IN THE LAND COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LanC 193/2024

Court Online Case Number: 2025-207439

Date reserved: 8 April 2026

Date of decision: 4 June 2026

Coram: Deputy Judge President Cowen

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

Date: 04 June 2026

Signature: [redacted]

In the matter between:

MOSSEL BAY MUNICIPALITY Applicant

and

DEPARTMENT OF AGRICULTURE, LAND REFORM

AND RURAL DEVELOPMENT Respondent

Summary: Application to make agreement concluded relating to the settlement of a claim under the Restitution of Rights in Land Act 22 of 1994, an order of Land Court. Application dismissed.

ORDER

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1. The application is dismissed.
2. There is no order as to costs.

JUDGMENT

COWEN DJP

[1] The applicant, the Mossel Bay Municipality (the Municipality), seeks an order making an agreement an order of Court. The agreement was concluded between the Municipality and the respondent, the then Department of Agriculture, Land Reform and Rural Development, now the Department of Land Reform and Rural Development (the Department). It concerns a land claim lodged by a community under the Restitution of Land Rights Act 22 of 1994 (the Restitution Act) in an area known as Tarka in the Western Cape.

[2] The agreement regulates the transfer, from the Municipality to the Department, of 36 erven (28 serviced and 8 unserviced) in respect of which the claim was lodged and a further 9 (1 serviced) erven on a portion of Erf 2005. The agreement records

that the Municipality approved the alienation of the erven, in compliance with the requirements of the Municipal Finance Management Act 56 of 2003 in the process of disposal of the properties. The price is recorded as R1 947 400.00, to be paid by the Department to the Municipality. The agreement includes what is termed a reversionary clause, in terms of which no beneficiary will be entitled, under the Deed of Sale and Title Deed, to sell the property for ten years to a person other than a co-claimant, failing which the property will revert to the Municipality for the same amount as the purchase price.

[3] The application came before me on the unopposed roll. The Department does not oppose the application. The Commission on the Restitution of Land Rights (the Commission) consents to the relief sought. While not a party to the application, the Regional Commissioner of the Commission in the Western Cape signed the agreement on the Department's behalf.

[4] The Land Court, established under the Land Court Act 6 of 2023 has the power to make 'any appropriate order' including making 'any arbitration award or any settlement agreement an order of the Court.'[1]

[5] During the course of the hearing, I requested the Municipality's counsel to address the Court on whether it is competent for this Court to grant the relief sought in the absence of any litigation between the parties, in light of the Constitutional Court's decision in *Eke v Parsons*[2] and the decision of the Gauteng High Court in

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[1] Section 26(1)(g) of the Land Court Act, which provides:
'26. Court orders
(1) The Court may make any appropriate order, including –
…
(g) making any arbitration award or any settlement agreement an order of the Court.'

[2] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (*Eke v Parsons*) para 15.

Avnet.[3] Counsel delivered written submissions after the hearing, whereafter judgment was reserved.

[6] In *Eke v Parsons,* the Constitutional Court held (*obiter)* that 'parties contracting outside of the context of litigation may not approach a Court and ask that their agreement be made an order of court.'[4] In *Avnet,* the High Court squarely considered whether an agreement may be made an order of court when it was concluded without litigation having commenced between the parties. The High Court concluded that it is not. In doing so, it agreed with the above *dictum* in *Eke v Parsons* and a similar finding, also *obiter*, in the Eastern Cape High Court decision of *PL v UL*[5]. In *PL v UL,* the Full Court held that for it to be competent for a Court to make an agreement an order of Court, 'it must relate directly or indirectly, to an issue or *lis* between the parties that is properly before the court, and in respect whereof, but for the settlement agreement, it would possess the necessary jurisdiction to entertain.'[6]

[7] In the context of the Restitution Act, a common way in which disputes come before the Court is in terms of s 14, which regulates referrals to Court of claims. Subsections 14(1) and (2) govern referrals of disputes in respect of claims which are not resolved by agreement.[7] This is the ordinary way in which restitution claims

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[3] *Avnet South Africa (Pty) Limited v Lesira Manufacturing (Pty) Limited and Another* [2019] ZAGPJHC 72; 2019 (4) SA 541 (GJ) (*Avnet*).
[4] *Eke v Parsons*, above n 2 para 25.
[5] 2013(6) SA 28 (ECG).
[6] *Id* para 15 cited with approval in *Eke v Parsons,* above n 2 para 25.
[7] (1) If upon completion of an investigation by the Commission in respect of specific claim-
(a) the parties to any dispute arising from the claim agree in writing that it is not possible to settle the claim by mediation and negotiation;
(b) the regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation; or
(c) .....
(d) the regional land claims commissioner is of the opinion that the claim is ready for hearing by the Court,
the regional land claims commissioner having jurisdiction shall certify accordingly and refer the matter to the Court.
(2) Any claim referred to the Court as a result of a situation contemplated in subsection (1) *(a)*, *(b)* or *(d)* shall be accompanied by a document-
(a) setting out the results of the Commission's investigation into the merits of the claim;

come before this Court. Claims may also be referred directly by a party in terms of s 38B of the Restitution Act. There are various other ways in which disputes under the Restitution Act may be litigated, such as, for example, review proceedings, interdict proceedings or proceedings for declaratory relief.

[8] The Municipality contended that this case can be distinguished from *Avnet* on the grounds that this is not a commercial dispute, but a dispute with a statutory basis in respect of a claim investigated by the Commission and resolved under statute and public law.

[9] In my view, these are not sufficient bases to distinguish this case from the principles which underpin the *Avnet* decision. First, the agreement is, in substance, an agreement regulating the sale of property, which is a commercial matter. The nature of the dispute is not altered because the parties to the agreement are state functionaries acting under legislation. Secondly, the nature of the dispute, or it being rooted in private rather than public law, is not the animating consideration. As held in *Avnet,* '[t]he primary function of the courts is to determine disputes between parties. The basis upon which a court makes a settlement agreement an order of court is therefore that there is a dispute between the parties which is already before the court and that, absent the settlement agreement, the court would have to adjudicate that dispute.'[8] That applies to disputes of a private or public law nature.

[10] Moreover, once an agreement is made an order of Court, it becomes an order

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(b) reporting on the failure of any party to accede to mediation;
(c) containing a list of the parties who have an interest in the claim;
(d) setting out the Commission's recommendation as to the most appropriate manner in which the claim can be resolved.

[8] Above n 3 para 30.

like any other and is enforceable through contempt proceedings or other appropriate process.[9] The Court in *Avnet* held: 'A breach of a court order is a serious matter. Disobedience of a court order constitutes a violation of the Constitution and can give rise to contempt proceedings, with consequences such as incarceration. It does not seem permissible or appropriate for parties to be free to clothe their agreement with these consequences, in circumstances where the agreement is not resolving a matter already before the court.'[10]

[11] It is a different matter if the legislature makes the provision in a statute for agreements concluded extra-judicially to be made orders of Court. Notably, the Restitution Act is legislation of that sort. It provides the means by which a Court may be approached to make such an agreement regulating the finalisation of land claims orders of Court.[11] Subsections 14(3), (3A) and (4) govern *inter alia* the referral to Court of matters pertaining to agreements concluded regarding the finalisation of claims.[12] Section 14(3A) sets out eleven instances when the Regional

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[9] *Eke v Parsons* above n 2 paras 29 and 31.
[10] Above n 2 para 34.
[11] *Cf* s 31 of the Arbitration Act 42 of 1965.
[12] S 14(3) 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.
(3A) If the regional land claims commissioner having jurisdiction is of the opinion that-
(i) a question of law arising out of the agreement needs to be resolved;
(ii) there is doubt as to whether or not all parties who have an interest in the claim are parties to the agreement;
(iii) there is doubt as to the validity of the agreement or any part of it;
(iv) there is doubt as to the feasibility of the implementation of the agreement;
(v) the agreement does not comply with section 42D (2);
(vi) the agreement is not just and equitable in respect of any party;
(vii) the agreement is contrary to any provision of the Act;
(viii) the authority of any signatory is in doubt;
(ix) the agreement is vague or contradictory;
(x) the parties to the agreement agree that it is desirable that the agreement be made an order of Court;
(xi) the agreement ought to be referred to the Court for any other good reason,
he or she may refer the matter to the Court.
(4) A referral under subsection (3A) shall be accompanied by a copy of the relevant deed of settlement and a report containing-

Land Claims Commissioner may refer such matters to Court. These include where the parties to the agreement agree that it is desirable that the agreement be made an order of Court.[13] Subsection 14(4) sets out what a Regional Commissioner must do when referring such a matter to Court.[14]

[12] In this case, the Regional Commissioner has not followed the procedure contemplated by subsecs 14(3A) and (4). Moreover, even if that procedure were to be followed, this Court would require to be satisfied *inter alia* that it could exercise its jurisdiction in circumstances where the claimant community is not a party to the agreement.

[13] The deponent to the founding affidavit offered further reasons for approaching the Court in the absence of a referral or other legal proceedings. The first is that the Municipality is a creature of statute with no inherent powers. In my view, a Court cannot be approached to sanction an agreement which would not fall within the power or competence of the respective state functionaries to conclude. The second is that s 6(1)(d) makes provision for the Commission to report to the Court on the terms of settlement of successfully mediated claims.[15] However, the Commission is not reporting in this case and s 6(1)(d) is expressly rendered subject to s 14. The

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(a) concise information about the background to the claim and the settlement;
(b) information necessary for the Court to establish whether or not it has jurisdiction;
(c) the reasons for the referral of the matter to the Court; and
(d) the regional land claims commissioner's recommendations, if any, as to how the matter should be dealt with.

[13] Subsection 14(3A)(x). Above n 12.

[14] Above n 12.

[15] 6 General functions of Commission
(1) The Commission shall, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner-
(a) …
(b) …
(c) …
(d) subject to the provisions of section 14, report to the Court on the terms of settlement in respect of successfully mediated claims; …

Municipality also relied on s 22 of the Restitution Act, which is now repealed, and, in any event, would similarly have required compliance with s 14.[16]

[14] *Avnet* concerned the powers of the High Court. The question in this case is whether the Land Court has the power to make agreements concluded outside of litigation orders of Court. In this regard, under s 26(1)(g) of the Land Court Act, the Land Court has the power to make 'any appropriate order' including 'making any arbitration award or any settlement agreement an order of the Court'.

[15] The power to make 'any appropriate order' is a wide and flexible power.[17] Its breadth is emphasised by s 26(1) of the Land Court Act which sets out a series of orders that may be made but then, in subsec 26(1)(i) confers on the Land Court the power to make 'any other appropriate order which a High Court is competent to make, and which relates to a matter under the jurisdiction of the Court.' In determining the meaning of an 'appropriate order', the Court must be guided by the Constitutional Court's decision in *Fose,* in which it was held that:[18]

> 'In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and

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[16] Through the application of s 22 (1)(d) which empowered the Land Claims Court 'to determine all other matters which require to be determined in terms of this Act.'

[17] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) (*Fose*) para 69; *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1997 (12) BCLR 1675 (CC); 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC) para 38. These cases interpreted s 7(4)(a) of the now repealed interim Constitution which contained a clause equivalent to s 38 of the 1996 Constitution which empowers competent Courts to grant appropriate relief when approached by persons alleging an infringement of or threat to a right protected in the Bill of Rights.

[18] *Fose v Minister of Safety and Security*, above n 17 para 69.

are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'

[16] The Constitutional Court was considering its approach to remedying harms caused by violating the Constitution and held further:[19]

> '[96] Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to "defend against encroachment or interference". It suggests that certain harms, if not addressed, diminish our faith in the Constitution. It recognises that a Constitution has as little or as much weight as the prevailing political culture affords it. The defence of the Constitution - its vindication - is a burden imposed not exclusively, but primarily on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement, and strike effectively at its source.
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> [97] Once the object of the relief in s 7(4)(a) has been determined, the meaning of "appropriate relief" follows as a matter of course. When something is appropriate it is "specially fitted or suitable". Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter three. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate.'

[17] In view of the provisions of s 14(3A)(x), the Land Court must have the power to make at least such settlement agreements concluded outside of the context of litigation orders of Court. Whether the Court has the power to do so in restitution matters beyond s 14(3A)(x) raises more complex issues. I decline to decide this

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[19] *Fose* above n 17 paras 96 and 97, footnotes omitted.

issue, however, because this matter came before me on the unopposed roll and only limited argument was received on what is an important issue. The issue, moreover, may require consideration not only in light of *Avnet, Eke v Parsons and PL v UL* but in light also of related provisions in statutes that govern the exercise of the powers of the Land Court. This may include further provisions such as s 30 of the Land Court Act,[20] ss 14 and 38B(5)[21] of the Restitution Act, ss 18(5) and 18(6)[22] and s 21(3)(a)[23] of the Land Reform (Labour Tenants) Act 3 of 1996 and relevant provisions of the Extension of Security of Tenure Act 62 of 1997.[24] I am, furthermore, satisfied that it is not necessary for me to decide the issue, because, if I assume that – notwithstanding *Avnet, Eke v Parsons* and *PL v UL* – the Court does have such a power under s 26(1)(g), I would not consider it to be an appropriate order in this case.

[18] The agreement in this case is not one to which the claimant is a party. While

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[20] Section 30 is titled 'Settling of matters'. It provides:
(1) If a matter is settled out of Court, either by means of negotiation or mediation, and the settlement agreement is accepted by all parties involved in the matter, the registrar of the Court must, if the parties agree thereto, submit the settlement agreement to the Court for confirmation or rejection.
(2) The Court must consider the settlement agreement and may—
(a) confirm the settlement agreement and make it an order of the Court; or
(b) before deciding the matter, refer the settlement agreement to the parties for reconsideration of any specific issues.

[21] Section 38 deals with claims that are referred directly to the Land Court. Section 38B(5) provides: 'Where all interested parties have reached agreement as to how the claim should be finalised, the Court may make the agreement and order of the Court.

[22] Section 18 is titled 'Resolution of claim by agreement'. Sub-sections 18(5) and (6) read:
(5) No agreement for the settlement of any application shall be of any effect unless the Director-General has certified that he or she is satisfied that it is reasonable and equitable, or unless it is incorporated in an order of the Court in terms of this Act.
(6) The Director-General may submit any agreement certified by him or her in terms of subsection (5), to the Court.

[23] Section 21 is titled 'Proceedings before Court. Section 21(3)(a) reads
'(3) If the Director-General submits to the Court an agreement in terms of section 18 (6) -
(a) the Court may make such agreement an order of the Court with or without such technical variations as may be appropriate'.

[24] These are the laws which currently constitute the primary jurisdiction of the Land Court. Further laws will fall under its jurisdiction pursuant to the Land Court Act once the President commences the relevant sections.

it purports to benefit the claimant and impose obligations (for example the reversionary clause) the scope of the claimants rights and obligations are far from clear. Indeed, in context of this case, the import of the agreement on the settlement of the restitution claim is not readily or sufficiently discernible. The agreement appears rather to be incidental to the settlement of the claim. It is thus not possible to ascertain whether the order, if granted, will effectively and suitably serve the overall objectives of the Restitution Act and vindicate the rights it protects, and in turn, the Constitution's promise of land restitution. Moreover, it does not seem appropriate in such a case to clothe an agreement with the consequences of contempt of Court process, if breached. Rather, it may be enforced in the ordinary course.

[19] In the result, I conclude that the application should be dismissed. This Court does not ordinarily grant costs and there is no reason to make a costs order in this case. I make the following order.

'1. The application is dismissed.
2. There is no order as to costs.'

SJ Cowen
Deputy Judge President, Land Court

Appearances:

Applicant: PJA Griesel instructed by Herbie Oosthuizen and Associates