claim, it will be published in the Gazette. The claim is then subject to further investigation and may be mediated with a view to settlement or referred to the Land Court for adjudication.

[68] Section 11 of the Restitution Act deals with the procedure after the lodgement of a claim.

[69] Section 11(1) of the Restitution Act provides:

'11. Procedure after lodgement of claim

(1) If the regional land claims commissioner having jurisdiction is satisfied that—

(a) The claim has been lodged in the prescribed manner.

(b) The claim is not precluded by the provisions of section 2. and

(c) the claim is not frivolous or vexatious.

he or she shall cause notice of the claim to be published in the *Gazette* and in the media circulating nationally and in the relevant province and shall take steps to make it known in the district in which the land in question is situated.'

[70] Section 11A (2) and (3) of the Restitution Act states that:

'11A. Withdrawal or amendment of notice of claim

(2) Where during the investigation of a claim by the Commission, the regional land claims commissioner having jurisdiction has reason to believe that any of the criteria set out in paragraphs (a), (b) and (c) of section 11(1) have not been met. he or she shall publish in the Gazette and send by registered post to—

(a) the claimant.

(b) the owner; and

(c) where applicable, a person who has made representations in terms of subsection (1) and any other party, who to his or her knowledge, may have an interest in the claim,

a notice stating that at the expiry of the period mentioned in the notice, the notice of the claim published in terms of that section will be withdrawn unless cause to the contrary has been shown to his or her satisfaction.

(3) At the expiry of the period contemplated in subsection (2), the regional land claims commissioner shall, unless cause to the contrary has been shown to his or her satisfaction, withdraw the notice of claim and—

(a) advise the persons mentioned in that subsection by notice sent by registered post.
(b) cause notice of his or her decision to be published in the Gazette; and
(c) take other steps to make his or her decision known in the district in which the land in question is situated.'

[71] Subsection 11(7) of the Restitution Act prohibits anyone from interfering in any manner with the land that is the subject of a land claim.

[72] Section 11(7) (aA) of the Restitution Act provides as follows:

"no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given in respect of-

i) any sale, exchange, donation, lease, subdivision or rezoning of land, and the Court is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit;

ii) any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit."

Section 36 of the Restitution Act

[73] Section 36 of the Restitution Act provides as follows:

"**Reviews of decisions of Commission**

(1) Any party aggrieved by any act or decision of the Minister, Commission or any functionary acting or purportedly acting in terms of this Act may apply to have such act or decision reviewed by the Court.

(2) The Court shall exercise all of the High Court's powers of review with regard to such matters to the exclusion of the provincial and local divisions thereof".

[74] Section 42D is titled '**Powers of Minister in case of certain agreements'** and provides as follows:

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

(a) To award to the claimant of land, a portion of land or any other right in land: Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant, unless –

(i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land in question; or

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

(b) the payment of compensation to such claimant;

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

(d) ...

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

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

(3) 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.'

Discussion

Section 42 D: Powers of Minister in case of certain agreements'

[75] The Restitution Act establishes various mechanisms for enforcing the constitutional right to restitution, including different methods for addressing land claims. One specific provision, section 42D, is activated when parties reach a settlement agreement concerning a claim. This section authorises the Minister to finalise such a settlement with interested parties, as long as they are satisfied that the claimant has a legitimate entitlement to the restitution of land rights, that the claim has been validated for the award of the land or a portion of it, or both, along with any applicable terms and conditions. Importantly, this mechanism does not require any referral to the court.

Section 42D is designed to facilitate a more expedient and less adversarial resolution of claims than traditional litigation processes in the Land Court. This provision promotes negotiated outcomes that cater to the specific circumstances of affected communities and landowners, allowing for a range of flexible remedies, including not only land restoration but also compensation and other benefits. Historically, this mechanism was the primary path for resolving claims.

The Minister serves as the pivotal decision-maker in this process. For a claim to progress, it must undergo a thorough investigation, and the Minister must be convinced of its validity. The Minister engages in negotiations with all relevant stakeholders, including claimants, landowners, and other affected parties. The outcomes of these negotiations can encompass a variety of remedies, such as land transfers, monetary compensation, provision of alternative land or rights, or support for development initiatives. It is imperative that any settlement agreement be documented in writing, signed by all parties, and subsequently submitted to the Minister for official endorsement.

[76] In addition, section 42D (3) provides as follows: The Minister may delegate any power conferred upon him or her by subsection (1) or sections 42C and 42E to the Director-General of Rural Development and Land Reform, [or any other officer of the State] or to the Chief Land Claims Commissioner or a regional land claims commissioner.

[77] The Minister may only be substituted upon delegating that authority in terms of section 42E, in *Quinella Trading (Pty) Ltd*[1] the Court held as follows:

> '...This power *[referring to the power to enter into agreements for the purchase of land]*, in terms of Section 42 E of the Act is the preserve of the Minister alone. As it is the state which effects restitution, so too it is the state through the Minister which purchases land for this purpose.'[2]

[78] It is clear from the evidence before me that the drafting of section 42D depended on the agreement of the purchase price between the parties. The parties did not agree on the purchase price, and the matter was referred to the Land Court for determination. At the time this application was launched, the land claim was still in the investigation stage and had not been referred to court under section 14 of the Restitution Act. However, the matter was referred to court after the parties exchanged the pleadings.

[79] The Applicant asserts that the agreement was intended to be formalised in writing under section 42D of the Restitution Act, with the Minister's final approval and signature.

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[1] *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Land Reform and* Others [2010] 4 All SA 331 (LCC).
[2] Ibid para 18.

[80] The Applicant further states that, to remove any ambiguity regarding the agreements reached during the meeting, they sent a letter to the Respondents requesting confirmation of the terms discussed. The Respondents were asked to reply within 14 days of receiving the letter; failure to respond would be taken as their agreement with its contents and the proposed course of action. The letter outlined the suggested approach for resolving the land claim as follows:

1. *"We suggest that the parties should agree that the purchase price for the developed Portion 6 of the farmer with a boom 316 KT should be determined by the Land Claims Court, and if this mechanism is agreed to, a full and complete settlement agreement in terms of section 42D can be drafted then signed on that basis without delay, by all parties concerned*
2. *The effect of the above mentioned will be that the current court application that was brought by our clients, does not have to proceed any further, and the land claim would then only be referred to the court for the purposes of determination of the market value related purchase price to be paid for the development of portion 6 of the farm Witgatboom 316 KT.*
3. *There should be no reason why an agreement to this effect should not come into being, as it is in the best interest of all parties to utilise such a mechanism to determine a market value-related purchase price, and to efficiently and expeditiously dispose of the land claim and the settlement thereof.*
4. *We request the parties addressed in this letter to consider the above-mentioned and to inform the writer hereof in writing should an agreement to the above effect not be acceptable to any of such parties.*
5. *If we do not received an answer in writing from any of the parties to which this letter has been addressed, within 14 days from the date of the letter, we will assume that an agreement to the above mentioned effect has been concluded between such parties, and that a Section 42D2 settlement agreement regarding this land claim will be drafted and signed by all relevant parties including the*

Regional Land Claims Commissioner, the Chief Land Claims Commissioner, the Minister, the land owners and the land claimants.

6. *We look forward to your response in due course, failing which we will accept that the land claim in respect of portion 6 of the farm Witgaatboom 316 KT has been finally settled, and we will then act as aforesaid"*

[81] The Applicant indicated in its initial submission that the parties have reached a stalemate, as their correspondence has failed to move the matter forward. This situation prompts an examination of the enforceability of an agreement to agree.

[82] Dealing with the enforceability of agreements to agree Jafta J in *Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)* expressed himself as follows:

> *"Agreement to negotiate in good faith*
>
> Agreements to negotiate in good faith are taken as a species of the *pacta de contrahendo* (agreements to agree). Generally, they are regarded as a category of contracts whose purpose is to create other contracts in future. But sometimes contracting parties, as was the position here, may be confronted by a situation where they are not able to agree on some of the terms of the contract. To resolve the problem, they may arrange to negotiate and agree on the outstanding terms on a future date. The arrangement may form part of the concluded agreement. A dispute may arise, if one of the contracting parties, as was the case here, refuses to negotiate the outstanding term so that the parties' agreement may be executed. When this occurs, the question that arises sharply is whether the term to negotiate is enforceable at the instance of the innocent party.
>
> Until 1992, our courts were reluctant to enforce agreements to negotiate in good faith, in the belief that contracting parties are free to drive a hard bargain and to withdraw from negotiations if they are no longer interested. The concern from our courts was that it was difficult, if not impossible, to enforce open-ended terms of that kind without an objective standard to which bargaining parties could be held. But in *Letaba Sawmills* the Appellate Division held that a term to negotiate in good faith there was enforceable because it contained a

deadlock-breaking mechanism. In that case the parties had agreed that should consensus on outstanding matters elude them, then an arbitrator may resolve the issue. The Court did not regard the arbitrator's role as amounting to a third party making the contract for the parties but as an enforcement of what the parties themselves had agreed. Our law considers the parties' freedom of contract to be sacrosanct and that the parties' consensus must be reached freely.

Therefore, currently the position in our common law is that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus. This position was reaffirmed by the Supreme Court of Appeal in *Southernport Developments*. In that case parties to a lease agreed to enter into good faith negotiations in respect of certain specified properties. The agreement provided that if the parties were unable to agree on any of the terms of the yet-to-be negotiated lease, the dispute would be referred to an arbitrator whose decision would be final and binding.[3]

[83] It is not disputed that the parties in this case entered into an agreement to agree and that the agreement included a deadlock-breaking mechanism. In its papers, the Applicant asserted that: The parties agreed that **should the** "*valuations as determined by seventh respondent for the value of the developed Land to be purchased, not be acceptable to the applicant, the determination of the value of the purchase price for such developed land would be referred to the land claims court by the 1st respondent for determination of a fair and reasonable market related value of such developed land*".

[84] The Second Respondent has since referred the matter to this court in terms of section 14(1) and (2) under case number LCC105/2022B. In my view, the Second Respondent fulfilled its obligations under the agreement and its obligations under section 14(1) and (2) of the Restitution Act, although they were executed after the issuance of this application.

[85] On 15 June 2023, the RLCC filed a referral notice with the Land Claims Court

[3] *Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)* para 95-97.

in terms of section 14 of the Restitution.

Notice of Referral filed by RLCC in terms section 14(1) of the Restitution Act under case 105 /2022

[86] Instead of filing its answering affidavit, on 15 June 2023, the RLCC Mpumalanga issued a notice of referral under section 14(1) of the Restitution Act to all parties, referring the disputed market value of portion 6 of the Farm to court for determination.

[87] Mr Lebjane Maphutha filed a certification in terms of section 14(1)(b) of the Restitution Act, certifying that it is not feasible to resolve the dispute relating to the market value of portion 6 of the farm Witgatboom 316KT claimed by the Maphanga Communal Property Association through mediation or negotiations. The referral is pending before this Court under case number LCC105/2022B.

[88] On the recommendation as to the most appropriate manner in which the Maphanga Claim and the market value of the Portion can be resolved, the RLCC recommended that this court should decide on the following:

a. Whether Tubatse Estate has made out a case for the review and set aside the report of the office of the valuer general, which recommended the market value of portion 6 to be R11 879 000.
b. Whether to accept the estate's offer of R200 million for portion 6 of the farm is fair and reasonable.

[89] In their heads of argument, the Applicant noted that the matter has been referred to court under section 14 of the Restitution Act, where the RLCC recommended that the Land Court determine the market value of Portion 6. However, the Applicant contends that this should follow the enforcement of section 42D. There is no merit in this submission. These are two parallel mechanisms. Referral in terms of section 14 (1) (a) and (b) does not require a settlement agreement to be concluded first.

[90] Upon thorough evaluation, I am of the view that the State Respondents have not breached the agreement to agree, and consequently, the Applicant's application should be dismissed. This should be the end of this matter. Nevertheless, for the sake of completeness, it is important to address the Applicant's assertion regarding the validity, binding nature, and enforceability of the compromise agreement, even in light of its non-compliance with the provisions of the Alienation of Land Act.

[91] The Alienation of Land Act governs the sale (alienation) of land and requires that all agreements for alienation be recorded in a written deed of alienation, signed by the parties or their agents. Section 2(1) of this Act states that no alienation of land after the commencement of the Act will have force or effect unless contained in a written and signed deed of alienation. This codifies the requirement of written formalities in land sales. Oral agreements for the sale of land are therefore generally not enforceable under the Act. The courts have consistently held that verbal agreements relating to immovable property are unenforceable.

[92] Section 2(1) provides that

> "No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

Section 28 (2) reads as follows:

> Any alienation which does not comply with the provisions of section 2 (1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee".

[93] Our courts have examined numerous legal requirements of sale agreements under the Act. It is now settled that one of the formal legal requirements is that the material terms of the contract must be reduced to writing.

[94] Most recently in *Cooper N O and Another v Curro Heights Properties(Pty) Ltd*[4] Meyer JA, writing for the unanimous court, said:

'Section 2(1) requires the whole contract of sale – its material terms – to be reduced to writing signed by or on behalf of the parties. The material terms of the contract are not confined to those prescribing the *essentialia* of a contract of sale, namely the parties to the contract, the *merx* and the *pretium*. Generally speaking, these terms, and especially the *essentialia*, must be set forth with sufficient accuracy and particularity to enable the identity of the parties, the amount of the purchase price and the identity of the subject-matter of the contract, and also the force and effect of other material terms of the contract, to be ascertained without recourse to evidence of an oral *consensus* between the parties. Whether a term constitutes a material term is determined with reference to its effect on the rights and obligations of the parties.'[5]

[95] Bloem J, dealing with the provisions of section 28 (2) of the Act, in *Bester N.O v Van Wyk*[6], held that:

"[7] The use of the words "or contract" in section 28(2) indicates that the legislature made provision for an instrument as an alternative to a deed of alienation in terms of which land may be alienated. The subsection refers to performance by the alienee in terms of a deed of alienation or a contract. I understand section 28 (2) to mean that an alienation of land will, notwithstanding non-compliance with the provisions of section 2 (1), be valid if:

(a) the alienee had performed in full in terms of the deed of alienation; or

(b) the alienee had performed in full in terms of the contract; and

(c) the land in question has been transferred to the alienee.

[96] In paragraph 8 of the judgment, the learned judge held that:

"The alienation shall be valid if the defendant had performed in full in terms of the oral contract. In terms of section 1 of the Act, "contract":

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[4] *Cooper N O and Another v Curro Heights Properties (Pty) Ltd* 2023 (5) SA 402 (SCA).

[5] Ibid para 16.

[6] Bester N.O v Van Wyk (2845/2012)[2016 ZAECGHC 37

> "*(a)* means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year;
>
> (b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take".

[9] A contract accordingly includes any agreement or agreements which have the same import as a deed of alienation under which land is sold against payment by the purchaser to the seller of an amount of money in more than two instalments over a period exceeding one year. Furthermore, in terms of the definition of "contract", it is immaterial whether it is in the form of an oral or written contract".

[97] In this instance, the compromise agreement fails to meet the criteria set out in the Alienation of Land Act (ALA), rendering it unenforceable.

Costs

[98] It is standard procedure for this Court to generally withhold the awarding of costs in relevant cases unless there are exceptional circumstances that warrant such an award.[7] The procedural approach at the LCC is predominantly shaped by its jurisdiction over cases arising from social interest litigation. Notably, this case diverges from typical proceedings due to the Applicant's insistence on pursuing the application even after the matter was referred to court under sections 14(1) and 14(2) of the

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[7] *Pannar Research Farms (Pty) Ltd and Another v Magome and Another 2002 (5) SA 621 (LCC) para* 5

Restitution Act.

Order

[99] In the premises, I order as follows:

1. The application is dismissed with costs

[redacted]

Flatela L

Judge of the Land Court

APPEARANCES:

For the Applicants:

Adv R du Plessis SC

Adv JS Stone SC

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For the State Respondents:

Adv L Gumbi

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For the Third Respondents:

Adv Phukubje

Adv M Mamitwa

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