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

CASE NO: 99/2023

Reportable

In the *Ex Parte* application of:

REGIONAL LAND CLAIMS COMMISSIONER:

GAUTENG PROVINCE

First applicant

CHIEF LAND CLAIMS COMMISSIONER

Second applicant

MINISTER OF LAND REFORM

AND RURAL DEVELOPMENT

Third applicant

Concerning:

Land Claims numbers: 10623; Q 0833; Z0044 and Z 0221

Date heard: 3 March 2026

Date delivered: 28 May 2026

Coram: Cowen DJP and Ncube J

Summary: Application for declaratory relief that claimants under Restitution of Land Rights Act 22 of 1994 are untraceable and that their claims are finalised for

statistical purposes. Declaratory relief to the effect that state functionaries have fulfilled their statutory responsibilities appropriate, but no relief granted in the form sought and in the absence of substituted service or further steps to trace beneficiaries and descendants. Application dismissed.

JUDGMENT

COWEN DJP

Introduction

[1] This case concerns untraceable claimants who lodged land claims for the restitution of land under the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). Unable to locate the claimants, the functionaries responsible for processing their land claims, the Commission for the Restitution of Land Rights (the Commission) and the Minister of Rural Development and Land Reform (the Minister), are unable to process them to finality in accordance with their statutory responsibilities.

[2] The applicants are the Regional Land Claims Commissioner, Gauteng Province (the Gauteng Commissioner), the Chief Land Claims Commissioner (the Commissioner) and the Minister. They have approached this Court *ex parte*. They seek, in the first instance, a declaration that four individual claimants are untraceable, in that the applicants have exhausted all possible avenues to trace, process and finalise their land claims. They seek the declaration that the claims are finalised for statistical purposes. They accept that should the claimants come

forward over time, they should be entitled to approach the Commission to reopen and process their claims. In the alternative, they seek guidance, or direction, on how to proceed with land claims where the claimant has become untraceable, and the restitution process cannot otherwise be finalised.

[3] The specific claimants in respect of whom the relief is sought are Makoti Elias Miyango,¹ Luckyboy Umsebenzi Mahlangu,² Nkatu Daniel Msiza³ and TB Mcube.⁴ According to the founding affidavit, Mr Miyango lodged a claim on 22 December 1998, in respect of a property in Benoni, Ekurhuleni District Municipality⁵ (the Miyango claim). In his claim form, Mr Miyango records that he was forcibly removed from the property. He is now deceased. His ID number was 2[...]. Mr Mahlangu, also found to be deceased, lodged a claim on 17 December 1998 in respect of a property in Brakpan, City of Ekurhuleni Metropolitan Municipality (the Mahlangu claim).⁶ His ID number was 7[...]. Mr Msiza lodged a claim on 28 December 1998 in respect of a property in Brakfontein, City of Tshwane Metropolitan Municipality (the Msiza claim).⁷ In the claim form, he says that in 1978, his family was evicted from the property that they had occupied since 1901. His ID number is 4[...]. Mr Mcube lodged a claim in respect of a property referred to as Tweefontein (the Mcube claim). He did not provide his ID number.

[4] Although the applicants seek relief in respect of these four claimants, the challenge of untraceable claimants is a national and systemic challenge to which

¹ Land claim number 10623.

² Land claim number Q0833.

³ Land claim number Z0044.

⁴ Land claim number Z0221.

⁵ Stand 2678 Benoni Bantu Township, Ekurhuleni District Municipality.

⁶ The property is described in the claim form as Portion: Gauteng East, Brakpan, NA District Lowveld.

⁷ Brakfontein 559JR, City of Tshwane Metropolitan Municipality.

they are seeking solutions. In this sense, it is a test case. The issues raised have profound constitutional implications.

[5] In *LAMOSAS 2*,⁸ the Constitutional Court held that land restitution ‘aims to right historical wrongs, resolve unjust dispossession and heal the “trauma of deep, dislocating loss of land” that has taken root in our country.’ The restitution process, it was reiterated, is linked to the restoration of dignity.⁹ There have been unacceptably long delays in finalising the restitution process envisaged by the Restitution Act. The delays undermine the Constitution’s promise of land justice in s 25(7) in terms of which ‘[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.’ Troublingly, the delays have meant that in some cases, possibly many, claimants have passed on without obtaining redress.

[6] While this injustice is stark, it remains important to appreciate that where claimants pass away, their claims may be prosecuted by their beneficiaries or descendants. This is regulated by subsecs 2(3) and (4) of the Restitution Act.¹⁰ Given the extraordinary delays in finalising restitution claims, it is now a stark reality that these provisions will increasingly have application.

⁸ *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* [2019] ZACC 10; 2019 (5) BCLR 619 (CC); 2019 (6) SA 568 (CC) (*LAMOSAS 2*) para 1.

⁹ *Id* para 2 with reference to *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) (*LAMOSAS 1*) para 63.

¹⁰ Section 2 is titled Entitlement to Restitution and provides in relevant part:

(3) If a natural person dies after lodging a claim but before the claim is finalised and-

(a) leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate, in his or her capacity as the representative of the estate, alone or, failing the executor, the heirs of the deceased alone; or

(b) does not leave a will contemplated in paragraph (a), the direct descendants alone, may be substituted as claimant or claimants.

(4) If there is more than one direct descendant who have lodged claims for and are entitled to restitution, the right or equitable redress in question shall be divided not according to the number of individuals but by lines of succession.

[7] The applicants have approached the Court for relief centrally because of the implications of the Constitutional Court decisions in *LAMOSAS 1*¹¹ and *LAMOSAS 2*¹² for the processing of land claims.

[8] In brief, when enacted in 1994, the Restitution Act required claimants to lodge restitution claims by 31 December 1998 (old claims). However, in 2014, the Restitution of Land Rights Amendment Act 15 of 2014 (the 2014 Amendment Act) extended the cut-off date to lodge claims to 30 July 2019. This second phase to lodge claims was cut short when, on 28 July 2016, the Constitutional Court delivered its decision in *LAMOSAS 1*, declaring the 2014 Amendment Act invalid because Parliament had failed to satisfy its obligation to facilitate public involvement in accordance with s 72(1)(a) of the Constitution. The declaration of invalidity operated prospectively, with the result that restitution claims lodged between 1 June 2014 and 28 July 2016 remained intact (new claims). However, the Constitutional Court interdicted the Commission from processing new claims at that stage, pending the re-enactment by Parliament of an Act reopening the period to lodge claims. The *LAMOSAS 1* interdict precluded the Commission from processing new claims in any matter, save for acknowledging receipt, until all old claims had been processed or referred to the Land Court.¹³ If after 24 months, no

¹¹ *Id.*

¹² Above n 8.

¹³ See paras 4 to 7 of the order in *LAMOSAS 1* which provided:

‘4. Pending the re-enactment by Parliament of an Act reopening the period of lodgement of land claims envisaged in s25(7) of the Constitution, the Commission on Restitution of Land Rights, represented in these proceedings by the Chief Land Claims Commissioner (Commission) is interdicted from processing in any manner whatsoever land claims lodged from 1 July 2014.

5. The interdict in para 4 does not apply to the receipt and acknowledgement of receipt of land claims in terms of s6(1)(a) of the Restitution Act.

6. Should the processing, including referral to the Land Claims Court, of all land claims lodged by 31 December 1998 be finalised before the re-enactment of the Act referred to in para 4 above, the Commission may process land claims lodged from 1 July 2014.

new legislation had been enacted, interested parties could apply to the Constitutional Court for an order on the processing of new claims.

[9] Parliament did not enact any legislation within the 24 months, and has still not done so. This led to *LAMOSAS 2*. After the 24 month-period lapsed, the Speakers of the National Assembly and National Council of Provinces applied to the Constitutional Court, unsuccessfully, for an extension. However, the Constitutional Court granted a counter-claim that dealt with the processing of new claims. The Constitutional Court held that, as there is no clarity when Parliament will enact any new legislation which may provide a procedure for dealing with new claims and prioritisation of claims, it would be unfair to perpetuate the interdict against processing them until all old claims have been finalised.¹⁴ The *LAMOSAS 2* order lifted the supervisory role of the Constitutional Court but made provision for judicial oversight by the then Land Claims Court, now the Land Court.¹⁵

7. In the event that Parliament does not re-enact the Act envisaged in para 4 within 24 months from the date of this order, the Chief Land Claims Commissioner must, and any other party to this application or person with a direct and substantial interest in this order may, apply to this court within two months after that period has elapsed for an appropriate order on the processing of land claims lodged from 1 July 2014.’

¹⁴ *LAMOSAS 2*, para 55.

¹⁵ *Id* para 59. Para 2 of the *LAMOSAS 2* order, which was subject to Parliament legislating otherwise (and to date it has not), provides in relevant part:

‘(a) The [Commission] is prohibited from processing in any way any claims lodged in terms of section 10 of the [Restitution Act] between 1 July 2014 and 28 July 2016 (interdicted claims) until the earlier of the dates when –

(i) It has settled or referred to the Land Claims Court all claims lodged on or before 31 December 1998 (old claims) by way of a referral of the claim in terms of s 14; or

(ii) The Land Claims Court, upon application by any interested party, grants permission to the Commission to begin processing interdicted claims, whether in respect of the whole or part of the Republic of South Africa and whether in respect of part or all of the process for administering an interdicted claim.

(b) Until the date referred to in para (a), no interdicted claim may be adjudicated upon or considered in any manner whatsoever by the Land Claims Court in any proceedings for the restitution of rights in land in respect of old claims, provided that interdicted claimants may be admitted as interested parties before the Land Claims Court solely to the extent that their participation may contribute to the establishment or rejection of the old claims or in respect of any other issue that the presiding judge may allow to be addressed in the interests of justice.

(c) Notwithstanding the provisions of s 11(5) and 11(5A) of the Restitution Act, no interdicted claimant shall be entitled to any relief having the effect of –

(i) altering or varying –

(a) the relief granted to any claimant in terms of section 35 of the Restitution Act in respect of a finalised old claim;

(b) the terms of an agreement concluded in terms of s 42 of the Restitution Act; or

[10] For present purposes, three elements of the order in *LAMOSIA 2* warrant emphasis:

- a. The Commission is prohibited from processing new claims until either it has *settled* or *referred* all old claims to the Land Court or the Land Court grants permission to do so;¹⁶
- b. The order generally disentitles any new claimant to relief that would have the effect of altering or varying relief obtained by a claimant in respect of an old claim;¹⁷
- c. The Commission is obliged to report regularly to the Land Court in respect of the processing of old claims.¹⁸

[11] It is against this background that the applicants have approached the Court for relief. Put simply, the challenge of untraceable claimants impedes their ability to complete the processing of old claims and thereby enable the interdict on the processing of new claims to be lifted. That, in turn, affects their ability to remedy the constitutional harm caused by delays processing claims.

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- (c) an award in terms of s 42E(1)(a) or (b) of the Restitution Act, unless the Land Claims Court in exceptional circumstances orders otherwise; and / or
 - (ii) awarding to such interdicted claimant land or a right in land that is subject to a pending claim for restoration by an old claimant.
 - (d) The Chief Land Claims Commissioner must file a report with the Land Claims Court, to be dealt with as the Judge President of that Court may deem fit, at six-monthly intervals from the date of this order, setting out –
 - (i) The number of outstanding old claims in each of the regions on the basis of which the Commission’s administration is structured;
 - (ii) The anticipated date of completion in each region of the processing of the old claims, including short-term targets for the number of old claims to be processed;
 - (iii) The nature of any constraints, whether budgetary or otherwise, faced by the Commission in meeting its anticipated completion date.
 - (iv) The solutions that have been implemented or are under consideration for addressing the constraints; and
 - (v) Such further matters as the Land Claims Court may direct, until all old claims have been processed.
 - (e) The Land Claims Court may make such order or orders as it deems fit to ensure the expeditious and prioritised processing of old claims.’

¹⁶ Para 2(a)(i) and (ii) of the order.

¹⁷ Para 2(c) of the order.

¹⁸ Para 2(d) of the order.

Litigation background

[12] When the application was initially heard, the Court postponed the matter and issued directives. First, the Court directed the applicants to deliver a supplementary affidavit detailing national statistics germane to the application and particulars relating to the costs and availability of related budget to effect substituted service in newspapers and other media. Secondly, the Court issued directives to enable interested parties to participate in the proceedings including the Land Access Movement of South Africa (the applicants in *LAMOSIA I*) and the Human Rights Commission, which was requested to inform other organisations with an interest in land reform and restitution of the proceedings. Thirdly, the Court directed the applicants to serve the application and directives on the Department of Home Affairs, the South African Social Security Agency (SASSA) and the Electoral Commission, who were requested to deliver a brief report indicating whether and, if so, how they can assist to identify and trace untraceable claimants.¹⁹ Further directives were subsequently issued requesting further written submissions.

[13] The applicants duly complied with the directives. They filed a supplementary affidavit providing the information requested and served the application as required. No interested party sought to intervene despite the Human Rights Commission taking steps to inform others, for which the Court expresses its gratitude. The Electoral Commission and SASSA delivered reports. The Department of Home Affairs did not deliver any report or otherwise respond.

¹⁹ The latter directive was issued in circumstances where the Commission's own tracing process entailed obtaining assistance from other organs of state.

Tracing claimants and the scale of the problem

[14] The Commission's efforts to trace the four claimants, Mr Miyango, Mr Mahlangu, Mr Msiza and Mr Mcube, or their relatives are set out in the founding affidavit. These efforts are undertaken in light of the Commission's 'Procedure on dealing with untraceable claimants'. The efforts embarked on in these cases include the use of a tracing agent, visiting the known address and publication of a notice in the Government Gazette. The information that SASSA and the Electoral Commission supplied in respect of the four claimants confirmed the status of Mr Miyango and Mr Mahlangu as deceased, and further, that the address used accorded with their records. The SASSA and Electoral Commission reports revealed that Mr Msiza was also deceased and provided what appears to be a new address. In the absence of any ID number, nothing further was ascertained about Mr Mcube.

[15] It is troubling that the Department of Home Affairs – probably best placed to assist to locate claimants and their descendants – did not respond to the Court's request for information. Notably, the Commission had, before approaching Court, itself sought to obtain its assistance, but received no response. This is not only troubling but difficult to understand in view of the duties of co-operative governance in s 41(1)(h) of the Constitution.²⁰

[16] As indicated above, the Commission's challenges in respect of the four claimants reflect a much broader systemic challenge. To provide a sense of the

²⁰ Section 41(1)(h) imposes a duty on all spheres of government and all organs of state within each sphere to cooperate with one another in mutual trust and good faith in various listed ways. These duties are regulated by the Intergovernmental Relations Framework Act 13 of 2005.

scale of the problem, the Commissioner, Ms Nomfundo Ntloko explained in a supplementary affidavit that as at 17 May 2024, there were approximately 407 untraceable claimants nationally, comprising 55 in the Eastern Cape, 35 in Gauteng, 103 in KwaZulu Natal, 25 in Limpopo, 21 in Mpumalanga and 168 in the Western Cape. There were no untraceable claimants in the provinces of the Free State, Northern Cape and North West. At the present time, and according to the Commission's January 2026 report under *LAMOS A 2*, there are approximately 5245 old claims that must still be finalised. The challenge of untraceable claimants thus translates into approximately 7.8% of old claims.

[17] From the applicants' point of view, it is clear that the challenge of untraceable claimants represents not only a constitutional harm but a material obstacle to the Commission reaching a point where new claims can be processed. Moreover, the challenge may present complications for new claimants because only if old claims are properly finalised, can there be certainty about the extent to which a new claimant can obtain relief in respect of land that was the subject of an old claim. The applicants desire to obtain appropriate relief is thus understandable.

Relief sought

[18] The primary relief sought is that the four claimants 'are declared untraceable in that the applicants have exhausted all possible avenues in order to trace, process and finalise their land claims, to no avail' (prayer 1), and that the claims are declared finalised for statistical purposes (prayer 2). A rider is provided in prayer 3 of the notice of motion, to the effect that if any of the four claimants come forward and wish to proceed with their claims, they may approach the Commission for representation to re-open and process the claim.

[19] The alternative relief sought is guidance, or direction, on how to proceed with land claims where the claimant has become untraceable, and the restitution process cannot otherwise be finalised. This is sought in prayer 4.

Declaratory orders

[20] The Land Court is expressly empowered to make declaratory orders under s 26(1)(d) of the Land Court Act.²¹

[21] It may first be noted that these proceedings were instituted before the Land Court Act came into force. In my view, this does not alter matters because the erstwhile Land Claims Court also had the express power to grant declaratory relief, albeit framed in different terms.²² Moreover, the transitional provisions of the Land Court Act, in my view, render the provisions of the Land Court Act applicable to these proceedings.²³

²¹ Land Court Act 6 of 2023. Section 26 is titled ‘Court orders’. Section 26(1)(d) provides that the Court may make any appropriate order, including ‘(d) a declaratory order’.

²² Eg Section 22(1)(cA) of the Restitution Act. For the restrictions on the exercise of that power see *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* [2005] ZASCA 12; 2005 (4) SA 212 (SCA) at para 62

²³ Section 35(1)(b) provides:

‘Any proceedings arising out of the application of this Act or any other law conferring jurisdiction on the Court, pending in the Land Claims Court, at the commencement of this Act must be continued and concluded in terms of this Act in the Court and, for that purpose –

- (i) those proceedings are deemed to have been instituted in terms of this Act in the Court; and
- (ii) anything done under any provision of any law amended by this Act is deemed to have been done under the corresponding provision of this Act,

unless the Court is of the view that this would not be in the interests of justice, in which event the Court must conclude the proceedings in the Court as if this Act had not been passed.’

[22] Declaratory relief is only granted if, in the discretion of the Court, it should be, having regard to all the relevant circumstances of the matter before it. In *Metrorail*,²⁴ the Constitutional Court held:

‘It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.’

[23] The Constitutional Court has, indeed, recognised that when dealing with public bodies, a declaratory order often suffices to provide effective relief without the need to go further.²⁵

[24] It is, however, not the function of the Court to advise parties.²⁶ It has also been long accepted ‘judicial policy governing the discretion’ that Courts will generally not decide issues ‘that are merely abstract, academic or hypothetical ones.’ As the Constitutional Court held in *JT Publishing*:²⁷

²⁴ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) para 107.

²⁵ *Metrorail* at para 108

²⁶ See *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 (4) SA 212 (SCA) para 68. Navsa JA noted that courts do not give abstract guidance, referencing the *Radio Pretoria* cases: ‘It was suggested on behalf of TAU that the order sought would serve as a guideline to all parties involved in land disputes. In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another* 2005 (1) SA 47 (SCA) this Court said the following at para [41]: “Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise...Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation.” The same is true for courts of first instance.’ The approach adopted by the SCA was confirmed in an unreported judgment of the Constitutional Court refusing leave to appeal. See *Radio Pretoria v Chairperson of the Independent Communications Authority of SA and Another* (CCT 38/04) [2004] ZACC 24.

²⁷ *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC)

‘[A] declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.’²⁸

[25] In *TAU*,²⁹ Gildenhuis AJ dealt with the power of the erstwhile Land Claims Court to grant declaratory orders under the now repealed s 22(1)(cA) of the Restitution Act which empowered the Court to ‘grant a declaratory order on a question of law relating to section 25(7) of the Constitution or to this Act or to any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order.’ After emphasising that the Court does not give legal advice to parties, Gildenhuis AJ proceeded to hold:³⁰

‘... The ‘question of law’ on which [the Court] is entitled to make an order must involve specific legal rights and obligations, and the parties having a legal interest in those rights and obligations must be cited. ...’

[26] And thereafter:³¹

²⁸ Id para 15. The Court acknowledged that there may be departures from the general approach in these terms: ‘We should no doubt regard it, like most general rules, as one that is subject in special circumstances to exceptions, in our field those necessitated now and then by factors which are fundamental to a proper constitutional adjudication.’

²⁹ *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* [2002] ZALCC 53; 2003 (4) SA 397 (LCC) (*TAU*).

³⁰ Para 16.

³¹ At para 18.

‘The Court would not readily grant a declaratory order where there is no real dispute on the question of law at issue in the case or where the legal position is clearly set out in the applicable statute. It would also be reluctant to grant a declaratory order that is not specific to a particular set of facts. ...’

Should declaratory relief be granted?

[27] The applicants have a clear interest in the determination of their obligations to process untraceable claimants’ claims, not least in light of the *LAMOS A 2* order. The live question is whether the Court should, in its discretion, grant the relief sought. There are four reasons I am disinclined to do so on the papers before the Court.

[28] The first is that I am not satisfied that all reasonable steps have been taken to trace the relevant persons. In this regard, what is reasonable is to be assessed in light of the fact that there have been unacceptable delays in finalising restitution claims. On the facts of the cases before Court, three of the four claimants are now deceased and the absence of an ID number for the fourth means that no further information is likely to be forthcoming even if further enquiries are made. What is insufficient, however, are the steps taken to locate their beneficiaries and descendants. In this regard, the applicants rely on the same steps as were used to locate the claimants and thereby rely mainly on the visit to the known address. This is an important measure to take. But for Mr Msiza, the SASSA report revealed a different address to what the Commission was using. Another consideration is that further efforts may be undertaken to obtain the co-operation of the Department of Home Affairs. Their assistance may prove helpful in all matters where a claimant is not deceased. And even where a claimant is deceased, their

assistance may be helpful to locate descendants or at least to obtain a date of death, which in turn would assist to locate descendants and beneficiaries through the Master's office. Ultimately, it may be to the Masters' offices that the Commission can turn for assistance in locating beneficiaries and descendants. To facilitate this process, provision is made in the order for the Registrar to deliver a copy of the judgment to the Director-General of Home Affairs and the Masters' Offices in provinces where there are lost claimants.

[29] Secondly, I am not satisfied that the declaration is suitably framed to declare rights or obligations practically and effectively. This applies both to prayers 1 and 2 of the notice of motion.³²

[30] As for prayer 1, the Restitution Act does not make provision for untraceable claimants and does not expressly regulate the consequences of untraceability, whether for the applicants or a claimant. As a result, and on its own, a declaration of untraceability does not have any clear legal consequences. The relief is, however, further explained when it adds that the claimants would be declared untraceable 'in that the applicants have exhausted all possible avenues in order to trace, process and finalise their land claims, to no avail.' In my view, these qualifiers focus attention substantially on the appropriate issue. This is whether the applicants have *fulfilled their statutory obligations in respect of processing the claims and bringing them to finality*. In my view, relief should rather be sought in these terms, in other words, framed as an order to declare the applicants' fulfilment of statutory obligations. I refer to this hereafter as a 'fulfilment order'. As there are other reasons to decline granting a fulfilment order at this stage, it is not necessary to

³² See above para 18.

consider whether relief might be granted in these terms under prayer 5 in the notice of motion for ‘any other relief that the above Honourable Court may deem fit.’

[31] As for prayer 2, a declaration that the land claims are ‘finalised for statistical purposes’ would, in my view, confuse matters. There are at least four ways in which a land claim may, in law, be regarded as finalised:³³ (a) if a claimant withdraws a claim; (b) if the Commission rejects a claim, an administrative act performed in terms of s 11(4) of the Restitution Act; (c) if the claim is settled by agreement or negotiation, which may ensue under s 14(3)³⁴ and s 42D³⁵ of the Restitution Act³⁶ or (d) the Land Court resolves the claim. There may also be cases where a claimant waives their rights. However, the relief is not aimed at declaring finality in any of these ways, but rather *for statistical purposes*.

³³ In *Gamevest*, the Supreme Court of Appeal explained, in four phases, the process for lodgement, consideration and final determination of a land claim: *Gamevest (Pty) Ltd v Regional Land Claims Commissioner for the Northern Province and Mpumalanga and Others* [2002] ZASCA 117; 2003 (1) SA 373 (SCA); 2002 (12) BCLR 1260 (SCA) para 7.

³⁴ Section 14 (3) provides: ‘If in the course of an investigation by the Commission the interested parties enter into a written agreement as to how the claim should be finalised and the regional land claims commissioner having jurisdiction certifies in writing that he or she is satisfied with the agreement and that the agreement ought not to be referred to the Court, the agreement shall be effective only from the date of such certification or such later date as may be provided for in the agreement.’

³⁵ 42D Powers of Minister in case of certain agreements

(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 30 June 2019, 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) The 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 considers appropriate.

³⁶ This Court has held that the exercise of power under s 42D of the Restitution Act is administrative action. *Nelutshindwi Community and Another v Nwanedi Communal Property Association and Others* [2025] ZALCC 48.

[32] There can be no doubt that the Commission has an obligation to maintain statistics regarding untraceable claimants, which they do. First, without keeping such statistics and records, it is difficult to see how the Commission could otherwise perform its statutory duties responsibly, accountably, effectively or transparently.³⁷ Secondly, the Commission is obliged under the *LAMOSAS 2* order to report regularly to the Land Court in respect of old claims, including constraints in finalising them.³⁸ The inability to process claims where claimants are untraceable is a constraint. The Commission is resultantly obliged to keep the Land Court apprised of the scale of the problem and the steps taken to solve it. This would include at least information about its policies to trace claimants and the number of untraceable claimants in each province. However, while there is an obligation on the Commission to maintain traceability statistics for both these reasons, it is unclear what the practical or even legal effect would be of declaring a claim ‘finalised’ for statistical purposes.

[33] A claim is either finalised in law or it is not. These claims have not been brought to finality in law. Indeed, as the Commission itself recognises, a currently untraceable claimant or their descendants or beneficiaries may still come forward. This is all the more so given that one explanation for the prevalence of untraceability is likely to be the delays in finalising old claims and the fact that claimants have, as a result, passed on.

[34] A third reason for declining to grant relief on the papers as they stand is that, even if granted, the impact of the relief on the *LAMOSAS 2* interdict remains

³⁷ Section 195 of the Constitution.

³⁸ Specifically, paragraph 2(d) of the order, above n 15.

unclear. No argument was addressed to the Court on this issue. As appears from paragraph 2(a) of the *LAMOSAS 2* order, the Commission is prohibited from processing new claims until one of two circumstances arises. Either the Commission must have *settled* or *referred* all old claims to the Land Court (order 2(a)(i)) or, upon application by any interested party, the Land Court has granted it permission to begin doing so (order 2(a)(ii)).³⁹ The former instance (order 2(a)(i)) operates automatically upon settlement or referral of all old claims. What is unclear is whether, properly construed, order 2(a)(i) would operate automatically in the face of a fulfilment order, as such claims are neither ‘settled’, as the term is ordinarily understood, or referred. The alternative would be that a fulfilment order would constitute a factor relevant to whether the Court should, on application of an interested party, uplift the interdict, in other words, under order 2(a)(ii). The current application does not seek to address this uncertainty, which, in my view, militates against the grant of declaratory relief.

[35] The fourth reason I am disinclined to grant relief, at least at this stage, is that it is sought *ex parte*. The relief directly impacts on the rights of the affected claimants and their beneficiaries or descendants. Although the Commission expressly does not seek to extinguish their rights, the intended effect of the relief sought is that the Commission will no longer process the relevant claims. Moreover, the Commission is ultimately seeking to place itself in a position to process new claims without finalising them, with attendant consequences.

[36] The Commission has not at this stage sought any order for substituted service on the persons affected by this application. In this case, it has now been established that three of the claimants are deceased and accordingly it is their

³⁹ Above n 15.

beneficiaries or descendants who are affected. This is not a case where any landowner's property has been gazetted as subject to claim.⁴⁰

[37] In its supplementary affidavit, the Commissioner provided the Court with useful information about the cost of effecting substituted service in newspapers and other mainstream media and related budget. While certain potential expenditure is apparently prohibitive, the affidavit makes it clear that there is no impediment to the Commission approaching this Court for a suitable substituted service order.

[38] Indeed, the Commission itself makes practical proposals in this regard making use of means of communication such as the Government Communications and Information Service (GCIS) to reach municipal offices, tribal council authority offices and other local government buildings. The GCIS channel can also reach people through district community radio talk shows, television stations, billboards, banners, activations at taxi ranks and malls and information blitzes on commuter trains at the last known addresses of claimants. As a possible template, the Commissioner referred this Court to a previous campaign aimed at assisting claimants to know the status of their claims. To this end, the GCIS 'made use of different media platforms internally and externally, in order to accommodate everybody in different languages that they understand. ... [Commission officials] engaged the public through allocations of call-in radio slots nationally and the regions, media briefings, acceleration of District Based Stakeholder Engagement Sessions, activations or pop-up activities, invitations to participate in Government exhibitions and office walk-ins'.

⁴⁰ This ensues in terms of s 11 of the Restitution Act.

[39] It is not necessary for this Court at this stage to prescribe how such substituted service should be effected. The Court ultimately approached to authorise substituted service would apply its mind to that issue. It may, however, be noted that when the time comes to do so, the Commission will presumably consider whether to apply for such relief for a greater number of, or possibly all untraceable claimants (per province or nationally), at the same time, as to do so might result in a substituted service order having greater impact and effect and be more cost-effective.

[40] I merely highlight that consideration should be given not only to targeting claimants but also their beneficiaries and descendants. How this is done will likely be informed by efforts to engage the Department of Home Affairs and the relevant Master's office where a claimant is deceased.

[41] In conclusion, I emphasise that none of the above conclusions means that the issues before Court are not, in substance, suitable issues for the grant of declaratory relief. Each consideration weighing against the grant of relief is either dilatory or speaks to the form of relief. Indeed, in this regard, I am of the view that if the applicants address these considerations, the grant of a fulfilment order would be appropriately sought and all the more so if linked with relief directed at determining its effect on the upliftment of the interdict under order 2(a)(i) of the *LAMOSIA 2* interdict.

Conclusion

[42] In view of the above conclusion, I have considered whether the appropriate order would be to dismiss prayers 1 to 3 of the application or to make no order

allowing the Commission to supplement its papers. In my view, it is appropriate to dismiss these prayers as the considerations raised are substantial, and the application is unlikely to be prosecuted further in this form.

[43] The alternative relief sought is for guidelines and directions on how to deal with the difficulty of untraceable claimants. It is not the function of the Court to give advice. Moreover, consideration may be given to the reasons for decision set out in this judgment.

[44] The further order made is to direct the Registrar to deliver a copy of this judgment to the functionaries referred to above.

[45] The following order is made:

- a. The application is dismissed.
- b. The Registrar of the Land Court is directed to send a copy of this judgment to the Director General of Home Affairs and to all Masters' Offices in Gauteng, the Eastern Cape, KwaZulu Natal, Limpopo, Mpumalanga and the Western Cape.

S Cowen

DJP Land Court

I agree.

T Ncube

Judge Land Court

Appearances:

For the Applicant: BA Loxton-Kamba instructed by the State Attorney, Pretoria