



**THE LAND COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

Case No LCC 37/2003

Before: Du Plessis AJ and Bishop AJ
Heard on: 19 March 2026
Further submissions on: 31 March 2026
Delivered on: 19 August 2026

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

In the matter between:

MACASSAR LAND CLAIMS COMMITTEE

Plaintiff

and

MACCSAND CC

First Defendant

**THE GOVERNMENT OF THE REPUBLIC OF SOUTH
AFRICA**

Second Defendant

MINISTER OF LAND AFFAIRS

Third Defendant

CITY OF CAPE TOWN

Fourth Defendant

MINISTER OF LOCAL GOVERNMENT AND HOUSING

Fifth Defendant

THE REGIONAL LAND CLAIMS COMMISSIONER

Sixth Defendant

THE MUSLIM JUDICIAL COUNCIL

Seventh Defendant

**CLIVE AUBRYT FIGAJI
GEOFFREY LANE FIGAJI
MARIANNA LORETA FIGAJI**

Eighth Defendant

THE REGISTRAR OF DEEDS

Ninth Defendant

THE SURVEYOR GENERAL

Tenth Defendant

THE CAMMES DARRIES HERITAGE LANE TRUST

Eleventh Defendant

ORDER

1. It is declared that the Seventh and Eleventh Defendants' counterclaims are "claims" as defined in section 1 of the Restitution of Land Rights Act 22 of 1994.
2. The first issue separated in the order of 16 August 2024 will be determined on a date to be arranged in a case management meeting to be convened by the Court.
3. Whether, and if so on what terms, the Seventh and Eleventh Defendants should be permitted to participate in the Plaintiff's claim as interested parties will be determined after resolving the issue in paragraph 2.
4. There is no order as to costs.

JUDGMENT

BISHOP AJ

[1] The Plaintiff lodged a restitution claim under the Restitution of Land Rights Act 22 of 1994 (**Restitution Act**) with the Commission for the Restitution of Land Rights (**the Commission**) prior to 31 December 1998 for rights in various portions of land in Macassar on the Cape Flats. It describes the land as a commonage and contends that the community of Sandvlei held the right in the land in common. The land consisted of five erfs – 1991, 1195, 1196, 1197 and 1198 and the remainder of Cape Farm 544. The Plaintiff has since applied to this Court for the restitution of that land.

[2] The Seventh Defendant (**the MJC**) and the Eleventh Defendant (**the CDH Trust**) contend that they have also lodged claims for restitution over portions of the same land. The issues before us concern the existence, nature and extent of the MJC's and the CDH Trust's restitution claims.

[3] Like the Plaintiff, both the MJC and the CDH Trust lodged claims with the Commission before 31 December 1998 (**the original claims**). The first issue is the scope of those claims.

[4] The MJC's claim form mentioned only erf 1195. There is no dispute that it is a claimant for that erf. The CDH Trust's position is similar. Its claim form refers only to Farm 664 or "Erf 664 Macassar", but it argues that additional documents demonstrate

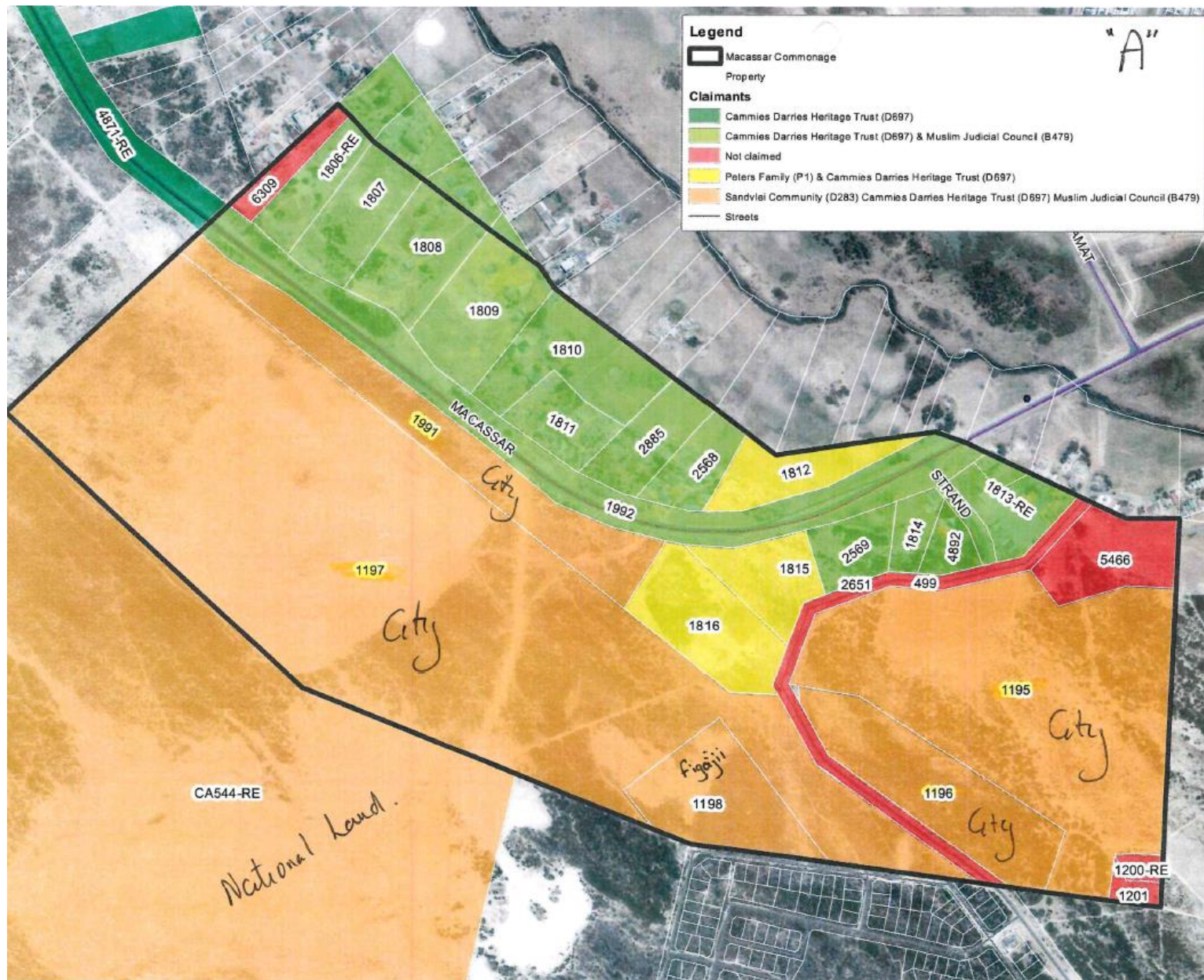
that, in fact, its claim also included Farm 544. As with the MJC, there is no dispute that the CDH Trust is a claimant for Farm 644.

[5] In October 2018, the Regional Land Claims Commissioner (**RLC**) gazetted the MJC's and the CDH Trust's original claims in terms of s 11(1) of the Restitution Act:

[5.1] The MJC's claim was defined as limited to "remaining extent of erf 1195, Macassar". This only partially overlaps with the Plaintiff's claim

[5.2] The Gazette defined the CDH Trust's claim as for "Erf 7461, Macassar". This does not overlap with the land the Plaintiff's claim.

[6] In 2015, the MJC and the CDH Trust brought counterclaims in this Court in the case that the Plaintiff had brought for the restitution of the five erfs. They claimed additional land not expressly mentioned in their original claim form. The additional land both the MJC and the CDH Trust claim in their counterclaim includes four erfs that are part of the Plaintiff's claim – erfs 1991, 1196, 1197 and 1198. I refer to this as **the disputed land**. The below map, submitted by the Plaintiff, usefully sets out the dispute between the parties.



[7] The Defendants advanced two bases on which they should be entitled to claim the disputed land.

[7.1] First, properly interpreted in light of all the relevant evidence, their original claims in fact included all the disputed land.

[7.2] Second, in the alternative, their counterclaims were applications for direct access under s 38B(1) of the Restitution Act and amounted to new claims lodged during 2014-2016, when the window for lodging restitution claims was re-opened. I refer to the counterclaims advanced on this basis as the **new claims**.

[8] The Plaintiff contends that both the bases on which the Defendants seek to claim the disputed land are bad in law. It successfully applied to have the two issues separated. In a judgment delivered on 16 August 2024, Cowen J (as she then was) separated the following two issues for determination:

[8.1] What land was claimed by the MJC, and what overlapping land, if any, was claimed by the CDH Trust prior to 31 December 1998 (**the Original Claim Issue**);

[8.2] Whether the MJC and the CDH Trust duly lodged claims when they delivered counter-claims with this Court on or about 16 January 2015 in terms of section 38B of the Restitution Act, as amended in 2014 (**the New Claim Issue**).

[9] We were meant to decide both issues.

[10] Unfortunately, we can decide only the second issue. Explaining why requires some explanation of how we managed this case to get it ready for hearing.

[11] After the separation order, the Defendants unsuccessfully sought funding from Legal Aid South Africa for their attorneys and counsel. The question arose whether the hearing of the separated issues could proceed in the absence of legal representation for the Defendants.

[12] After several case management meetings – which included Legal Aid SA, the Commission, the Defendants and the Plaintiff – it became apparent that the Defendants would not accept alternative pro bono representation arranged by the Court, and also were not able or willing to review Legal Aid SA's decision not to fund their representation despite indicating that they intended to do so.

[13] This created something of an impasse. The separated issues are vital for the Defendants as they will determine the extent of their claims, and when and how they can be adjudicated. It would be undesirable for the issues to be decided without the Defendants' being represented. However, the Plaintiff is entitled to the determination of the separated issues within a reasonable time as its claim cannot be advanced until those issues are decided.

[14] The Court resolved the impasse by appointing pro bono counsel to present the Defendants' position. In the best tradition of the Bar, Ms Adhikari generously agreed to accept the appointment. The Court thanks her for being willing to assist and to enable the proper ventilation of the dispute.

[15] Ms Adhikari did not act for the Defendants; they had indicated they would not accept alternative attorneys or counsel. She would act for the Court to ensure that

both sides of the argument were presented before it. As she did not act for the Defendants, she could not consult with them or lead evidence on their behalf. She could only reasonably present legal argument on agreed facts. While this was an imperfect solution, it was the best option available.

[16] In line with an agreement at a case management meeting, the Plaintiff and the pro bono counsel filed a joint practice note in which they agreed on the issues that should be decided, and the parts of the pleadings (including attached documents) that were relevant to deciding those issues. The Court intended to hear the separated issues on that basis.

[17] At a case management meeting approximately a month before the scheduled hearing, the Defendants indicated that they had now instructed their counsel to represent them at the hearing but required a postponement. The hearing was postponed for approximately a month, and new dates were set for the parties to file heads of argument. Ms Adhikari was released from her obligation.

[18] No party indicated that they intended to lead evidence, and no evidence was led at the hearing of the separated issues. The question that arose was whether it was possible to address the Original Claim Issue in the absence of evidence the Defendants claim is relevant to determine the proper meaning to be assigned to the MJC's and the CDH Trust's original claims. The parties agreed that it could not be adjudicated without evidence.

[19] The Court then asked whether evidence was necessary given that the Commissioner had published the MJC's and the CDH Trust's claims under s 11(1) in a way that did not include the disputed land. Was it possible, the Court asked, for the Defendants to contend for a different scope of the claim in the absence of a review of

the RLC's interpretation of the claim in the Gazette? The issue was debated, and the parties filed supplementary arguments on this question. I call this **the Published Claim Issue**.

[20] Against that somewhat lengthy procedural backdrop, there are three issues we need to decide: the Published Claim Issue, the New Claim Issue, and, based on the outcome, what is the way forward to finally resolve the Old Claim Issue.

The Published Claim Issue

[21] Section 11(1) of the Restitution Act¹ requires the RLC to consider any claim that is lodged and, if she is satisfied that certain requirements are met, to "cause notice of the claim to be published in the Gazette and in the media circulating nationally and in the relevant province". When she publishes the claim, the RLC defines which land has been claimed.

[22] The issue is whether it is open to a claimant who relies on a claim that has been published under s 11(1) to contend before this Court that the claim includes land that is not included in the published notice.

¹ Section 11(1) reads in full:

- "(1) If the regional land claims commissioner having jurisdiction is satisfied that-
- (a) the claim has been lodged in the prescribed manner;
 - (b) the claim is not precluded by the provisions of section 2; and
 - (c) the claim is not frivolous or vexatious,
- he or she shall cause notice of the claim to be published in the Gazette and in the media circulating nationally and in the relevant province, and shall take steps to make it known in the district in which the land in question is situated.

[23] The Plaintiff does not contend that the Court is “bound” by the RLC’s determination “in the sense of being precluded from adjudicating the merits of the claim”. Instead, it argues that s 11(1) constitutes the RLC’s interpretation of the claim form and “defines the claim that is before the Court”. That interpretive role is part of the Commission’s statutory function. The s 11(1) notice is an administrative act with legal consequences.² Unless and until it is set aside, the Court can only adjudicate the claim as defined in the s 11(1) notice. The Plaintiff relies on *Makhuva-Mathebula*, which, it argues, holds that disputes about the scope of a published claim must be addressed through review.³

[24] The Defendants argue that they are permitted, in a direct access claim under s 38B, to prove a claim that differs from what was published under s 11(1) without challenging the notice. The fact that the definition of the claim is susceptible to review does not mean it *must* be reviewed in order to pursue a broader claim. That is because the Commission performs an investigative, facilitative and administrative role, not an adjudicative one. Adjudication is left for this Court, and it is not bound by the RLC’s view of the ambit of a claim. There will be cases where either a claimant or a landowner will want to review the definition of a claim in a s 11 notice in order to avoid the direct consequences of publication. But as claimants under s 38B, they are entitled to advance a different interpretation of the ambit of the claim form before this Court

² The Plaintiff refers to *Minaar NO v Regional Land Claims Commissioner for Mpumalanga and Others* (2007) JOL 18913 (LCC) at 15, citing *Gamevest (Pty) Ltd v Regional Land Claims Commissioner* 2003 (1) SA 373 (SCA) at 380A-C.

³ *Makhuva-Mathebula Community v Regional Land Claims Commissioner, Limpopo and Another* [2019] ZASCA 157 at paras 47-50.

without reviewing the s 11(1) definition. The Defendants rely on the SCA's reasoning in *Mahlangu*,⁴ which they say addresses an analogous situation.

[25] Although it was the Court that raised the possibility that the s 11(1) notice may preclude the Defendants' interpretation of the claim form, on reflection the Defendants are correct.

[26] The Plaintiff is right that even unlawful administrative action is binding until it is set aside by a court.⁵ They are also right – as numerous cases demonstrate – that the publication of a s 11(1) notice is administrative action and that it is possible to review the RLC's definition of a claim.

[27] But there is a prior question – what is the legal effect of the administrative act of defining the claim in the s 11 notice? Is the effect to define the claim before the Court considering a s 38B application (as the Plaintiff argues)? Or are the consequences limited to other legal effects stipulated in the Restitution Act, without affecting the adjudication of a s 38B claim (as the Defendants argue)?

[28] The direct effects of a s 11 notice are stipulated in s 11(7).⁶ The effects are limited to preventing obstruction of the claim, primarily by the inconsistent use or

⁴ *Mahlangu NO v Minister of Land Affairs and Others* [2004] ZASCA 74; 2005 (1) SA 451 (SCA).

⁵ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) at paras 87-106.

⁶ Section 11(7) reads in full:

- (7) Once a notice has been published in respect of any land-
 - (a) no person may in an improper manner obstruct the passage of the claim;
 - (aA) no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given in respect of-

transfer of the land as defined, and the eviction of claimants from the claimed land. It does not specify that the definition of the claim in a s 11 notice confines this Court when it adjudicates the claim. As Spilg J put it in *Nyavana Traditional Authority*, the “consequences of a s 11 publication therefore affects real rights and secures a sterilisation of the Gazetted land in issue”.⁷

[29] Section 11A deals with the withdrawal or amendment of a s 11(1) notice. It allows any person “affected by the publication of the notice” to apply to the RLC to withdraw or amend the claim. But the effect of the s 11 notice is still defined by s 11(7). A person affected by one of the consequences listed in s 11(7) can rely on s 11A to remove (in the case of a landowner) or expand (in the case of a claimant) those restrictions. Section 11A says nothing about restricting the Court’s duty to interpret the scope of the claim form when it adjudicates the claim.

[30] I agree with the Defendants that, although *Mahlangu* concerned a different notice under the Restitution Act, the principle it establishes applies. The issue was

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- (i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit;
 - (ii) any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit;
 - (b) no claimant who occupied the land in question at the date of commencement of this Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner;
 - (c) no person shall in any manner whatsoever remove or cause to be removed, destroy or cause to be destroyed or damage or cause to be damaged, any improvements upon the land without the written authority of the Chief Land Claims Commissioner;
 - (d) no claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier.

⁷ *Nyavana Traditional Authority v MEC for Limpopo Department of Agriculture and Others* [2020] ZALCC 12; [2021] 1 All SA 237 (LCC) at para 12.

whether the existence of an unreviewed s 12(4) notice precluded a s 38B application.⁸ The issue arose because s 38B(1)(b) requires prior leave of the Court to bring a s 38B(1) application if a s 12(4) notice has been published for that land. In *Mahlangu*, a s 12(4) notice had been published, and the claimants sought leave to bring a s 38B application without reviewing the notice.

[31] The Land Claims Court (**LCC**) adopted the Plaintiff's logic. It held that allowing the s 38B application would "have the effect of avoiding a review application of the [Commission's] decision, and yet achieve the results of such a review."⁹ It could not allow the s 38B(1) application to proceed as it was not in a position to "set aside" the Commission's decision without the information that would emerge in a review. The SCA fairly described the LCC's holding that the s 12(4) notice "precluded a claim for restitution being made in terms of s 38B, and that until that decision was set aside in review proceedings the community's claim was premature."¹⁰

[32] The SCA saw it differently. While "the community would of course have been entitled to have the commission's finding and recommendation set aside on review", the Act did not preclude the LCC "from entertaining proceedings in terms of s 38B while that finding and recommendation remain extant."¹¹ The SCA interpreted the

⁸ Section 12(4) allows the Chief Land Claims Commissioner to publish a notice that all claims in respect of a land, area or township in question are investigated at the same time.

⁹ *Mahlangu NO v Minister of Land Affairs and Others* [2000] ZALCC 53; [2001] 2 All SA 190 (LCC) at para 31.

¹⁰ *Mahlangu* (n 4) at para 12.

¹¹ *Ibid* at para 13.

introductory words to s 38B – “[n]otwithstanding anything to the contrary contained in the Act” – to provide “expressly that the LCC may entertain such proceedings.”¹²

[33] The SCA applied *Mahlangu* in a similar context in *Manok Family Trust*.¹³ It held that a decision by the RLC under s 11(4)¹⁴ that a claim has not been properly lodged and she will *not* gazette the claim, “does not necessarily mean that a claimant has reached the end of the road. A claimant may, in certain circumstances, pursue a claim by approaching the LCC directly in terms of s 38B of the Act”.¹⁵ Mpati P cited *Mahlangu* for that proposition.

[34] The statement is on point. The issue arose because, after taking a decision under s 11(4), the RLC purported to “revive” the claim. The landowners objected that he was not entitled to do so. The SCA held that s 11A did not apply to decisions under s 11(4). The decision maker was *functus officio* and the decision stood until reviewed and set aside.¹⁶

[35] The claimants had brought a conditional counter-application to review the s 11(4) decision. One of the grounds was that the regional commissioner had no power “to decide or reject a claim”.¹⁷ Mpati P rejected the argument because “the decision made by the regional commissioner in terms of s 11(4) of the Act does not amount to

¹² Ibid.

¹³ *Manok Family Trust v Blue Horizon Investments 10 (Pty) Ltd and Others* 2014 (5) SA 503 (SCA).

¹⁴ Section 11(4) reads: “If the regional land claims commissioner decides that the criteria set out in paragraphs (a), (b) and (c) of subsection (1) have not been met, he or she shall advise the claimant accordingly, and of the reasons for such decision.”

¹⁵ *Manok Family Trust* (n 13) at para 19.

¹⁶ Ibid at para 17.

¹⁷ Ibid at para 18.

a dismissal or rejection of the ... claim".¹⁸ It was in that context that he pointed out that it was still open to the claimants, despite a valid decision under s 11(4), to apply directly to the LCC under s 38B.

[36] Does the logic of *Mahlangu* and *Manok Family Trust* apply to a decision to gazette a claim in terms of s 11(1)? Yes. It is not the RLC's task to adjudicate claims.¹⁹ The purpose of s 11(1) is to preserve the land defined in the notice while the claim is finalised, not to restrict the adjudicative role of the Court. Once the Court is required to adjudicate a claim in terms of s 38B,²⁰ it must decide the scope of the claim based on its own interpretation of the claim form; it is not bound by the interpretation in the s 11(1) notice.

[37] The various decisions that have reviewed s 11(1) decisions are all explicable on this logic. In *Gamevest* – which held that s 11(1) decisions are reviewable – affected landowners had sought to review the decision prior to adjudication.²¹ The same occurred in *Minaar*²² and *Bouvest*²³ where landowners argued the s 11(1) notice improperly included land that ought to have been excluded. The motivation for a

¹⁸ Ibid.

¹⁹ *Mahlangu* (n 4) at para 13, citing *Farjas (Pty) Ltd v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC) at para 41.

²⁰ I prefer not to decide whether this principle also applies to claims that come to the Court through s 14 as the issue does not arise in this case, and the statements in both *Mahlangu* and *Manok Family Trust* concerned s 38B applications.

²¹ *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga, and Others* 2003 (1) SA 373 (SCA).

²² *Minaar NO v Regional Land Claims Commissioner for Mpumalanga and Others* [2006] ZALCC 12.

²³ *Bouvest 2173 CC & others v Commission on Restitution of Land Rights & others* [2010] JOL 25529 (LCC)

landowner to review a s 11(1) decision is not hard to find; the notice restricts their ability to freely use their land.

[38] In *Makhuva-Mathebula*,²⁴ *Silwane Community Development Trust*,²⁵ and *Nyavana Traditional Authority*²⁶ claimants sought to review a s 11(1) decision prior to adjudication on the basis that it excluded land that should have been included. From the claimant's perspective, the s 11(1) decision has a real impact even if it does not preclude a court from ultimately interpreting a claim form differently. It ensures the Commission investigates their full claim, and provides the protection of s 11(7) to the full scope of the land they believe they claimed. Contrary to the Plaintiff's claim, *Makhuva-Mathebula* holds only that s 11(1) decisions are reviewable, not that they *must* be reviewed in order to advance a different interpretation of the claim form in this Court.

[39] The result is that the s 11(1) notices are not a bar to the Defendants arguing that their original claims include the disputed land. The parties agree that whether, in fact, the claim forms do include the disputed land can only be decided after evidence is led on how those forms should be interpreted. I return at the end of the judgment to consider what that means for the future conduct of this matter.

²⁴ Note 3 above.

²⁵ *Silwane Community Development Trust v Regional Land Claims Commissioner, Kwazulu-Natal and Others* [2021] ZASCA 2.

²⁶ Note 7 above.

The New Claim Issue

[40] Did the Defendants' counterclaims constitute "claims", or were they required to lodge new claims with the Commission?

[41] The issue turns on the proper interpretation of s 38B(1). The provision has been amended on three occasions – in 1997, 1999 and 2014. To properly interpret it, we first need to trace the evolution of the provision, and then to consider its meaning in 2015 when the counterclaims were lodged.

The Evolution of s 38B(1)

[42] Section 38B was inserted by a 1997 amendment to the Restitution Act (**the 1997 Amendment**).²⁷ In its initial form, without its provisos,²⁸ s 38B(1) read:

“Notwithstanding anything to the contrary contained in this Act, any person who or the representative of any community which is entitled to claim restitution of a right in land may apply to the Court for restitution of such right”.

[43] The provision did not require that a claim had been lodged, only that the person applying to the LCC was “entitled to claim restitution”. Whether a person was so entitled would be determined by the criteria in s 2.

[44] The explanatory memorandum to the bill that would become the 1997 Amendment supports this view. It says that direct access to the LCC “is an important measure to expedite the restitution process by allowing claimants with straightforward

²⁷ Land Restitution and Reform Laws Amendment Act 63 of 1997.

²⁸ The provisos in s 38B(1)(a) and (b) are not relevant to this application.

claims, or with access to the necessary resources, to approach the Court.” While most claimants would depend on the Commission to investigate and present their claim, those who did not should be allowed to go directly to the LCC without relying on the Commission’s resources.

[45] The section must be read with the definition of “claim” in s 1. Prior to the 1997 Amendment, the definition read simply: “‘claim’ means any application lodged with the Commission in terms of this Act”. Before 1997, there was no other way for a claim to be lodged, and a claimant could only get to the LCC through the Commission. The 1997 Amendment changed the definition to align it with the possibility of direct access to the LCC introduced by s 38B:

‘claim’ means-

- (a) any claim for restitution of a right in land lodged with the Commission in terms of this Act; or
- (b) any application lodged with the registrar of the Court in terms of Chapter IIIA for the purpose of claiming restitution of a right in land;

[46] Despite the subsequent amendments to s 38B, the definition of “claim” has remained the same.

[47] The definition matters both because the word is used in s 38B(1), and because the entitlement to restitution depends on when the claim was lodged. From 1994 to 2014, s 2(1)(e) provided that a person would be “entitled to restitution if ... the claim for such restitution is lodged not later than 31 December 1998”. Whether someone has lodged a “claim” determines their entitlement to restitution or equitable redress.

[48] When the 1997 Amendments were made, the original window for lodging claims was still open. It was in that context – when claims could still be lodged with the Commission – that the intention was to permit two avenues for claimants: either lodge a claim with the Commission, or apply to the Court directly. Between 1997 and 1999, the language of s 38B(1) read with the definition of “claim” achieved that goal.

[49] The complication was introduced when the window for lodging claims closed on 31 December 1998. In 1999, a further amendment was made to s 38B(1) (**the 1999 Amendment**²⁹), after which it read:

“Notwithstanding anything to the contrary contained in this Act, any person who or the representative of any community which is entitled to claim restitution of a right in land and has lodged a claim not later than 31 December 1998 may apply to the Court for restitution of such right”.

[50] Under the 1997 Amendment, the only condition for direct access was an entitlement to lodge a claim. But that no longer made sense after the window had closed. The purpose of s 38B could no longer be to allow new claims through direct access. The provision was amended to require that the person applying for direct access was entitled to claim restitution and had “lodged a claim not later than 31 December 1998”. While s 38B(1) – then and now – requires that a claim had been lodged, it does not specify that the claim must have been lodged with the Commission.³⁰

²⁹ Land Restitution and Reform Laws Amendment Act 18 of 1999.

³⁰ The Defendants point out that the words “with the Commission” were included in the Bill that preceded the 1999 Amendment, but were removed. The explanation for this in the legislative history was not debated before us, so we cannot place much store in its initial inclusion. What matters is the ultimate text does not specify that the claim must have been lodged “with the Commission”.

[51] The reasons for the change were set out in the explanatory memorandum to the bill that became the 1999 Amendment: “In view of the fact that no claims may be lodged after 31 December 1998, only claimants who have lodged their claims with the Commission not later than that date qualify for direct access after the commencement of the Bill.”³¹ Section 38B no longer permitted an alternative to lodging with the Commission; instead, it limited the right of direct access to those who had lodged claims before the window closed. It allowed claimants with existing claims to fast-track the adjudication of their claims.

[52] The 1999 Amendment did not amend the definition of “claim” in s 1, which still included lodging an application under s 38B. But because the window for claims was closed, it created no difficulty in interpreting s 38B. If a claimant brought a s 38B(1) application after the 1999 Amendment, it could only be because they had lodged a claim with the Commission. The broader definition of “claim” was still necessary for the rest of the Act as there were claimants who had (before 31 December 1998) approached the LCC directly before the deadline, without ever lodging a claim with the Commission.

[53] In 2014 Parliament reopened the window for lodging restitution claims. The **2014 Amendment**³² amended s 2(1)(e) to change the deadline for lodging a claim from 31 December 1998 to 30 June 2019. To give effect to the reopening, the 2014

³¹ Explanatory Memorandum to Land Restitution and Reform Laws Amendment Bill B 9B-99 at para 10. The additional condition was arguably unnecessary. The requirement that the person applying for direct access was entitled to claim restitution would, in terms of s 2, in any event demand that they had lodged a claim prior to 31 December 1998. But the Explanatory Memorandum makes plain that no other purpose was sought to be achieved by the 1999 Amendment.

³² Restitution of Land Rights Amendment Act 15 of 2014.

Amendment also amended s 38B to change the date from 31 December 1998 to 30 June 2019. The 2014 Amendment did not alter the definition of “claim”.

[54] The 2014 Amendment was short-lived. In 2016 the Constitutional Court declared it unconstitutional and invalid in *LAMOSALA I*.³³ The effect of the order of invalidity was to close the window for new claims, and to return s 38B to its post-1999 Amendment state. But the declaration of invalidity was prospective only. So when the Defendants lodged their counterclaims, the 2014 Amendment was valid and in force.

[55] That is the somewhat convoluted history of s 38B(1). We have to decide, not what it means today, but what it meant in 2015 when the counterclaims were made. I next explain why that is a difficult textual endeavour.

The Textual Problem

[56] The obvious difficulty with s 38B(1) after the 2014 Amendment is that it is inconsistent with the s 1 definition of “claim”.

[57] Section 1 defines an application under s 38B(1) as a “claim”. But s 38B limits the right to bring an application to someone who “has lodged a claim” by the deadline. On the one hand, the lodging of a “claim” is a precondition to lodge a s 38B application. But, on the other, the s 38B application is a “claim”.

[58] That is not a problem when the window for bringing claims is closed. But it is a problem when the window is open because the Act seems to say both that a claimant

³³ *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC)

can go to the Court without first lodging a claim with the Commission, and that an application to the Commission is a prerequisite to approaching the Court.

[59] There is no way to interpret the two provisions without doing violence to the language. There are two options:

[59.1] Treat the requirement for lodging a claim with the Commission as a precondition. But for s 38B(1) to make sense, that would require giving “claim” a different meaning from its defined meaning. “Claim” must have that wider defined meaning throughout the rest of the Act to ensure that those who lodged direct access claims pre-1999 Amendment without first lodging claims with the Commission continue to be treated as claimants.

[59.2] Treat the requirement to lodge a claim as fulfilled when the application is lodged, in line with the definition. But that is not consistent with the language of s 38B(1) which says a person “may apply” only if he or she “has lodged a claim”. It can only mean that the claim must have been lodged *before* the application under s 38B(1).

[60] I see no textual solution to resolve this conundrum. Both interpretations are inconsistent with the text. The answer must be sought in judicial decisions, the purpose of the provision, the context in which it appears, and the constitutional rights at stake.³⁴

³⁴ See *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) at para 47.

Judicial Decisions

[61] There are three judgments that the parties rely on – *Witz*,³⁵ *Amaqamu Community*, and *Mahlangu*.³⁶ *Witz* and *Amaqamu Community* reach opposite conclusions but, as I hope to show, they were each interpreting s 38B at different moments in time. *Mahlangu* does not directly consider the question that confronts us.

Witz

[62] In 2000, the meaning of s 38B(1) was considered in *Witz*. The claimant had not lodged a claim with the Commission, and had instead filed a s 38B application with the LCC. The question arose whether that was permissible. Meer AJ (as she then was) described the introduction of Chapter IIIA as “a drastic change”.³⁷ Before its introduction, the only route to restitution was through the Commission. Section 38B gave claimants “the option to approach the Court via the Commission in terms of s 10, or directly via s 38B(1) before 31 December 1998.”³⁸ In order to apply directly to the Court, the LCC held it “was not necessary for him to lodge the claim with the Land Claims Commission.”³⁹

³⁵ *Department of Land Affairs v Witz* [2000] ZALCC 42; 2006 (1) SA 86 (LCC).

³⁶ *In re Amaqamu Community Claim (Land Access Movement South Africa and Others as Amici Curiae)* 2017 (3) SA 409 (LCC).

³⁷ *Ibid* at para 7.

³⁸ *Ibid*.

³⁹ *Ibid*.

[63] *Witz* seems to answer the question before us in favour of the Defendants. Unless we thought it was clearly wrong, it would be binding.⁴⁰ The impact of *Witz* was appreciated by the parties and Cowen J when this issue was separated, and is why two judges were assigned to decide it.

[64] The difficulty is whether *Witz* was interpreting the 1997 version of s 38B, or the 1999 version. It quotes the 1999 version earlier in the judgment.⁴¹ But because Mr Witz made his application directly to the Court before the 31 December 1998 deadline – and therefore before the 1999 Amendment – whether he was entitled to do so would have to be determined based on the text after the 1997 Amendment. The LCC did not expressly consider the difference between the two versions because, in that case, it did not matter.

Amaqamu Community

[65] This question was considered by four judges of the LCC in *Amaqamu Community*.⁴² The case concerned the effect of the Constitutional Court's decision in *LAMOSAI*, which declared the 2014 Amendment invalid. *LAMOSAI* did not invalidate claims that had been lodged between the date that the 2014 Amendment came into force and the date of the judgment – so-called “new order claims”. But it interdicted

⁴⁰ The Defendants point out that the LCC also accepted that a claimant could apply directly to the LCC without lodging a claim with the Commission in *Richtersveld Community and Others v Alexkor Ltd* 2001 (3) SA 1293 (LCC) at para 7. This is correct. But the case, like *Witz*, concerned the interpretation of s 38B after the 1997 Amendment. While it supports the holding in *Witz*, it does not answer the question before us.

⁴¹ *Witz* (n 35) at para 5.

⁴² *In re Amaqamu Community Claim (Land Access Movement South Africa and Others as Amici Curiae)* 2017 (3) SA 409 (LCC).

the Commission from processing those claims until it had finalised all the claims lodged prior to 31 December 1998 – “old order claims”.

[66] The issue in *Amaqamu Community* was whether that interdict against the Commission also prevented the LCC from adjudicating new order claims. The LCC concluded that it did, save that new order claimants could be admitted as interested parties in an old order claim at the discretion of the presiding judge. It was in that context that the Court’s statements about s 38B must be understood.

[67] One of the reasons the LCC concluded that it could not adjudicate new order claims was because the Commission was prevented by the *LAMOSIA* / interdict from assisting the Court as it normally would.⁴³ It then said:

The route of direct access to the court is also blocked. Section 38B of the [Restitution Act], enabling a party to approach the court directly, is premised upon the existence of a claim lodged and accepted by the commission.⁴⁴ Such claim has to have been lodged before 31 December 1998, which date is still the operative date since the AA has been declared invalid.⁴⁵

⁴³ Ibid at para 52.

⁴⁴ See *Haakdoornbult Boerdery CC and Others v Mphela and Others* 2007 (5) SA 596 (SCA) (2008 (7) BCLR 704; [2007] ZASCA 69) para 14:

‘The proceedings in the LCC were brought under s 38B of the Act, which entitles a disaffected party to approach the LCC directly, usually because of the lack of progress on the part of the state in processing the claim.’

See further *Mahlangu NO v Minister of Land Affairs and Others* 2005 (1) SA 451 (SCA) ([2004] ZASCA 74). (Original footnote).

⁴⁵ Ibid at para 53.

[68] The logic was that the *LAMOSAS* / interdict against the Commission could not have contemplated that the LCC would still adjudicate new order claims because the only route for new order claimants to get to the LCC was through the Commission.

[69] When the Constitutional Court considered the fate of new order claims in *LAMOSAS II*, it confirmed the position adopted in *In re Amaqamu* – the LCC may not adjudicate the claims of new order claimants save for admitting them as interested parties.⁴⁶ It did not mention s 38B.

[70] There are two factors to consider about the reasoning in *Amaqamu Community*. First, it is part of the ratio for the decision. If s 38B had permitted new order claimants to continue to lodge direct access claims, the interdict against the Commission would not have precluded the Court from deciding these claims.

[71] Second, and more importantly, it is not clear what category of claims the Court was concerned with. It seems to be concerned with new claims. But it then says that the cut-off date for 38B applications is 31 December 1998. But from 2014 to 2016 it was 30 June 2019. If the Court was concerned with the type of claims that confront us – those lodged only as s 38B claims in the 2014-2016 window – it would not have mentioned the 31 December 1998 deadline. It seems to be saying only that, post *LAMOSAS I*, there could be no new order claims under s 38B that are not also old order claims that had been lodged with the Commission prior to the 1998 deadline.

[72] The reasoning does not seem to apply to the category of new-order claimants that confront this Court – those that did not lodge claims with the Commission but

⁴⁶ *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)

applied directly under s 38B while the 2014 Amendment was valid and the window for lodging claims was still 30 June 2019.

Mahlangu

[73] The Plaintiff also relies on the decision in *Mahlangu* to support its interpretation. It argues that *Mahlangu* describes the process for lodging a claim on the basis that a claim will first be lodged with the Commission and then brought on direct access to the Court. But whether lodging a claim with the Commission was a requirement for a s 38B application was not an issue in *Mahlangu*, and the Court did not consider it. Its description of the process does not dictate that outcome. All it says is that “[i]n certain circumstances a claimant may pursue a claim by approaching the LCC directly in terms of s 38B of the Act”.⁴⁷ Save for dealing with the provisos in s 38(1)(b), Nugent JA did not further describe what those circumstances are. *Mahlangu* does not advance the debate.

[74] The same is true of *Haakdoornbult*.⁴⁸ *Amaqamu Community* relied on it for the proposition that a s 38B application “is premised upon the existence of a claim lodged and accepted by the commission”.⁴⁹ But all that *Haakdoornbult* actually says is that claimants “usually” use s 38B “because of the lack of progress on the part of the state in processing the claim.”⁵⁰ That is true; and was particularly true in 2007 when

⁴⁷ *Mahlangu* at para 5.

⁴⁸ *Haakdoornbult* (n 43).

⁴⁹ *Amaqamu Community* (n 41) at para 53

⁵⁰ *Haakdoornbult* (n 43) at para 14.

Haakdoornbult was decided. The decision does not consider the meaning of s 38B(1) in 2015.

Conclusion on judgments

[75] Only two judgments have directly considered this issue – *Witz* and *Amaqamu Community*. *Amaqamu Community* does not refer to *Witz* (even though Meer JP was on the bench). Yet it seems to contradict *Witz*. The Court also did not carefully analyse the text of s 38B, and its history of amendments, or explain why its conclusion that s 38B(1) requires prior lodgment with the Commission was correct.

[76] But it is possible to make sense of the apparently conflicting decisions in *Witz* and *Amaqamu*. *Witz* interpreted the post-1997 Amendment version. *Amaqamu* interpreted either the post-1999 Amendment version or the post-LAMOSA I version. What has not yet been interpreted is the post-2014 Amendment version, which was valid only from 2014 to 2016, when the window for claims was opened. Neither case therefore answers the peculiar question that confronts us.

The Context and the Purpose

[77] There are two parts to the relevant context – the history and the surrounding statutory provisions.

[78] I have already set out the history of amendments that is central to understanding the meaning of s 38B when the Defendants made their counter-application in 2015. To summarise:

[78.1] When the Restitution Act was enacted in 1994, the only way to lodge a claim was with the Commission.

[78.2] The 1997 Amendment introduced s 38B and amended the definition of “claim”. The effect was to allow anyone entitled to claim restitution to either lodge a claim with the Commission, or apply directly to the LCC. At the time, the window for claims was still open. This is the version that, in my view, was interpreted in *Witz*.

[78.3] After the window for claims closed, the 1999 Amendment changed s 38B to introduce an additional requirement for direct access to the LCC – having lodged a claim with the Commission. The purpose of the provision was no longer an alternative to lodging with the Commission, but a way to bypass delays in the Commission for those who had lodged claims within the window.

[78.4] The 2014 Amendment re-opened the window for claims to be lodged. The only change it made to s 38B was to change the date from 31 December 1998 to 30 June 2019. But it left the wording inserted in the 1999 Amendment requiring a claim lodged with the Commission and did not alter the definition of “claim”. This is the version of s 38B we must interpret.

[78.5] The Constitutional Court declared the 2014 Amendment invalid, returning s 38B to the version in place after the 1999 Amendment. This is what was interpreted in *Amaqamu*.

[79] We need to deduce whether, when it re-opened the window for claims in the 2014 Amendment, Parliament intended to again allow direct access without prior lodgment (as intended under the 1997 Amendment), or if it intended only to allow direct

access after lodging with the Commission (the effect of the 1999 Amendment). The issue is unclear, as pointed out above, because of the contradiction between the text of s 38B (which favours the Plaintiff) and the definition of “claim” (which favours the Defendants).

[80] Through the years, direct access has served different purposes. It has served both as a means to bypass the Commission completely, and as a way for claimants who lodged claims with the Commission but are frustrated by its delays to fast track the determination of their claims. In 2015, was s 38B(1) meant to serve only the second purpose, or also the first? I answer that question when I conclude this interpretive exercise.

[81] I have so far focused only on the text of s 38B(1) and the definition of “claim”. Are there pointers in other provisions of the Restitution Act?

[82] Section 38B(3) permits the regional land claims commissioner, after “the lodgement of an application contemplated” in s 38B(1) to “suspend the investigation of any claim lodged in terms of section 10 in respect of the land in question”. The provision is consistent with the possibility that a claimant will first lodge a claim with the Commission and then apply to Court. But it does not necessitate that meaning. There may be no claim to suspend. Or the suspended claim may have been lodged by a different claimant.

[83] The same is true of s 38B(4) which empowers the Court to “order that all claims lodged in terms of section 10 in respect of the land in question be transferred to the Court”. The purpose seems primarily to deal with multiple claims over the same land and to ensure that if one claimant applies directly, the Court can ensure that all related claims are adjudicated together.

[84] The Plaintiff and the Commission argued that part of the structure of the Restitution Act was that the Commission should have a record of all land claims. Permitting claims to be lodged at the LCC without first being lodged at the Commission would undermine that purpose and the Commission's ability to perform its functions.

[85] There is some weight to this argument. The Commission is responsible for the general management of all claims. A mechanism that meant it would not have a record of some claims would hinder the performance of that responsibility. But the point has its limits. The Commission will be aware of any s 38B application because a copy must be served on the RLC and the Director General.⁵¹ It will be able to record the claim as it would other claims lodged with it.

The Right to Restitution

[86] The Restitution Act – like all legislation – must be interpreted to “promote the spirit, purport and objects of the Bill of Rights”.⁵² That requires courts not only to avoid interpretations that would render legislation unconstitutional,⁵³ but also to prefer interpretations that “better” promote constitutional rights.⁵⁴

⁵¹ LCC Rule 53A(4). I refer to the LCC Rules, not this Court's Rules because we are concerned with the meaning of s 38B at a point in time prior to this Court's establishment.

⁵² Constitution s 39(2).

⁵³ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 21-23.

⁵⁴ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 46.

[87] Section 25(7) of the Constitution guarantees the right to restitution in these terms: “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.” “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.”⁵⁵ These deep wounds have not been healed, and the evils of land dispossession have not been undone.⁵⁶ Although it has been 32 years since the Restitution Act was enacted, thousands still wait for their entitlements to be determined, for their chance for justice.

[88] While the s 25(7) right is limited to “the extent provided by an Act of Parliament”, an interpretation of that legislation – the Restitution Act – which makes it easier for a person or community to obtain a determination of their entitlement to restitution or equitable redress better serves the “spirit, purport and object” of the provision. While s 25(7) does not guarantee anyone a right to restitution, its goal is to undo historical dispossession. Allowing more restitution claims to be adjudicated will better serve that purpose.

[89] Here, the Defendants’ interpretation expands access while the Plaintiff’s restricts it. Assuming for the moment that the Defendants fail on their argument that their original claims included the disputed land. If they are also precluded from bringing a direct access application, they will not be able to have their entitlement to restitution

⁵⁵ *LAMOSA II* (n 45) at para 1.

⁵⁶ *LAMOSA I* (n 33) at para 1.

or equitable redress of the disputed land determined at all. That will be true for all other potential claimants in their position.

[90] The Defendants' interpretation also promotes the right guaranteed in s 34 of the Constitution to "have any dispute that can be resolved by the application of law decided in a fair public hearing before a court". It widens the options for claimants to have their entitlement to restitution or equitable redress determined, while the Plaintiff's narrows it.

[91] I appreciate that, in this case, holding that the Defendants have lodged a claim affects the Plaintiff. It means there is a possibility that this Court will admit the Defendants as interested parties in their claim. But that is already the case for any other new order claimant that lodged a claim within the 2014-2016 window. The peculiar interest of the claimant in this case does not weigh against the general constitutional interests that favour the Defendants.

[92] I also accept that the constitutional benefit of the Defendants' interpretation is marginal. That is so for two reasons:

[92.1] We do not know how many other claimants took the Defendants' path and lodged a s 38B(1) application in the 2014-2016 window but did not lodge a claim with the Commission. As the issue has not arisen before, and as it would likely only be well-resourced claimants who would take that course, there are unlikely to be many more. But either way, the constitutional interests at stake favour enabling access in the face of statutory ambiguity. If there are few such claimants, it will have a limited effect. If there are many claimants, then all the better – more claimants will eventually have their entitlement to restitution determined.

[92.2] Interpreting s 38B to require prior lodging with the Commission would not have denied the Defendants or anyone else the ability to lodge a claim. It would generally be easier to complete a claim form than to bring a direct access application. But providing another option always expands access, even if the barrier to access was minor.

[93] To put the point differently, while the window for claims is open, the Plaintiff's interpretation introduces what the Defendants call an "unnecessary formality". It requires a claimant who has the ability to prosecute their own claim, and intends to approach the LCC directly, to first lodge a claim with the Commission merely to trigger the right to apply directly under s 38B. No constitutional purpose would be served by this requirement.

Other Considerations

[94] The Defendants rely on two academic authorities that support their interpretation.⁵⁷ They are unhelpful because neither of them grapple with the particular issue of the meaning of s 38B(1) during the window opened by the 2014 Amendment.

[95] Both parties rely on rules. The Plaintiff relies on rule 3(1)(a) of the Commission's Rules, while the Defendants call in aid Rule 53A of the LCC Rules. They are both

⁵⁷ D Carey-Miller & A Pope *Land Title in South Africa* (2000) at 388; J Pienaar & J Brickhill 'Land' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, OS, 2007) at 48-53, fn 7.

unhelpful for two reasons. One, the rules are not relevant to interpreting a statute.⁵⁸ Two, they were introduced in 1998 and so do not address the current problem.

Conclusion

[96] I find the interpretive issue finely balanced. To my mind, two considerations are decisive in favour of the Defendant's interpretation.

[97] First, looking at the multiple iterations of s 38B(1) what appears is that when the window for claims was open, it permitted applications without prior lodgment with the Commission. When the window was closed, s 38B applications were a means of speeding up claims that had already been lodged. If we have to ascertain the purpose of the 2014 Amendment, it seems to me that it is best interpreted as seeking to achieve the same goal as the 1997 Amendment because it re-opened the window for claims.

[98] Second, that interpretation expands access to the right in s 25(7) and furthers access to courts. While I accept that it also imposes a possible burden on old order claimants, how that balance must be struck has already been determined in *Amaqamu Community* and *LAMOSIA II*. I do not see how allowing a likely small category of s 38B(1) claims lodged in the 2014-2016 window will disrupt that balance.

[99] The textual route to that outcome is that the "claim" that s 38B requires had to be lodged before 30 June 2019 can be the application to the Court or a claim with the Commission, as the definition of "claim" envisages. The requirement is met by the

⁵⁸ *Moodley and Others v Minister of Education and Culture, House of Delegates and Another* [1989] ZASCA 45; 1989 (3) SA 221 (A) at 233D-G.

application itself. The deadline is therefore only to prevent direct access claims outside the window, not to prohibit them within the window.

[100] I accept that this is not a natural reading. But there is no interpretation that fully gives effect to the words of s 38B(1) and the definition of “claim”. In my view, in light of the history, context, purpose, and the Constitution, it is the best construction of a provision that is in irresistible tension with the definition of “claim”.

[101] I therefore conclude that the Defendants’ counterclaims were “claims” under the Restitution Act, even though they were not preceded by a claim lodged with the Commission.

The Consequences and the Way Forward

[102] I have found that the Defendants’ new claims were validly lodged. But the scope of their old claim must still be determined. The difference between old order and new order claims matters a great deal.

[103] As I mentioned earlier, in *Amaqamu Community* the LCC ordered that new order claimants – which I hold includes the Defendants – are not entitled to the adjudication of their claims until all old order claims are resolved. They are only entitled, at the discretion of the Court considering an old order claim, to be admitted as an interested party.

[104] That was confirmed by the Constitutional Court in *LAMOSHA II*. Parliament did not enact new legislation to replace the 2014 Amendment and again re-open the

window for restitution claims. That left the fate of the new order claims uncertain; *LAMOSIA I* had envisaged that Parliament would address the issue.

[105] The Constitutional Court confirmed the interdict prohibiting the Commission from processing any new order claims until all old order claims are resolved, or this Court orders otherwise. It also ordered that, until that time:⁵⁹

[N]o interdicted claims 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.

[106] The only right the Defendants' counterclaim affords them is for us to consider whether to permit them to participate as interested parties in the Plaintiff's claim, and then to define the terms of their participation.

[107] But the Defendants' old claims are different. If they are right that those claim forms should be interpreted to include the disputed land, then they are on the same footing as the Plaintiff. They are not merely interested parties, but claimants who can fully assert their rights and have them adjudicated together with the Plaintiff. But, as the parties all agree, we cannot make that determination without evidence on the meaning of the claim forms.

[108] It would be premature to make a determination about whether to admit the Defendants as interested parties (and, if so, on what terms) until we decide if they are

⁵⁹ *LAMOSIA II* (n 46) at para 67(2)(b).

entitled to full participation as claimants in their own right. If we conclude that the old claims do include the disputed land, then it will be unnecessary to make a decision about admitting the defendants as interested parties.

[109] The appropriate approach, therefore, is to determine the Original Claim Issue first. If we decide against the Defendants on that issue, we will then need to decide whether the Defendants should be interested parties and the terms of any admission.

[110] That must happen as soon as possible. All the parties have waited too long for the determination of the merits of their claims. I have narrated the history of delay caused by difficulties in securing legal representation for the Defendants. That will not be allowed to further delay the determination of the Original Claims Issue. If they cannot secure their own legal representation, the Court will again invite them to accept alternative pro bono representation. If they refuse, the Court will appoint legal practitioners as amici curiae to present the Defendants' position to the Court. The Court will not allow the Defendants' legal representation to delay the hearing of the Original Claims Issue.

[111] On costs, the ordinary rule in this Court should apply – there should be no order as to costs.

[112] I make the following order:

1. It is declared that the Seventh and Eleventh Defendants' counterclaims are "claims" as defined in section 1 of the Restitution of Land Rights Act 22 of 1994.

2. The first issue separated in the order of 16 August 2024 will be determined on a date to be arranged in a case management meeting to be convened by the Court.
3. Whether, and if so on what terms, the Seventh and Eleventh Defendants should be permitted to participate in the Plaintiff's claim as interested parties will be determined after resolving the issue in paragraph 2.
4. There is no order as to costs.



M Bishop
Acting Judge of the Land Court

I agree.



WJ Du Plessis
Acting Judge of the Land Court

Date of hearing:	19 March 2026 Further Submissions on 31 March 2026
Date of judgment:	19 August 2026
For the Plaintiff:	B Joseph SC and J Williams, instructed by Ighsaan Sadien Attorneys
For the Sixth Defendant	M Majozi and E Mahlangu, instructed by State Attorney
For the Seventh and Eleventh Defendants:	W Duminy SC and G Quixley, instructed by Raymond McCreath Attorneys

