Reportable
Case No 665/2002

In the matter between:

THE KHOSIS COMMUNITY AT LOHATLA	**First Appellant**
THE GATLHOSE COMMUNITY	**Second Appellant**
THE MAREMANE COMMUNITY	**Third Appellant**

and

THE MINISTER OF DEFENCE	**First Respondent**
THE PREMIER OF THE NORTHERN CAPE PROVINCE	**Second Respondent**
THE MINISTER OF AGRICULTURE AND LAND AFFAIRS	**Third Respondent**
THE MINISTER OF PUBLIC WORKS	**Fourth Respondent**
REGIONAL LAND CLAIMS COMMISSIONER NORTHERN CAPE PROVINCE	**Fifth Respondent**

Coram: HARMS, FARLAM, MTHIYANE, BRAND JJA and PONNAN AJA
Heard: 23 FEBRUARY 2004
Delivered: 18 MARCH 2004

Subject: Restitution of Land Rights Act 22 of 1994 – application under s 34 declaring in advance that communities not entitled to restoration of land

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J U D G M E N T

HARMS JA/

HARMS JA:

Introduction

[1] The Lohatla Army Battle School of the SA National Defence Force ('SANDF') lies in the Northern Cape, more or less within a triangle formed by the towns Postmasburg, Danielskuil and Kathu. It is an oblong piece of land, belonging to the state and about 50 km long and 35 km wide, with a perimeter of 211 km and covering 1580 sq km. The north-western portion of the battle school, some 62 000 ha, is the subject of land claims (in terms of the Restitution of Land Rights Act 22 of 1994) by the Gatlhose, Maremane and Khosis communities. However, the claim of the Khosis is not a separate claim since it overlaps with the other claims.

[2] In the ordinary course of events a party's entitlement to restitution of a right in land (taking into account the factors set out in s 33) and the determination of the nature of the restitution (which may consist of, inter alia, restoration of the land itself or part of it, the grant of a right in the land, alternative state-owned land, or compensation)[1] are decided at the same time. The reason is that these matters are interlinked and it is difficult to decide the issues piecemeal. Contrary to this general scheme, s 34 provides for, in effect, a declaratory order: On application by a national, provincial or local government body, and before the final determination of a claim under the Act, the Land Claims Court ('the LCC') may rule 'that the land in

[1] S 35.

question or any rights in it shall not be restored to any claimant or prospective claimant' in the final adjudication of the claim (s 34(1)).

[3] Pursuant to this provision, the Minister of Defence[2] and the Premier of the Northern Cape Province[3] applied to the LCC for an order declaring that no part of the battle school area will eventually be restored to any of the communities. The Minister of Land Affairs, who is the minister responsible for the administration of the Act, as well as the Regional Land Claims Commissioner, supported the application.[4] In spite of vigorous opposition by the Khosis community,[5] joined somewhat faint-heartedly by the other two communities, the LCC granted an order substantially as prayed. With its leave the appeal is before us.

[4] The Act has its genesis in s 25(7) of the Constitution which 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.'

Persons and communities who are entitled to restitution of a right in land are defined (s 2) and 'restitution of a right in land' is said to mean either (a) the restoration of a right in land, or (b) equitable redress (s 1).

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[2] The minister, who was the first applicant, does not accept that the Khosis have any valid land claim but for present purposes it has to be assumed that they do.
[3] As second applicant.
[4] They were joined as respondents in the application. The formal requirements of s 34(2)-(4) have been complied with.
[5] The appellants, in the opposing affidavit, agreed that the issue should be disposed of by means of this application and they sought, by means of a counter-application, a declaratory order with a converse effect.

[5] According to the jurisprudence of the LCC[6] there is no substantive right to any particular form of restitution, whether restoration, alternative land, compensation or some other form of relief. A claimant has no specific right to a particular form of relief, even in respect of the property originally dispossessed. The interim and final Constitutions and the Act merely provide for a right to 'claim' or 'enforce' restitution. A substantive right to a particular form of restitution only comes into existence when a court makes a restitution order.

[6] The Act spells out two threshold or jurisdictional requirements that have to be present before an *ante omnia* ruling on restoration of the land may be made. Section 34(6) provides namely as follows:

'The Court shall not make an order in terms of subsection (5)(b) unless it is satisfied that –

(a) it is in the public interest that the rights in question should not be restored to any claimant; and

(b) the public or any substantial part thereof will suffer substantial prejudice unless an order is made in terms of subsection (5)(b) before the final determination of any claim.'

Subsection (5), in turn, states:

'After hearing an application contemplated in subsection (1), the Court may-

(a) dismiss the application;

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[6] *In re Kranspoort Community* 2000 (2) SA 124 (LCC) para 82.

(b) order that when any claim in respect of the land in question is finally determined, the rights in the land in question, or in part of the land, or certain rights in the land, shall not be restored to any claimant;

(c) make any other order it deems fit.'

[7] The communities argued, and the LCC held, that the use of the word 'may' in s 34(5) gives the court a discretion to dismiss the application even if the jurisdictional requirements of s 34(6) have been met. I do not agree that there is such an overriding discretion. Apart from the fact that it would not make sense to provide for such a discretion in the light of the stringent threshold requirements, the word 'may' in this context does not indicate the presence of any discretion. It simply defines the possible orders, depending on the court's findings. In other words, it performs a purely predicative function.[7]

[8] As far as the 'public interest' aspect of the threshold requirements is concerned, the majority judgment of the LCC stated that it is 'essentially a discretion, requiring the court to exercise a value judgment.' Both the public interest requirement and the issue of substantial prejudice involve the exercise of a value judgement based on the proven facts but the use of the word 'discretion' in this regard may give rise to misunderstanding. If it is used in the wide sense, namely that the court 'is entitled to have regard to a number of disparate and incommensurable features in coming to a decision'

[7] Cf *Minister of Environmental Affairs & Tourism and others v Pepper Bay Fishing (Pty) Ltd* 2004 (1) SA 308 (SCA) para 34.

there can be no quarrel with its use.[8] The distinction between a narrow and a wide discretion is important, especially on appeal. A court of appeal, subject to its 'due deference' obligation to a value judgment of a lower court has less constraints when hearing an appeal involving a value judgment (wide discretion) than in the case of an appeal against the exercise of a narrow discretion.[9]

The proceedings in the LCC

[9] The LCC has, to the exclusion of other courts, the exclusive jurisdiction to decide as court of first instance matters such as the present (s 22). Its quorum consists of a single judge unless the president of the court decides otherwise. Two judges were allocated to this case, namely Bam AJP and Meer AJ. In a contested case under s 34, at least one assessor has to assist the court; it was Mr A Zybrands. Such an assessor is a full member of the court and the decision or finding of the majority of the members of the court is its decision or finding.[10] Meer AJ, in a judgment concurred in by the assessor, found for the applicants while Bam AJP disagreed.

[10] A few initial remarks about Bam AJP's judgment would not be out of place. He held that the order sought was not competent. The appellants did not seek to support this finding presumably because the order sought and

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[8] *Media Workers Association of SA and others v Perskor* 1992 (4) SA 791 (A); *Knox D'Arcy Ltd and others v Jamieson and others* 1996 (4) SA 348 (A) 361H-I.
[9] Eg *Ex parte Neethling* 1951 (4) SA 331 (A); *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) 537D-G.
[10] This does not apply to matters that constitute questions of law, none of which arose in the court below.

given followed the wording of s 34(5)(b). Moreover, he expressed a dislike for application proceedings and would have preferred to hear oral evidence. In particular, he would have liked a 'countervailing expert report to form a balanced view'. However, the Act prescribes application proceedings. The communities, who had the right to apply for a reference to oral evidence or cross-examination, never did so. They did not suggest that the report was not balanced or that a countervailing report could be obtained, on the contrary, they relied on the report in support of their case and accepted that they cannot dispute its contents.

[11] As far as the majority judgment is concerned, reference has already been made to the deference due by a higher court to the findings of a lower court. That obligation is particularly strong where the lower court is a specialist court which is called upon to make value judgments, as in the present instance.[11] Although we are entitled and obliged to revisit the issues, the question remains whether it can be said that the lower court was wrong and not merely that there is some scope for disagreement. Quite noticeable was the fact that the appellants did not once during the course of argument point to an instance where the majority in the LCC had erred, and its ratio on the second threshold was not even alluded to.

The land in issue

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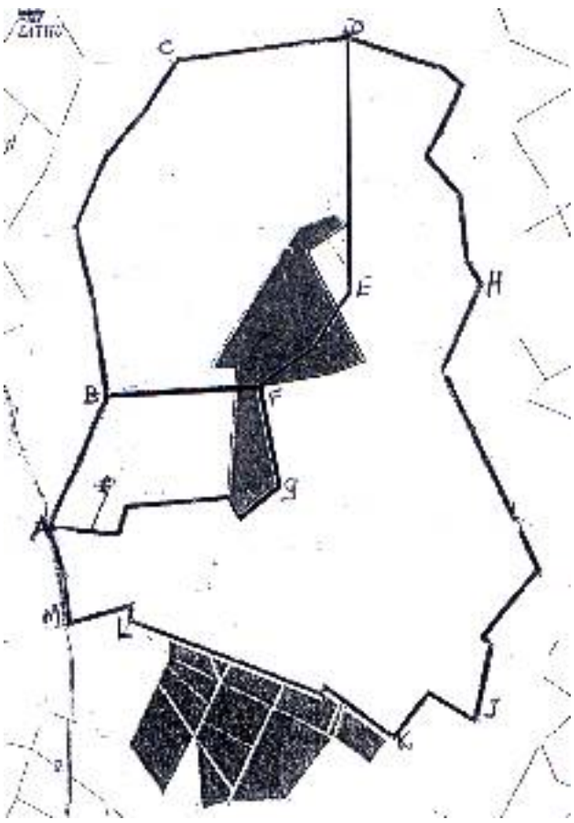
[11] Cf the deference towards assessments of damages for pain and suffering by the trial court: *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199-200.

[12] This map may be of some assistance in understanding the description that follows.



[13] As mentioned, the land claimed by the three communities involves the north-western portion of the battle school and consists of what was known as the Maremane and Gatlhose native reserves. The eastern and southern parts of the battle school consist of land expropriated from white farmers to which there is not any land claim. It is larger than the two reserves taken together. The Gatlhose reserve (BCDEF) lies to the north of the Maremane reserve (ABFG) and is much bigger. In the middle of the battle school is a portion of land indicated in black, between 8 500 and 9 400 ha in extent, which is the

subject of the Khosis claim.[12] This land, on the eastern border of the Maremane reserve and substantially on the eastern border of the Gatlhose reserve, is part of the reserves.[13] Adjacent to the southern border of the battle school is Jenn Haven, an area of more than 14 000 ha (indicated in black below the line LK), which was allocated to the Khosis in exchange for the land claimed, and to which the majority moved during 1992 after all the infrastructure and improvements had been created at state cost.

The history of the occupation of the reserves

[14] In the absence of anything to the contrary, the evidence of Mr Joseph Free, who on the face of it does not appear to be specially qualified to deal with the history, has to be relied upon. He is the leader of the Khosis at Lohatla, the first appellant, and his group is referred to as the 'Free group'. His tale begins with the occupation of the reserves by the Griqua nation during the first half of the nineteenth century. They came in contact with Tswana people, more particularly the Batlharo tribe under the leadership of Chief Molete and his son Chief Holele, whose direct descendants are still the chiefs of the tribe. The reserve area was first allocated by the Griqua chief, Nicholas Waterboer, to Batlharo chiefs who had married Griqua women.

[15] Under British rule the reserves, which formed part of British Bechuanaland, were allocated in 1885 to the Batlharo tribe. In 1895, the area

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[12] It was initially believed that the land was 14 000 ha.
[13] A small portion straddles the expropriated land but that fact is not of any consequence at this stage.

was incorporated into the Cape Colony, which became part of the Union of South Africa in 1910. The Natives Land Act 27 of 1913 had no effect on the rights of the inhabitants but by virtue of the Native Trust and Land Act 18 of 1936 the land vested in the SA Native Trust as 'scheduled native areas'. The effect of this was that the land had to be held for the exclusive use and benefit of the 'natives'. The state, however, had a right to resume such land for public purposes, subject to certain formalities and the payment of compensation (s 18(1)).

[16] According to the evidence of Mr Free, the people who lived on the reserves regarded themselves as members of one community. Then came the Population Registration Act 30 of 1950 which artificially divided the community for purposes of racial classification into 'blacks' (primarily Tswanas) and 'coloureds' (those of predominantly Griqua extraction). Although the impact of classification became increasingly evident throughout the 1960's and 1970's, says Mr Free, it did not prior to 1977 result in a clear division of the community along racial lines.

[17] The creeping impact of racial divisions as a result of the doctrine of apartheid became more apparent as time went on. The reserves were identified as 'black spots' and were excised from the trust and transferred to the state during 1969 by way of proclamation. For the community it was a time of uncertainty and anxiety which culminated with the removal of the

'blacks', some 12 000 persons, during 1976-1977. They were relocated to Bophuthatswana, about 200 km to the north. It is said that this land, although larger than the reserves, is inferior and not sufficient to sustain the communities. The community was thereby split in two with the 'coloureds' remaining in occupation.

[18] The defence force obtained approval during January 1978 for the reservation of the former reserves for its purposes.[14] The already described Khosis area, water rich and fertile, was temporarily reserved for the 'coloureds'. As a result, those who had not been living within the newly prescribed area had to re-establish themselves with the consequent dislocation, financial and otherwise. In due course the Khosis area became encircled by the battle school and the movement of the community and its livestock was severely restricted. During military exercises they were placed under curfew. Their movement in and out of the reserve (they are 14 km from the main road)[15] was controlled. Tension built up between the army and the community and, it seems, also amongst members of the community who, bereft of their traditional leadership, split into two groups: those who were prepared to be accommodating towards the defence force's demands and those who were not. Since the community members were not classified

[14] The appellants' submission that the purpose of the 1977 dispossession was to establish the battle school is based on surmise.
[15] The distance from the Khosis area to the eastern border of the school is 11 km.

as ‘black’, the state, during this period, had limited power to act against them on the ground of racially based legislation, and chose to negotiate.

[19] These negotiations, according to the minister, culminated in a properly advertised public meeting of the Khosis community in 1990, where it agreed by an overwhelming majority to be relocated to Jenn Haven. The appellants argue that the minister, who was obviously not present, has no firsthand knowledge of the facts.[16] The appellants, for their version, also rely on hearsay evidence, namely that of Mr Free, who likewise was not present. The fact of the matter is that there was a meeting, it had been advertised, there was disagreement within the community and the overwhelming majority chose to relocate. The Free group refused to budge although land and houses had been reserved for its members. (The Free group consists of 127 persons, including children.)[17] Mr Free says the majority moved because it felt intimidated but there is not a single member of that group of which we are aware who joined in the land claim on behalf of the Khosis. Mr Free, when he stated that they (‘we’) always knew that they could be compelled ‘like the blacks’ to move someday and that they were afraid of going to jail, exaggerated somewhat. The Khosis were able to resist the state for 17 years prior to 1994 and their political and legal position was not during that period entirely comparable to that of ‘blacks’.

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[16] The ordinary rules of evidence do not apply in the LCC: s 30.
[17] That was when this application was launched. There were 45 adults in 1993 and 38 families in 1997.

The battle lines

[20] The case of the minister is that it is in the public interest the SANDF should be entitled to the exclusive use of the whole of the Lohatla area. In this regard the minister is intractable. The Free group insists, as first prize, that the reserves should be restored to the three communities and, in the alternative, also intractably, that the Khosis area should be allocated to the communities. The parties have been at loggerheads since 1993 when the defence force applied for the eviction of the Free group from the Khosis area.[18] The respective stances of these parties have not been affected by the reference of the land claim to the LCC or the numerous attempts to settle the matter.[19]

[21] The attitude of the Gatlhose and Maremane communities has been different. The state has offered the communities monetary compensation equal to the land value of the reserves, ignoring the 'compensatory' land which they already possess.[20] It is not necessary to deal with the whole history of the negotiations save to refer to two events. The minutes of the pre-trial meeting held with the LCC judges on 21 January 2000, record that these communities and a part of the Khosis community were prepared to

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[18] The application is pending the outcome of the land claim.
[19] The Khosis at Jenn Haven are not involved in the dispute. They are not a party to the present proceedings and non-joinder has not been alleged. Mr Free admits that he has no mandate on behalf of the people of Jenn Haven.
[20] The amount offered was R24m for the approximately 62 000 ha. The land value of the reserves is R400 per ha.

accept monetary compensation for purposes of purchasing alternative land.[21] The following day a public meeting was held with the Gathlose and Maremane communities and, according to the minutes, the principle of financial compensation for the purchase of alternative land in lieu of restitution was unanimously accepted.

[22] Although these two communities, on the papers, have joined the Free group in opposing the relief sought, that appears to be a tactical move. The settlement suggested came to nought because, says the minister, of the refusal of the Free group to accede to the proposal whereas the communities say it is because alternative land has not been identified. Whichever side is correct, the fact of the matter is as mentioned that the Free group is not prepared to settle except, at the very least, on the basis that the Khosis area be allocated to the group unconditionally.

[23] That the opposition of the Gatlhose and Maremane communities was for tactical purposes appears from the fact that Mr Trengove, for the appellants, at the outset of his argument accepted that on the available evidence – there is no indication that there might be other evidence – the battle school will have to stay and he never even suggested that the reserves (excluding the Khosis area) could be restored to the communities. That is

[21] From other documentation it would appear that questions such as access to ancestral graves still have to be negotiated. More about this later.

why he posed two questions: (i) why does the SANDF claim the whole area and (ii) why does it want the issue to be decided *ante omnia*?

The battle school

[24] The main infrastructure of the school is on the Maremane reserve and the replacement value is in excess of R800m, ie, 32 times the land value of the reserves.[22] The remainder of the land is used for training exercises. It cannot be disputed that the school is a national asset and essential for the SANDF, not only for its own training purposes but also for that of international forces in joint training exercises. It is not in contention that the size of the battle school is hardly large enough to enable the SANDF to engage in realistic war training with live ammunition; nor is it in issue that there is no alternative land available in this country which could be used to replace the school.

[25] The battle school plays an important role in the economy of the Northern Cape Province – one of the poorer provinces – in general and, more particularly, in the immediate vicinity. Permanent personnel amount to 2400; 500 are civilians. In surrounding towns 423 state owned houses are occupied by staff. Official spending involves the formal business sector, including industry, farming and the Regional Services Council. Staff

[22] This is an estimate by the minister. His ability to give this evidence has been questioned but the actual value is not really an issue.

spending widely supports the informal sector. A large number of towns and villages, as far away as Kimberley and Upington, are financially affected.

[26] Although established during the pre-1994 era, its value has not been diminished. Reasonable persons may differ on the role of a defence force in a democracy and may differ as to whether, especially in South Africa, a fully prepared and operational defence force is needed. History teaches that many well meaning leaders have miscalculated the readiness, the need for and the size of a defence force – sometimes too big, sometimes too small. However, the Constitution[23] requires a disciplined military force, not only to defend and protect the Republic, its territorial integrity and its people; it may also be deployed in fulfilment of international obligations or in co-operation with the police. An insufficiently trained defence force is unable to fulfil its constitutional duty and is a danger to itself and to others. The SANDF has a duty towards its soldiers to provide them with proper training in order to limit the danger to life and limb.

[27] The battle school area is heavily contaminated with unexploded ordnance and is as such not fit for human or animal use. It cannot be cleared cost effectively. An estimate of the clearing costs, in 1996, was £7,9m. This represents many times the value of the land. These facts are fully set out in expert reports which form part of the communities' papers. Mr Trengove, probably in consequence, did not argue that the return of the reserves

[23] S 200 and 201.

(excluding the Khosis area) was a feasible option and this is the principal reason the Gathlose and Maremane communities are prepared to settle for monetary compensation.

[28] There is land within Lohatla that can be made safe for human habitation. Some of it falls outside the reserves and does not affect the outcome of this case save to mention that the SANDF had offered part of it to the Free group during the settlement negotiations.[24] A few families were initially prepared to accept the offer but they have since changed their mind. The Khosis area itself may also be made safe at a cost of between R300 and R350 per ha, which is not much less than the value of the land of R400 per ha.

The first threshold requirement: public interest

[29] The first issue then is to decide whether it is in the public interest that the reserves should not be restored (s 34(6)(a)).[25] It has been stated that the finding of the LCC that it is in the public interest that the reserves should not be restored to the Gathlose and Maremane communities was not attacked on appeal for the reasons given. What remains for consideration is the Khosis area.

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[24] The area is the south-eastern part, some 10 000 ha, and, presumably, adjoins Jenn Haven.

[25] For a discussion of the meaning of 'public interest': Dr Willemien du Plessis 1987 *THRHR* 292; *Ex parte North and South Central Metro Substructure Councils of the Durban Metropolitan Area and another* 1998 (1) SA 78 (LCC).

[30] In considering its decision in this regard a court has to take into account the factors listed in s 33. All of them are not necessarily applicable in any given case. However, in a case such as the present the general approach ought to be that the dispossessed community is entitled to restoration of the land unless restoration is trumped by public interest considerations.

[31] Undeniably, the umbilical cord that joins any particular community and its ancestral land is strong and it has a highly emotional element that has to be respected. That does not, however, mean that all other public interest considerations should be ignored. Land is finite and there are millions out there who also wish to have their share. All claims and aspirations cannot be satisfied. A balance must be struck and the limited resources of the country must be considered.

[32] The appellants stressed the desirability of remedying past human rights violations (para (b)), the history of the dispossession, and the hardship caused to the community (para (eC)). With the history and hardship I have already dealt. Without wishing to denigrate the position of the Khosis, there is a slight sleight of hand in their case. Those who have borne the brunt of the dispossession were the Gathlose and Maremane. They, who number many thousands, are prepared to relinquish their claim to restoration. Here we are really concerned with the position of the smaller balance of the

Khosis, 127 souls in all, who have always been and still are in possession of the Khosis area.

[33] Section 33 also requires of a court to give consideration to the feasibility of restoration of rights in land (para (cA)), social upheaval (para (d)), and the current use of the land (para (eB)). These factors are closely related to the public interest considerations of s 34(6)(a). The public interest in maintaining the battle school has already been dealt with and it has been pointed out that the appellants' counsel did not attack the findings of the LCC in this regard. What remains is whether the Khosis area, right in the middle of the school, can be excised from the battle school and whether it is in the public interest that a small community should live within the midst of the school.

[34] The evidence establishes that the SANDF requires for training purposes the whole area, including the Khosis area. Otherwise training at brigade level is impossible. Certain manoeuvres, which are essential for training, are impossible to execute. Soldiers, who have to be prepared to expect the unexpected, know that – because of the limitation on the use of the Khosis area – attacks cannot come from the east or west. New weapons systems cannot be tested fully. The range and rate of fire of modern weapons demand safety arcs. The Khosis area falls within the danger zone. The access road traverses the battle area. Exercises can only be conducted by

crossing the area and that is the reason why the area has not been fenced. During exercises access and egress have to be restricted.

[35] The counter offered by the appellants is a passage in the report from which the preceding information was taken in which the expert witness, Mr Heitman, stated:

'The only alternative to full use of the "Free Area" would be to acquire additional land adjacent to the Army Battle School to give the space needed for realistic training. That land would have to be larger than the "Free Area", to allow adequate safety distances during mechanised operations training. Merely adding an equivalent area would not give sufficient depth to allow safe training.'

Why then not acquire more land to the north and leave the Khosis area, ask the appellants? First, as the report states, it is not simply a case of adding another 10 000 ha to the north. Second, there is no evidence of any available or suitable land.[26] In any event, the SANDF will practically be deprived of the use of the land to the south, east and west of the Khosis area.[27] More land in an area where land appears to be a scarce commodity, taking into account the different claims to it, has to be contaminated and made useless for future generations. (Mention has already been made of the fact that contaminated land cannot be recovered.) And, as the LCC found, this alternative, which, it may be added, is not based on any fact and does not do

[26] The minister said in reply that there is none.
[27] The land south of the northern point of the Khosis area represents about 75% of the Battle School.

justice to the Heitman report read as a whole, does not present a long-term solution and will force the SANDF to expand in an inefficient manner.

[36] The appellants submit, if I understand the argument, that during a meeting with President Mandela and (among others) the Minister of Defence the latter effectively conceded that the whole area is not required by the battle school. This meeting took place on 27 November 1996. It is quite clear from the minutes that proposals were made which were called 'decisions and recommendations'. The main one was that the Gathlose and Maremane (the Khosis were not included) be acknowledged as the rightful owners and that the SANDF should enter into a lease agreement with the communities on an indefinite basis. (There is no suggestion that this proposal was acceptable to anyone.) Then followed the pregnant paragraph:

'Alternative land for the resettlement of the communities, to include the Khosis, be purchased/acquired at state expense, adjacent to Lohatla.'

This, on my reading, simply means that the Khosis, in due course, had to leave Lohatla. The allocation of the south eastern part of the battle school to the communities was also mooted but, as mentioned, the Free group later rejected this proposal.

[37] Another factor relating to public interest is that the Khosis area cannot simply be allocated to the Free group. The other communities have as much a claim to the area as have the Khosis because the Gathlose and Maremane according to Mr Free (who, originally, does not hail from the Khosis area)

also lived on that land. They cannot return to this relatively small piece of land which is too small for even the Free group.

[38] It follows from the aforegoing that the appellants have not presented any convincing argument which indicates that the LCC erred when it found that it is not in the public interest to restore the Free area. That conclusion then leads to the second threshold requirement. It should, however, be borne in mind that the same facts may be relevant to both inquiries.

The second threshold requirement: substantial prejudice

[39] The main thrust of the appellants was directed at this leg of the case, namely whether the applicants have established that the public or any substantial part thereof will suffer substantial prejudice unless the order is made *ante omnia* (s 34(6)(b)). As counsel asked: 'Why now?' The occupation of the Khosis has been in contention since the late 1970's and that the battle school has all along been able to operate. To answer the question it is convenient once again to consider the situation of the Khosis apart from that of the Gathlose and Maremane.

[40] Before doing so, reference should be made to one of the minister's motives in launching the application. The minister's interest in the outcome of the claim is limited to the restoration question. Equitable redress is for the account of the Department of Land Affairs. An early decision in his favour on the s 34 application will release the minister from the proceedings. That

will lead to a savings of costs. The limitation of the issues at the trial will also lead to a saving of legal costs to the fisc. Although the minister has submitted that legal costs, even those of the communities, are a kind of prejudice a court should have regard to, I believe that cost considerations can at best be a makeweight.

[41] Early settlement of the land claims is probable as soon as the restoration aspect has been resolved. In itself it is also not a compelling reason for an *ante omnia* order. However, in the case of the Gathlose and Maremane it is not a self standing consideration. These communities, consisting of many thousands of people who cannot return to the land, remain in limbo. They live on land that is insufficient for their needs. A large amount of money has been set aside by the state to enable them to purchase additional land. That cannot happen because the small Free group refuses to accept the inevitable. Every delay in finalising their claim must, by the very nature of their displacement, amount to substantial prejudice. If one asks the converse question, namely what do they stand to gain by delaying the matter, the answer is clearly nothing. Maybe the trite statement that justice delayed is justice denied has special application in their situation.

[42] Inevitably the spotlight reverts to the Free group. The appellants submit that it is inappropriate to break the deadlock at this stage because it will deprive the Free group of any hope that the land would be restored to

them and it will deprive them of the 'dignity' of a trial.[28] The short answer is that the Act specifically created a mechanism to break deadlocks, that the finding on the first leg is that they can have no reasonable expectation that they will be able to retain the land, and it is not in the public interest to have trials on issues without any realistic prospects of success. In this regard the premier of the province, who, it will be recalled, is also an applicant, made a compelling case of substantial prejudice being suffered by, surprisingly, the Free group through the delay. Apart from the danger to the community posed by their presence in the middle of a battle school, something to which I shall return, he points to the fact that the province is not able to comply with its constitutional duty to provide this isolated community with proper education, health facilities, infrastructure and other amenities. As far as schools are concerned, the existing facility is dilapidated and unsuitable. There are 27 learners spread across seven grades and quality education cannot be provided. It is not feasible to upgrade the facilities especially, one could well imagine, while the dispute keeps simmering. Concerning health, the premier points out that the community is isolated, there is an absence of potable water and sanitation, and that the living conditions of the Free community pose serious health risks. He finally mentions that housing and other infrastructure cannot be provided economically and that the provision

[28] Strictly, counsel used this argument in relation to the 'ultimate discretion' point but it is equally applicable here.

of services would not be sustainable to such a small isolated community. Neither in evidence nor in argument were any of these matters, which were foundational to the judgment of the LCC, addressed by the appellants – most probably because they are unanswerable.

[43] The safety of the Free group is a concern of both the minister and the premier. According to the minister, although the Khosis area is the least contaminated, it is a total anachronism to maintain a totally isolated small civilian population in the middle of a battle school. The danger to life where live ammunition is used during training is obvious. Mistakes are bound to happen. He mentioned that it is well documented that a number of civilians, including children, living in the Free area have been killed in explosions during their attempts illegally to recover parts of unexploded ammunition. Livestock roams over the whole of Lohatla, adding to the danger to life of herders and animals. Last, but not least, during exercises the basic right of free movement of the community is restricted to an extent that is unacceptable to the Free group.

[44] The first response of the appellants is that there is a factual dispute about civilian deaths. Mr Free stated namely in his answering affidavit that no accidents have occurred within or near the Khosis area. In this regard he was less than frank because in a previous affidavit he admitted that in the past 20 years there have been ‘only’ some 5 to 6 fatal accidents due to

unexploded munitions among members of the 'local community' within the battle school. This he considers an acceptable risk factor. As Meer AJ correctly said, one death is one too many. His other suggestion is that a fund must be established along the lines of the compensation fund for occupational injuries and diseases. Then he proposes that the area be fenced but as the minister points out, this is not at all feasible because it is not possible to conduct exercises without traversing the Khosis area since, even if no actual exercises take place there, observation and controlling teams have to traverse the area and use high points in it.

[45] The LCC found, and I agree, that the Free community suffers substantial prejudice because of the absence of education, health, social services and personal security. Mr Free's response is that the minister is 'paternalistic' because he and his followers know what is best for them. His decision on behalf of children and others that their health, education and lives are of lesser importance than the land claim is not only paternalistic; it is reckless and wholly unacceptable.

[46] This, I believe, makes it unnecessary to consider in any detail whether the SANDF (and through it the South African public as a whole) will suffer substantial prejudice unless the *ante omnia* order issues. It also answers counsel's 'why now' question. The Free group should have left Lohatla

before those persons died and before social conditions deteriorated to an extent where children have to suffer because of the ideals of their parents.

Alternative relief

[47] The notice of motion sought an order declaring that 'no part of the land in question shall be restored to any claimant' and the LCC made an order in those terms. The LCC's understanding of the matter was that the issue related to the question (in the words of Meer AJ) of physical restoration or (according to Bam AJP) the right to occupy. If due regard is had to the history of the dispute and to the formulation of the issues in both the founding affidavit and the answering affidavit (which also served as the counter-application) that approach was correct.

[48] Bam AJP, in spite of the clearly defined issue, held that since s 34 is not limited to the non-restoration of land but extends to the non-restoration of any 'rights' in it, the applicants had to satisfy the court that none of these rights should not be restored. The term 'rights', in terms of the definition, includes customary law interests and what the learned judge had in mind was a bundle of customary law interests such as servitudes (which he did not attempt to circumscribe), the right to extract water and minerals from the land, to plough, to graze, and to gather wood and soil. As Meer AJ pointed out in her judgment dealing with the application for leave to appeal, this was not an issue at all. She is correct. In any event, the rights that Bam AJP had

in mind are inconsistent with the right to exclusive occupation which the SANDF on the evidence requires. How, for instance, can water be hauled over a distance of about 14 km from the Khosis area (where the fountains are) to the main road and, if it is there, where could it be utilised? How does one extract minerals from the ground in the battle school without occupying the land? And then one is ignoring the fact that no one suggested that the communities had ever recovered minerals. How does one plough or graze land in the midst of a battle school if the evidence establishes that it is dangerous for humans and animals to use the land?

[49] Alluded to in prior discussions but not raised on the papers as issues were the access to graves and the possibility of erecting a memorial for the communities but these are not excluded by the terms of the order and may be considered in determining the scope of equitable redress. Last, as stated before, at the meeting with Mr Mandela the option of recognising the bare dominium of the claimants and letting the land on an indefinite basis to the SANDF was mooted but this option was apparently not acceptable. The idea was not resurrected in any of the affidavits and whether or not it was a viable option was not discussed and must consequently be discounted.

Order

[50] No order for costs was asked for by the respondents and none will be made. The appeal is dismissed.

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L T C HARMS
JUDGE OF APPEAL

AGREE:

FARLAM JA
MTHIYANE JA
BRAND JA
PONNAN AJA