CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 29/06

THE CONCERNED LAND CLAIMANTS' ORGANISATION OF PORT ELIZABETH	Applicant
versus	
THE PORT ELIZABETH LAND AND COMMUNITY RESTORATION ASSOCIATION	First Respondent
MINISTER OF LAND AFFAIRS	Second Respondent
CHIEF LAND CLAIMS COMMISSIONER	Third Respondent
NELSON MANDELA METROPOLITAN MUNICIPALITY	Fourth Respondent
THE MEC FOR LOCAL GOVERNMENT AND HOUSING FOR THE EASTERN CAPE PROVINCE	Fifth Respondent
THE PORT ELIZABETH LAND RESTITUTION AND HOUSING ASSOCIATION	Sixth Respondent

Decided on: 21 September 2006

JUDGMENT

THE COURT:

Introduction

[1] This case concerns claims for restitution of residential land. The narrow issue posed is whether under the Constitution a person or community dispossessed of

property by past racially discriminatory laws and practices is entitled to insist on restitution of that property as against other equitable redress.

[2] The applicant, a community organisation representing aggrieved land claimants, has come to this Court by way of direct access.[1] It asks for an order declaring that the agreement on land restitution (framework agreement) entered into by the Minister of Land Affairs (Minister), other government respondents[2] and the Port Elizabeth Land and Community Restoration Association (PELCRA) representing certain land claimants from the community is inconsistent with the Constitution because it offends section 25(7) of the Constitution.

[1] Rule 18 of the Rules of this Court provides for an application for direct access to this Court. The rule reads:

> "(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
> (2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
> (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
> (b) the nature of the relief sought and the grounds upon which such relief is based;
> (c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot;
> (d) how such evidence should be adduced and conflicts of fact resolved.
> (3) Any person or party wishing to oppose the application shall, within 10 days after the lodging of such application, notify the applicant and the Registrar in writing of his or her intention to oppose.
> (4) After such notice of intention to oppose has been received by the Registrar or where the time for the lodging of such notice has expired, the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include—
> (a) a direction calling the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted; or
> (b) a direction indicating that no written submissions or affidavits need be filed.
> (5) Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4)(a) have been complied with."

[2] The Chief Land Claims Commissioner; the Nelson Mandela Metropolitan Municipality; the MEC for Local Government and Housing for the Eastern Cape Province and the Port Elizabeth Land Restitution and Housing Association.

[3] Section 25(7) provides that:

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

[4] The impugned agreement was concluded in terms of section 42D(1) and (2)[3] of the Restitution of Land Rights Act[4] (the Act). The Act is the legislation that gives effect to section 25(7) of the Constitution. The agreement establishes a framework for the settlement of claims for restitution of land and for developing vacant land in the residential areas of Fairview and Salisbury Park (earmarked land) in Port Elizabeth. It provides for land restitution on a collective or community basis for the benefit of claimants who are party to the framework agreement and the broader community by subdividing the earmarked land into commercial and residential erven; by supplying

[3] Section 42D(1) and (2) provide:

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

[4] 22 of 1994.

bulk services; by building residential dwellings; and by constructing community facilities.

[5] The agreement stipulates that the monetary value of the development planned shall be the sum of the monetary value of all individual claims for land restitution. Each land claimant is listed in an annexure to the agreement and is entitled to compensation averaging R30 000.00 or its equivalent in the form of a plot and a dwelling. The total cost of the development is to be funded by the national treasury to the tune of R41.92m. In turn, the claimants undertake neither to pursue individual claims for monetary compensation nor to insist on the restoration of their original portions of land in the two development areas.

The parties

[6] It is beneficial to describe the parties briefly. The applicant is known as the Concerned Land Claimants' Organisation of Port Elizabeth, an association of land claimants who were dispossessed of their land situated in the earmarked areas under a racially oppressive law.[5] The claimants have submitted valid land restitution claims and are listed in the annexure to the framework agreement.

[7] PELCRA, another community organisation, is the first respondent. It was formed in 1993 to assist with claims for restitution of land in Port Elizabeth. Representing land claimants, PELCRA negotiated and concluded a framework

[5] Community Development Act 3 of 1966.

agreement with the Minister and other government respondents. The applicant did not exist then. Its members belonged to and were represented by PELCRA. In effect the applicant is a breakaway group from PELCRA.

[8] The second respondent is the Minister. She is responsible for the administration of the Act and is a party to the impugned framework agreement. Also joined is the Chief Land Claims Commissioner (Commissioner) who is cited as the third respondent. The Commissioner has a statutory duty to implement the land restitution process. The fourth respondent is the Nelson Mandela Metropolitan Municipality, which is joined as the municipality concerned. The MEC responsible for Local Government and Housing: Eastern Cape is the fifth respondent. He subscribed to the agreement on behalf of the province, which owns the earmarked land. The Port Elizabeth Land Restitution and Housing Association (PELRHA) is the sixth respondent. PELCRA and the Minister formed PELRHA to perform the role of the land developer envisaged in the agreement. One of its important tasks is to establish a fair and equitable scheme for allocation of sites within the earmarked land to claimants.

Brief background

[9] The year 1993 promised great social transition. The advent of the interim Constitution was imminent and kindled new hope. Those dispossessed of their land in Port Elizabeth by the minority apartheid state were no different. They too had cause

to anticipate more compassionate land ownership arrangements.[6] The Legal Resources Centre of Port Elizabeth came to their help in pursuing their claims for restitution. Claimants authorised PELCRA to act for them in advancing land claims in relation to their original land in the earmarked area. The applicant recalls that, on a number of occasions at meetings, claimants were told not to ask for their land back as they would be given an opportunity to acquire a serviced plot in a developed area in lieu of their dispossessed property. The applicant claims that this assurance was taken by its members to apply only to those people whose land had already been developed, as it could not be restored to them vacant.

[10] In February 2000, PELCRA, acting for claimants, entered into the agreement with the Minister. Shortly after signature, the terms of the agreement were presented to the claimants at a meeting of PELCRA. All welcomed the terms. The applicant says that at the report back meeting, it was not obvious that the framework agreement was incompatible with the aspirations of its now aggrieved members. Its members became concerned only in July 2001 when a proposed layout plan was displayed. On the plan a huge part of the undeveloped land had been allocated for commercial purposes and another for high-density housing. On the applicant's version less than half of the land is available for allocation to the claimants for residential purposes. It is worried that a number of its now concerned members have been allocated residential stands much smaller than their original land and that some have accepted the stands by signing individual settlement agreements as required by the framework

[6] For example see, The Abolition of Racially Based Land Measures Act 108 of 1991 and the establishment of the Land Commission on Allocation of Land. The Commission was later repealed by section 41(1) of the Restitution of Land Rights Act 22 of 1994.

agreement without understanding the adverse impact of the terms of the settlement agreements on their land claims.

[11] The applicant's complaint is that before the agreement was concluded its members understood that people who were claiming undeveloped land would still have their claims considered on the footing that their original land would be returned to them. The applicant insists that PELCRA had a duty to ensure that the agreement entered into with the Minister provided that the undeveloped and vacant land is returned to its original owners.

[12] Nearly a year and a half later, in August 2001, claimants who preferred restoration of their original land met and formed themselves into an association, that is, the applicant. The applicant requested the Minister to intervene and undo the agreement. The Minister referred their concern to the Commissioner. The applicant also met with the Eastern Cape Development Tribunal, however their concerns did not fall within the jurisdiction of the tribunal. They also held a meeting with the Regional Land Claims Commissioner, the premier of the Eastern Cape Province and a member of the mayoral committee of the Nelson Mandela Metropolitan Municipality, all to no avail.

Land Claims Court

[13] In July 2003 the applicant approached the Land Claims Court and sought an order to review and set aside the decision of the Minister and the Commissioner to

enter into the framework agreement and to stop PELRHA from continuing with the development of the land allocated for restitution. The Minister and the Commissioner were opposed to the relief sought.

[14] The Land Claims Court dismissed the application and declined to grant the applicant leave to appeal. It held that the applicant had misconceived its remedies because the decision of the Minister or the Commissioner to conclude the framework agreement is not reviewable under the Act[7] or the Promotion of Administrative Justice Act[8] or by reason of inherent jurisdiction that the Court[9] might have. This is so, the Court found, because the framework agreement is governed not by administrative law but by the law of contract. The Supreme Court of Appeal also refused the petition to it for leave to appeal and did not furnish reasons.

[15] The Court went on to find that even if the Minister's action was reviewable the applicant had not shown that its members had standing because they were not directly prejudiced by the agreement. In contrast, the Minister and the Commissioner had shown that if the agreement were to be set aside other land claimants would be

[7] Section 36(2) of the Restitution of Land Rights Act provides:

> "The Court shall exercise all of the Supreme Court's powers of review with regard to such matters, to the exclusion of the provincial and local divisions thereof."

[8] Section 6 of the Promotion of Administrative Justice Act 3 of 2000.

[9] The Land Claims Court was established by section 22 of Restitution of Land Rights Act. Its inherent jurisdiction is defined in section 36 as follows:

> "(1) Any party aggrieved by any act **[of]** 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.
> [Sub-s. (1) substituted by s. 21 of Act 78 of 1996.]
> (2) The Court shall exercise all of the Supreme Court's powers of review with regard to such matters, to the exclusion of the provincial and local divisions thereof."

severely prejudiced. The Court reasoned that the agreement does not preclude members of the applicant from pursuing their individual land claims. Yet if they choose to, they may participate in the realisation of the goals envisaged in the framework agreement.

The applicant's submissions

[16] In this Court the case of the applicant rests on two grounds. The one is that the agreement is invalid because it offends section 25(7) of the Constitution; it does not make provision for the restoration of the original dispossessed land in the earmarked area even though the land was available and had not yet been developed when the agreement took effect. The applicant advances an additional ground based on unfair discrimination. It says that the agreement improperly discriminates between claimants who were dispossessed of their land in the earmarked area and to whom restoration of land remained possible, and claimants in respect of other areas where restoration of land is no longer possible as those areas have subsequently been developed.

[17] Both grounds are constitutional issues of some importance. Yet both issues are raised for the first time in this Court. After the application was lodged, the Chief Justice directed the parties to address two matters: (a) whether the application for direct access should be treated as an application for leave to appeal under rule 19 against the decision of the Land Claims Court of 30 September 2004 and (b) the merits of the appeal to allow the Court to dispose of the appeal without need for further affidavits.

Direct access

[18] The question is whether there exist exceptional circumstances that justify bypassing the Land Claims Court and the Supreme Court of Appeal and hearing the matter by way of direct access.[10] The Minister and the Commissioner oppose the granting of direct access and say it is not in the interests of justice to do so. The MEC has filed a notice to abide. The rest of the respondents are silent.

[19] In our view, the opposing respondents are right that no exceptional circumstances have been shown to exist for direct access. The dispute between the parties has dragged on for nearly five years and the applicant has not shown a need to resolve the dispute urgently. There is no reason advanced why the new arguments based on the Constitution were not raised before the Land Claims Court, whose view on the matter, as a specialist court, would clearly be important. In effect we are needlessly invited to be a court of first and last instance. Yet the applicant does not assert that if direct access is not granted its members will be denied effective relief. Lastly, just and equitable restitution of property or its equitable redress is a pressing constitutional imperative. Yet where the law that gives effect to the right to land redress establishes a specialist court to resolve related disputes, only very compelling public and other interests would justify bypassing that court. None have been shown.

[10] See for example, *Zondi v Member of the Executive Council for Traditional and Local Governmental Affairs and Others* 2005 (4) BCLR 347 (CC); 2005 (3) SA 589 (CC) at para 12; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (4) BCLR 415 (CC); 1998 (2) SA 1143 (CC) at paras 4-9; *S v Bequinot* 1996 (12) BCLR 1588 (CC); 1997 (2) SA 887 (CC) at para 15.

It is not in the interests of justice to grant direct access to this Court. It must be refused.

[20] What remains is to consider whether the application for direct access should be treated as an application for leave to appeal under rule 19,[11] against the decision of the

[11] Rule 19 of the Rules of this Court provides:

"(1) The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.

(2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave.

(3) An application referred to in subrule (2) shall be signed by the applicant or his or her legal representative and shall contain—

(a) the decision against which the appeal is brought and the grounds upon which such decision is disputed;

(b) a statement setting out clearly and succinctly the constitutional matter raised in the decision; and any other issues including issues that are alleged to be connected with a decision on the constitutional matter;

(c) such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court; and

(d) a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court, and if so—

(i) which court;

(ii) whether such application is conditional upon the application to the Court being refused; and

(iii) the outcome of such application, if known at the time of the application to the Court.

(4) (a) Within 10 days from the date upon which an application referred to in subrule (2) is lodged, the respondent or respondents may respond thereto in writing, indicating whether or not the application for leave to appeal is being opposed, and if so the grounds for such opposition.

(b) The response shall be signed by the respondent or respondents or his or her or their legal representative.

(5) (a) A respondent or respondents wishing to lodge a cross-appeal to the Court on a constitutional matter shall, within 10 days from the date upon which an application in subrule (2) is lodged, lodge with the Registrar an application for leave to cross-appeal.

(b) The provisions of these rules with regard to appeals shall apply, with necessary modifications, to cross-appeals.

(6) (a) The Court shall decide whether or not to grant the appellant leave to appeal.

(b) Applications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself.

(c) The Court may order that the application for leave to appeal be set down for argument and direct that the written argument of the parties deal not only with the

Land Claims Court of 30 September 2004. The respondents resist dealing with the present application as one for leave to appeal. It is plain that the application does not answer to the requirements of an application for leave to appeal under rule 19. Besides its irregular form, the most glaring defect in the application is that it is brought some eleven months after the Supreme Court of Appeal dismissed the applicant's petition for leave to appeal in May 2005. No explanation for this lateness is forthcoming, nor are we asked to condone it. Seemingly the applicant hopes to surmount this hurdle by simply starting fresh proceedings directly in this Court. However, having found the direct access application bad, we nonetheless consider it appropriate to treat the application as one for leave to appeal the decision of the Land Claims Court. To that end, we turn to examine whether it is in the interests of justice to hear the appeal.

Interests of justice under rule 19

[21] In assessing where the interests of justice lie, one is obliged to weigh carefully all factors relevant to the application for leave to appeal.[12] An important, although not singularly decisive, factor is the application's prospects of success on appeal. We consider this factor first. It will be remembered that the Land Claims Court dismissed the applicant's claim on the merits for the reasons that the decision of the Minister to conclude the framework agreement is not susceptible to judicial review; but that even

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> question whether the application for leave to appeal should be granted, but also with the merits of the dispute. The provisions of rule 20 shall, with necessary modifications, apply to the procedure to be followed in such procedures."

[12] See for example, *Minister of Health and Others v Treatment Action Campaign and Others (1)* 2002 (10) BCLR 1033 (CC); 2002 (5) SA 703 (CC); *S v Boesak* 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC); *Fraser v Naude and Others* 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1 (CC); *S v Mhlungu and Others* 1995 (7) BCLR 793 (CC); 1995 (3) SA 867 (CC).

if it is, the members of the applicant lack legal standing; that they have not shown prejudice and that, in any event, they have an alternative remedy.

[22] We are prepared to assume in the applicant's favour that the agreement concluded by the Minister is susceptible to judicial review. However, even if the conduct of the Minister and Commissioner is susceptible to review, the applicant must make out a case for reviewing and setting aside the agreement. In this Court the applicant relies on two arguments. The first is that the framework agreement offends section 25(7) of the Constitution, which provides that a person dispossessed of land is entitled to restitution of that land or equitable redress, subject to the provisions of an Act of Parliament. The second is that the framework agreement discriminates unfairly between different classes of claimants. The essence of the complaint is that the agreement breaches sections 25(7) and 9(3)[13] of the Constitution because it does not provide for restoration of the original land dispossessed. There is no suggestion that the agreement falls foul of the requirements of section 42D of the Act or that the section itself is inconsistent with the Constitution.

[23] Section 25(7) is part of a cluster of constitutional protections of property. On its terms the section confers a right to a person or community dispossessed of property as a result of racially discriminatory laws or practices "either to restitution of that

[13] Section 9 provides:

> "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

property or to equitable redress".[14] The Constitution says the entitlement is to the extent provided by an Act of Parliament. The Act empowers the Minister to conclude agreements with claimants with valid claims providing for one or more of awarding land, paying compensation or awarding land and paying compensation.[15]

[24] The agreement may determine the manner in which the awarded land rights are to be held or compensation to be made. The agreement may contain terms the Minister considers appropriate. Clearly in concluding agreements to give effect to the right to land restitution the Minister has a wide discretion within the options authorised. Claimants too play a vital role. As parties and beneficiaries to the agreement, their consent to the manner of restitution is indispensable. And expectedly, if the agreement is concluded with a community, the interest of the individual claimants will be coloured or qualified by the broader communal interest. For instance, a development plan that is agreed with a community and envisages communal spaces and facilities may imply smaller residential plots or individual compensation. The Act requires that the agreement provide for all members of the dispossessed community to have access to the land or compensation and on a non-discriminatory and accountable manner.[16] That does not mean that every claimant in the affected community is obliged to subscribe to the agreement. Those who opt out of the development agreement may pursue their right to equitable redress that will take the form of compensation.

[14] See above para 3.

[15] Section 42D(1)(a) to (c).

[16] Section 42D(2).

[25] Turning to the community agreement in this matter, clause 2.3 provides:

> "land claimants jointly decided not to pursue individual claims for monetary compensation or to insist on the restoration of the original portions of land that they were dispossessed of but to pool their resources for achieving community restoration by acquiring and developing land…"

Now the applicant and its members seek to escape the consequences of this contractual term. They now insist on the restoration of their original land portions. They say that they discovered nearly eighteen months after the agreement took effect that its terms were inimical to the full extent of their land claims and urge us to hold, more than six years after signature, that the contractual term breaches section 25(7).

[26] There is no merit in this argument. Section 25(7) confers a right to restitution or equitable redress but leaves the form and manner of redress to legislation. We have described the wide discretion the legislative scheme confers on the Minister and claimants subject to the equitable jurisdiction of the courts. Neither a claimant nor a community may insist as of right on original land dispossessed. This is not surprising. The affected land dispossession occurred over nearly 80 years since 1913, to different persons and communities across our land. Over the period patterns of land ownership, use and development have changed drastically. What is appropriate property restitution or equitable redress in response to historical dispossession is bound to vary and be subject to the specific context. For that very reason the submission that the

framework agreement discriminates unfairly against claimants who insist on return of their original land is unsustainable and must be dismissed.

[27] We must conclude that the assertion that the agreement is inimical to the terms of section 25(7) of the Constitution lacks any prospect of success. What remains is to deal with the unfair discrimination complaint. This claim too has no prospect of success. None of the land claimants whose land may still be available are obliged to subscribe to the compensation arrangements envisaged by the framework agreement. Those land claimants who do are obviously bound by the terms of the agreement and will be entitled to be treated on par with fellow claimants. They cannot be said to be unfairly discriminated against. And those land claimants who do not subscribe to the framework agreement but choose to claim their original land are entitled to pursue their respective claims, if any, as permitted by the Act.

[28] Accordingly, we do not need to consider the conclusion of the Land Claims Court that members of the applicant lack standing in this matter. Nevertheless, it should be recorded that the applicant represents a genuine community concern however small or unrepresentative. On the papers in this Court, land claimants who are members of the applicant also appear on the list of claimants appearing in Annexure A to the agreement. These appear to be people who originally owned land in the earmarked area and feel aggrieved by the terms of the framework agreement. In our view it may well be that the applicant therefore has an interest sufficient to vest standing in the applicant and its members. We are well aware that the applicant

represents a splinter group from PELCRA. However, in our view, that fact would in all probability not be a sufficient reason to non-suit them on the ground of standing.

[29] Having concluded that the arguments raised by the applicant bear no prospect of success, it is necessary to consider whether there may be other considerations relevant to the interests of justice. One which also militates against the grant of the application is the delay of the applicant in pursuing this litigation. At every stage, the applicant has been dilatory. From the time the agreement was concluded in February 2000, it took eighteen months before the applicant was formed. Then it took nearly two years to initiate the review proceedings in the Land Claims Court, after the judgment of the Land Claims Court in September 2004 it took more than six months to approach the Supreme Court of Appeal and after the Supreme Court of Appeal had refused leave to appeal a further eleven months elapsed before the applicant approached this Court.

[30] In six years much water has gone under the bridge. The earmarked land which had consisted of large plots of land with little or no infrastructure apart from a few gravel roads is well on its way to becoming a properly planned, developed and new residential township, with smaller erven, fully serviced and public amenities. This was made possible by pooling the entitlement of claimants to compensation. Many claimants have taken or are in the process of taking transfer of the fully serviced but smaller plots. It is obvious that if the framework agreement were to be set aside enormous prejudice will result. The legitimate choice of the majority of land

claimants will be brought to nought at the instance of a disgruntled minority. It has not been shown that it is in the interests of justice to do so.

[31] What is more, at least some members of the applicant have an alternative remedy. The Minister and the Commissioner are right in their contention that claimants who have not agreed to accept the terms of the framework agreement are entitled to pursue their claims in the ordinary course under the Act. It is clear from the scheme of the Act that section 2 determines entitlement to restitution. On the other hand, a section 42D agreement does not confer or deny the right to restitution. It operates only when the Minister is satisfied that a claimant is entitled to restitution. It merely creates an additional but not exclusive mechanism for restitution of a right in land. A claimant may vindicate its entitlement to restitution by any other means the Act permits. In other words members of the applicant who have not agreed to the framework agreement need not upset the framework agreement to enforce their right to restitution. They have alternative relief to equitable compensation. We cannot determine on the papers before us the extent to which members of the applicant have a claim for equitable compensation. That is a matter which will have to be determined in accordance with the provisions of the Act. Nor can we determine at this stage whether any of the applicants have waived any right to equitable compensation once they agreed to the framework agreement. This too may need to be determined by another forum.

[32] We conclude therefore that it is in the interests of justice neither to entertain the application for direct access nor to grant leave to appeal against the judgment of the Land Claims Court delivered on 30 September 2004. The application must therefore be dismissed. The Minister and the Commissioner have asked for costs should the application be dismissed. Although the applicant misconceived its remedy and its members seem to be moved by a desire to procure larger erven than on offer under the settlement agreement, it nonetheless sought to enforce admitted rights to land restitution guaranteed under our Constitution. Accordingly, this is not an appropriate case to make costs follow the event. Each party should carry its own costs.

Order

[33] (a) The application is dismissed.

(b) No order as to costs is made.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J, Sachs J, Van der Westhuizen J, Yacoob J, Kondile AJ, Van Heerden AJ.