

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: LCC 87/00

Held at **RANDBURG** on 17 January 2001, 9 - 14 March 2001, 16 - 17 May 2001
before **Moloto AJ**

Decided on: 6 July 2001

In the matter between:

GAMEVEST (PTY) LTD Applicant

and

**THE REGIONAL LAND CLAIMS COMMISSIONER
FOR THE NORTHERN PROVINCE AND MPUMALANGA** First Respondent

THE CHIEF LAND CLAIMS COMMISSIONER Second Respondent

THE LAND CLAIMS COMMISSION Third Respondent

THE BA-PHALABORWA BA GA-MASEKE TRIBE Fourth Respondent

THE BA-PHALABORWA BA GA-SHAI TRIBE Fifth Respondent

JUDGMENT

MOLOTO AJ:

Introduction

[1] This is an application for the review and other relief relating to certain decisions alleged to have been taken and actions undertaken by some or all of the first, second and third respondents in terms of the Restitution of Land Rights Act¹ (“the Act”). The said decisions and actions were allegedly taken and undertaken in respect of a claim or claims for restitution of rights in land in terms of the Act lodged

1 Act 22 of 1994, as amended.

by the fourth and fifth respondents with the first respondent. The area claimed includes land belonging to the applicant.

[2] The applicant in this matter is a company and owner of seven farms in the Northern Province called Glip, Brand, Ram, Punt, Remaining Extent of Ziek, Remaining Extent of Brook and Remaining Extent of Breakfast which it has consolidated into one farm known as the “Croc Ranch”. The applicant runs a game reserve on the Croc Ranch.

[3] The first respondent is the Regional Land Claims Commissioner, Northern Province and Mpumalanga appointed as such in terms of section 4(3) of the Act. The second respondent is the Chief Land Claims Commissioner also appointed in terms of section 4(3) of the Act. The third respondent, who was originally cited in the papers as “The Land Claims Commission”, is the Commission on Restitution of Land Rights established in terms of section 4(1) of the Act and of which the first and second respondents are members. The applicant stated that it did not know which of these three respondents to cite because it (the applicant) did not know who among them took the decisions and undertook the actions sought to be reviewed. The applicant stated that section 6 of the Act makes it difficult to identify the party, among the three respondents, who would have made the decisions or undertaken the actions. The portion of section 6 which is said to cause the difficulty reads:

“(1) The Commission shall, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by such commissioner-”.

[4] Other sections cited to support this confusion are sections 7(1), (2), (2B) and (4) and 8(1) and (3) of the Act, all of which have provisions similar to section 6(1) above.

[5] The fourth and fifth respondents are two of four portions of a tribe called Ba-Phalaborwa which lives in the Northern Province. The fourth and fifth respondents, together with the other two groups forming the Ba-Phalaborwa tribe, lodged with the first respondent, several claims for restitution of land rights in terms of the Act. The claims of the fourth and fifth respondents related, among others, to the Croc Ranch. The application for review seeks to invalidate these claims by the fourth and fifth

respondents pertaining to the Croc Ranch. The claim of the fourth respondent appears to have been incorporated into that of the fifth respondent at some stage. As a result the fourth respondent is no longer involved in this application.

Background

[6] There is a family of four tribes collectively called Ba-Phalaborwa and individually called Ba-Phalaborwa ba ga-Makhushane, Ba-Phalaborwa ba ga-Selwane, Ba-Phalaborwa ba ga-Maseke and Ba-Phalaborwa ba ga-Shai (also known as Ba-Phalaborwa ba ga-Mashishimale). The Ba-Phalaborwa live in the Northern Province in the vicinity of the area claimed, which is near the town of Phalaborwa.

[7] Ba-Phalaborwa unassisted by lawyers, lodged land claims with the first respondent at various times in 1996. A land claim form dated 22 May 1996 was lodged on 12 June 1996.² This claim form is signed by Kgoshi B L Malatji “for Magoshi a Phalaborwa.” The word Kgoshi means chief or king³ and the plural is “Magoshi”, therefore the phrase “for Magoshi a Phalaborwa” means for the chiefs of Phalaborwa. In the claim form the particulars of the persons who lost the right in land are given as:

“Kgoshi B L Malatji - Ba-Phalaborwa
Kgoshigadi M F Malatji - Selwane (Ba-Phalaborwa)
Kgoshigadi M C Shai - Mashishimale (Ba-Phalaborwa)
Kgoshi M A Malatji - Maseke (Ba-Phalaborwa)”

The word “Kgoshigadi”⁴ is the feminine gender of “Kgoshi,” meaning queen or chieftainess.

[8] Another claim form (annexure “FJ” to the applicant’s founding affidavit) dated 10 May 1995, again completed by Ba-Phalaborwa unassisted by lawyers, was lodged with the first respondent. No date of receipt or the first respondent’s date stamp appears on the claim form. The applicant states that

2 Annexure “FI” to the applicant’s founding affidavit.

3 See Reynierse (ed) *South African Multi-Language Dictionary and Phrase Book* 1st ed, 4th printing (Reader’s Digest Association, Cape Town 1995) at 244. Note that in the dictionary the word is spelt without an “h” but with a “s”.

4 See n 3 above.

it was lodged on 29 June 1996. There is, however, a date stamp of the “Phalaborwa Local Government” reflecting “29 June 1995”. The information on this claim form is the same as that on annexure “FI”, except that this claim form (annexure “FJ”) is signed by four signatories, apparently all four chiefs and chieftainesses.

[9] Ba-Phalaborwa lodged a further eleven land claims with the first respondent, this time with the assistance of a firm of attorneys. These claims were sent under cover of a letter⁵ dated 27 November 1998 by Mr Steytler, the attorney for Ba-Phalaborwa, and were received by the first respondent on 7 December 1998. Annexure “FG” explains the relationship of these latter claims to the previously lodged ones. It is therefore important to quote the relevant portions of annexure “FG”. It reads, in part:

“Our clients informed us that they have already filed claims that are similar to some of the claims contained in our documentation. They request you to regard the claims that we are now filing, as an amplification of the claims that they have already filed. Should there be any contradiction or anomalies between the claims that were first filed and the claims that are now being filed, the latter claims must be regarded as correct.”

[10] The Ba-Phalaborwa insisted on their claims being lodged jointly as they see their tribes as one community, but their attorney advised them to lodge the claims separately, because, so were they advised, the four tribes are separate legal entities.

[11] A “short history” and “schedule claims” are annexed to the eleven claims. For purposes of this application “schedule claims” 2C and 2D are relevant. Schedule 2C lists, amongst others, the farms Glip, Brand, Ram and Punt as part of the claimed land. This schedule relates to the claim on behalf of the Ba-Phalaborwa ba ga-Maseke tribe (fourth respondent). Schedule 2D relates to the claim of the Ba-Phalaborwa ba ga-Mashishimale tribe (fifth respondent) and lists, among the farms claimed, Remaining Extent of Ziek, remaining Extent of Brook and Remaining Extent of Breakfast. I mention at this stage that although these claims were submitted for various groups, the attorney for Ba-Phalaborwa, explained in his affidavit in support of the fifth respondent’s opposition to this application, that he advised the Ba-Phalaborwa to claim separately. They were reluctant to do so because they alleged that

5 Annexure “FG” to applicant’s founding affidavit.

they originally occupied the land as “one unified tribe and that they still think of themselves as one tribal family.”

[12] On 19 May 1997 the Regional Land Claims Commissioner wrote a letter⁶ to the Ba-Phalaborwa Tribal Authority the subject matter of which was described as:

“LAND CLAIM: SEVERAL FARMS IN THE PHALABORWA DISTRICT of the BA PHALABORWA TRIBE; in re.: SALE OF PORTIONS 11 & 16 SELATI RANCH 143 KT”

The letter reads in part:

“The Commission is not in a position to interdict the sale in that the claim as it stands does not comply with the Restitution of Land Rights Act 22 of 1994. The racially based measure and the rights relied on for the claim, are not described. It is also not clear whether the above mentioned property portions 11 & 16 of Selati Ranch 143 KT are definitely included in the claim or not. We therefore have no reason in law to interdict the sale of the said land.

Such rights as are mentioned in the claim deal with tribal jurisdiction, a matter best dealt with by the Department of Constitutional Development in conjunction with the House of Traditional Leaders of the Northern Province. This does however not imply that any claim against the land by members of the Ba-Phalaborwa is excluded.”

It must be noted that the abovementioned annexure “FK” was written before the claims submitted by Mr Steytler in December 1998.

[13] After the lodgment of the Ba-Phalaborwa land claims the first respondent arranged for the transfer of one state employee from the Regional Land Claims Commissioner, North West Province to the Northern Province office of the first respondent to deal with these claims by the Ba-Phalaborwa. This was allegedly done in order to have a dedicated staff member to attend to these claims, seeing that there was a shortage of staff within the first respondent’s office. The dedicated staff member was assigned on 9 May 2000.

6 Annexure “FK” to the applicant’s founding affidavit.

[14] The applicant heard of the claims by the family of four tribes and that the claims include, among other areas, the Croc Ranch. The applicant, through its officers and attorneys directed correspondence to the first respondent noting that it is involved in a major eco-tourism investment on Croc Ranch which is hampered by the claim, hence the applicant, the Northern Province and the country are suffering great loss as a result of potential investors withdrawing from the venture; and demanded a quick adjudication of the claims in so far as they relate to the Croc Ranch; that the first respondent must reject the claims as they do not satisfy the requirements of the Act; if the claims are not rejected, then the first respondent must furnish his reasons for not rejecting them. The first respondent replied⁷ to the effect that the restitution process is long, there is a lack of capacity within the first respondent's office to deal with all claims at the same time and that, therefore, some prioritisation is necessary. The first respondent went on to explain that as at the time of writing the reply, the claims on the applicant's properties had not yet been investigated or researched by the Commission. The relevant claims were, therefore, prioritised as follows:

- “(i) All claims involving the area within the Kruger National Park between the Great Letaba and Olifants Rivers.
- (ii) All claims involving the Great Letaba Game Reserve.
- (iii) All claims involving land transferred to the then Gazankulu government and other state land.
- (iv) All claims involving the Phalaborwa Town and mines.
- (v) All claims involving private farms and game reserves.”

7 Annexure “FP” to applicant's founding affidavit.

[15] The first respondent's letter went on to explain that a decision in terms of section 11(4)⁸ of the Act can only be taken once the:

“investigations, research, rights enquiry and claimants verification processes are concluded. Furthermore, the Commission does not rely only on the facts alleged in the lodged documents for a decision to accept or reject a land claim, but on other sources of facts as well . . .”

“We therefore ask for your patience in this regard. The Commissioner will as soon as there is any progress in the investigations, research, the rights enquiry and claimant verification processes of the Ba-Phalaborwa Ba-Shai Ga-Mashishimale land claim [‘claim 2D’], advice and/or inform you accordingly.”

[16] Not satisfied with the reply, the applicant wrote further letters to the first respondent in more or less the same vein and culminating in the launch of the application. I will deal with the correspondence later.

The application

[17] On 4 August 2000, the applicant launched this application praying for an order in the following terms:

“1 The review and setting aside of the following decisions and actions of the First Respondent, alternatively the Second Respondent,

8 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.”

Paragraphs (a), (b) and (c) of subsection (1) read:

“(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 shall take steps to make it known in the district in which the land in question is situated.”

further alternatively the employees and functionaries of the Third Respondent, pertaining to-

The Fourth Respondents' (*sic*) claim of restitution to the Applicant's farms Glip, Brand and Ram [**"the Fourth Respondents' claim"**];

and

The Fifth Respondents' (*sic*) claim of restitution to the Applicant's farms R/E of Ziek, R/E of Brook and R/E of Breakfast [**"the Fifth Respondents'(*sic*) claim"**]-

- 1.1 The decision(s) to accept the Fourth Respondents' (*sic*) claim and the Fifth Respondents' (*sic*) claim [**"the claims submitted by the Fourth and Fifth Respondents"**] as validly submitted in terms of the Restitution Of Land Rights Act, 22 of 1994 [**"the Restitution Act"**] and the Third Respondent's Rules;
- 1.2 The decision(s) not to dismiss the claims submitted by the Fourth and Fifth Respondents as frivolous or vexatious, in terms of section 11(3) of the Restitution Act;
- 1.3 The decision(s) not to advise the Fourth and Fifth Respondents that their claims do not meet the acceptance criteria of the Restitution Act, and of the reasons for such decision, in terms of section 11(4) of the Restitution Act;
- 1.4 The decision(s) not to advise the Fourth and Fifth Respondents that their claims do not meet the acceptance criteria of the Third Respondents Rules for the submission of claims;
- 1.5 The decision(s) that the factual basis for the claims submitted by the Fourth and Fifth Respondents have to be investigated by the First Respondent, alternatively the Second Respondent, further alternatively the Third Respondent;
- 1.6 The decision(s) to prioritise finalisation of several other claims by the Fourth and Fifth Respondents and by so doing to delay finalisation of the claims submitted by the Fourth and Fifth Respondents for restitution to the Applicant's land, without notice to the Applicant and without giving the Applicant an opportunity to be heard on such decision(s);
- 1.7 The failure to provide reasons to the Applicant for the decisions and actions referred to in the foregoing six sub-paragraphs, despite demand;

- 1.8 The failure to take any steps to finalise the claims submitted by the Fourth and Fifth Respondents.
- 2 An order declaring that the claims submitted by the Fourth and Fifth Respondents do not meet the acceptance criteria of the Restitution Act and of the Third Respondents Rules for the submission of such claims;
- 3 An order dismissing the claims submitted by the Fourth and Fifth Respondents as frivolous or vexatious, in terms of section 11(3) of the Restitution Act;
- 4 Alternatively to prayer 3-
- 4.1 An order compelling the First Respondent, alternatively the Second Respondent, further alternatively the Third Respondent to apply the acceptance criteria of the Restitution Act and of the Third Respondents Rules to the claims submitted by the Fourth and Fifth Respondents in that the claims have to reflect-
- 4.1.1 Dispossession of a community or part of a community;
- 4.1.2 Dispossession of a right in land;
- 4.1.3 Dispossession because of past racially discriminatory laws or practices; and
- 4.1.4 Dispossession after 19 June 1913;
- 4.2 An order referring the matter back for reconsideration to the First Respondent, alternatively the Second Respondent, further alternatively the Third Respondent, to consider whether the claims submitted by the Fourth and Fifth Respondents ought to be dismissed as frivolous or vexatious, in terms of section 11(3) of the Restitution Act;
- 4.3 An order compelling the First Respondent, alternatively the Second Respondent, further alternatively the Third Respondent to give priority to the finalisation of the claims submitted by the Fourth and Fifth Respondents;
- 4.4 Alternatively to prayer 4.3, an order referring the prioritising of claims submitted by the Fourth and Fifth Respondents for reconsideration to the First Respondent, alternatively the Second Respondent, further alternatively the Third Respondent;
- 5 Further alternatively to prayers 3 and 4-

- 5.1 An order compelling the First Respondent, alternatively the Second Respondent, further alternatively the Third Respondent to apply the acceptance criteria of the Restitution Act and of the Third Respondents Rules to the claims submitted by the Fourth and Fifth Respondents;
- 5.2 An order referring the matter back to the First Respondent, alternatively the Second Respondent, further alternatively the Third Respondent, to advise the Fourth and Fifth Respondents that their claims do not meet the acceptance criteria of the Restitution Act, and of the reasons therefore in terms of section 11(4) of the Restitution Act, being that the claims do not reflect-
- 5.2.1 Dispossession of a community or part of a community;
 - 5.2.2 Dispossession of a right in land;
 - 5.2.3 Dispossession because of past racially discriminatory laws or practices; and
 - 5.2.4 Dispossession after 19 June 1913;
- 5.3 An order compelling the First Respondent, alternatively the Second Respondent, further alternatively the Third Respondent, to dismiss the claims submitted by the Fourth and Fifth Respondents as frivolous or vexatious, in the event of the Fourth and Fifth Respondents not submitting amended claims within 30 days from date of receiving the notice referred to in prayer, duly complying with the acceptance criteria of the Restitution Act and of the Third Respondents Rules;
- 5.4 An order compelling the First Respondent, alternatively the Second Respondent, further alternatively the Third Respondent to give priority to the finalisation of the claims submitted by the Fourth and Fifth Respondents;
- 5.5 Alternatively to prayer 5.4, an order referring the prioritising of claims submitted by the Fourth and Fifth Respondents for reconsideration to the First Respondent, alternatively the Second Respondent, further alternatively the Third Respondent.
- 6 Costs against:
- 6.1 Those Respondents seeking to oppose the application; and
 - 6.2 The First, Second or Third Respondent in the event of them failing to deliver to the registrar of the Land Claims Court the record of the proceedings and all documents

relevant to the above decisions/actions, or their reasons for the decisions/actions, or to notify the Applicant that they have done so, within 5 days of receiving this notice.

7 Further or alternative relief.”

[18] The applicant later filed a “supplemented notice of motion”, which amends the notice of motion in the following respects:

- (1) the name of the third respondent is correctly given as the “Commission on Restitution of Land Rights” where the third respondent’s particulars are provided in the supplemented notice of motion.
- (2) the farm Punt is added to the farms claimed by the fourth respondent in the supplemented notice of motion.
- (3) the words “[a]lternatively to prayer 1.2” have been added at the beginning of prayer 1.3.
- (4) the words “. . . without notice to the Applicant and without giving the Applicant an opportunity to be heard on such decision(s)” have been omitted in prayer 1.6.
- (5) prayer 1.7 of the notice of motion has been omitted.
- (6) the prayer for costs is recast as follows:

“6 Costs against:

6.1 The Fourth and/or Fifth Respondents should they seek to oppose the application, jointly and severally with any costs order against the First, Second and/or Third Respondent (*sic*);

6.2 The Second and/or Third Respondents should they seek to oppose the application, jointly and severally with any costs order against the First, Fourth and/or Fifth Respondents;

6.3 The First Respondent on the attorney and client scale jointly and severally with any costs order against the Second, Third, Fourth and/or Fifth Respondents;”

[19] The notice of motion was supported by voluminous affidavits and annexures to the affidavit, thereby generating equally voluminous answering affidavits. Replying affidavits were filed and the matter came up for hearing of argument on 17 January 2001. The respondents’ answering affidavits were to the effect that no decisions as alleged by the applicant had been taken, except as explained in annexure “FG” to the founding affidavit and annexure “FZ” to the supplementary founding affidavit. For the rest they answered the applicant’s allegations. I will deal with these allegations as I deal with argument. I raised certain issues with the applicant’s counsel which I wanted to clear before the matter was proceeded with. These were:

(1) Annexure “RG” to the replying affidavit of Christopher David Head (“Head”) is a copy of an undated letter from applicant’s attorneys and faxed to fourth and fifth respondents’ attorneys on 20 October 2000 at 18:30. Paragraph 6 thereof reads in part:

- “6.3 Quite clearly, after our involvement in the matter, you should not have liaised in private with the administrative organ, to the exclusion of our client. Material information and documents should not have been exchanged without at the very least copying them to us. Such a process is inherently unequal and unfair seen against the functions of the commission.
- 6.4 Furthermore and with respect, in opposed matters attorneys should not liaise in private with judicial officers or state functionaries who must make decisions. It creates the impression of unequal and unfair treatment.
- 6.5 This impression is strengthened if the attorney(s) representing the other interested parties are excluded from these discussions, exchanges of documents and reciprocal support in the preparation of affidavits.” (my emphasis)

Although he could not say who the judicial officers referred to in paragraph 6.4 were, Mr de Villiers, for the applicant, assured me that the words did not refer to me as the presiding officer in the matter and apologised for any impression that might have been created that the words referred to me. The allegations at paragraph 6.3 were not explained. It needs to be made quite clear, however, that in the nature of the restitution process at the Commission stage, the regional land claims commissioner will quite often communicate with the claimants or their representatives in the absence of the landowners’ representatives. Such situations will arise

when a regional land claims commissioner acts in terms of sections 6(1)(a) - 6(1)(cA); 10(2); 10(4); 11(2) - 11(4); 12(1)(a) and (c); 12(3); 13(1)(b) and 13(2)(a) of the Act.⁹ Therefore,

9 Section 6(1)(a) - 6(1)(cA) read:

“6 General functions of Commission

- (1) The Commission shall, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner-
 - (a) subject to the provisions of section 2, receive and acknowledge receipt of all claims for the restitution of rights in land lodged with or transferred to it in terms of this Act;
 - (b) take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims;
 - (c) advise claimants of the progress of their claims at regular intervals and upon reasonable request;
 - (cA) investigate the merits of claims contemplated in paragraph (a);”

Sections 10(2) and 10(4) read:

“10 Lodgement of claims and representation of community

- (1) ...
- (2) The Commission shall make claim forms available at all its offices.
- (3) ...
- (4) If there is any dispute as to who legitimately represents a community for the purposes of any claim under this Act, the regional land claims commissioner having jurisdiction may in the manner prescribed in rules made by the Chief Land Claims Commissioner in terms of section 16, in order to have a person or persons elected to represent the community-
 - (a) take steps for drawing up a list of the names of the members of the community;
 - (b) direct that a meeting of such community be convened and an election be held at that meeting;
 - (c) take such other steps as may be reasonably necessary for the election.”

Sections 11(2) - 11(4) read:

“11 Procedure after lodgment of claim

- (1) ...
- (2) The regional land claims commissioner concerned may, on such conditions as he or she may determine, condone the fact that a claim has not been lodged in the prescribed manner.
- (3) A frivolous or vexatious claim may be dismissed by the regional land claims commissioner concerned.
- (4) 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.”

Sections 12(1)(a), 12(1)(c) and 12(3) read:

“12 Commission’s power of investigation

- (1) The Commission may, through a member of the Commission or any person authorised thereto in writing, in order to carry out its functions-
 - (a) conduct an investigation;
 - (b) ...

without an explanation of the circumstances under which it is alleged there was communication and an exchange of documents between the claimants' attorneys and an administrative organ, no impropriety can be found if the administrative organ is the Commission. The allegations in paragraph 6.5 were similarly not substantiated. I will revert to these issues later.

- (2) The next issue I raised with counsel for the applicant relates to the matters referred to in paragraph 9.5 to 9.7 of the supplementary founding affidavit by Mr Head. The applicant's attorney wrote a letter to the registrar, as is stated in the affidavit, "to arrange in advance the (*sic*) date of the hearing" of an interim application for access to all relevant documents. It is further stated in the affidavit that the letter was written in terms of rule 37(1)(a) and (2)(a). Rule 37(1)(a) states that:

"The Court may, on application by any party or of its own accord -

- (a) make an interlocutory order in a pending case" (my emphasis)

and rule 37(2)(a) states:

-
- (c) by notice in writing, addressed and delivered by a member of the staff of the Commission or a sheriff to any person, direct such person, in relation to an investigation, to appear before a member of the Commission at a time and place mentioned in such notice and to produce to such member all documents or objects in the possession or custody or under the control of such person and which are relevant to that investigation."

(2) ...

- (3) If a claimant is not able to provide all the information necessary for the adequate submission or investigation of a claim, the regional land claims commissioner concerned shall direct an officer contemplated in section 8 to take all reasonable steps to have this information made available."

Section 13(1)(b) and 2(a) read:

"13 Mediation

- (1) If at any stage during the course of the Commission's investigation it becomes evident that-

(a) ...

- (b) in the case of a community claim, there are competing groups within the claimant community making resolution of the claim difficult;

(c) ...

- 2(a) A direction contemplated in subsection (1) shall be made in a written notice specifying the time when and the place where such process is to start."

- “(2) Formal applications for interlocutory orders in pending cases -
- (a) must be brought on notice supported by affidavits if the matter so requires; and ...” (my emphasis).

The applicant had made no interlocutory application and the Court had no intention of making an interlocutory order of its own accord. Therefore, there was no interlocutory application for which a date of hearing could be arranged in advance. The letter referred to does not state that the request therein is in terms of rule 37, hence the response by the Registrar to the attorney to act in terms of the rules of Court. The remark in paragraph 9.7 of the supplementary founding affidavit by Head to the effect that the request in the letter was made in terms of rule 37(1) and (2) is not justified.

- (3) The last preliminary issue I raised with Mr de Villiers has to do with paragraph 74 of the applicant’s heads of argument dated 21 December 2000. It reads:

“The first two respondents hold high office in government. They stand in a peculiar and close relationship to this Honourable Court.”

Once again no clear explanation could be given of what counsel insinuated with the statement. All that was said was that no bias by the Court in favour of the first two respondents was insinuated by the statement. I accept counsel’s explanation on the three issues without reservation, but must caution against wild, unsubstantiated allegations against other parties and/or officials of either the government or the Court.

[20] The applicant proceeded to apply for a postponement of the matter on the grounds that the heads of argument on behalf of the first three respondents were filed late hence applicant’s counsel did not have time to study, analyse and reply to them. These had been filed on 16 January 2001, the day before the hearing. The application was granted. The matter was postponed to a date to be arranged; costs occasioned by the application were reserved for determination with the costs of the main application and reasons for the grant of the order were to be given with the main action. My reasons follow hereunder.

[21] The applicant's argument was that it was prejudiced in the preparation of its case because it did not know, and therefore could not respond to, the heads of argument of the first three respondents. In support of this argument the applicant relied on rule 59 of the rules of this Court, read with practice direction number 4. Rule 59 reads:

“59 Heads of Argument

- (1) The Court may direct the parties, or any of them, to furnish heads of argument in a case.
- (2) Any direction under subrule (1) -
 - (a) must stipulate when and by whom heads of argument must be delivered;
 - (b) must indicate specific issues on which argument is required; and
 - (c) must be brought to the attention of the parties concerned at a conference or by the Registrar.
- (3) The heads of argument must include a list of the authorities to be quoted in support of each head.”

Practice direction number 4 reads:

- “(1) The applicant's legal representative must file heads of argument no later than ten Court days before the hearing of any opposed application.
- (2) The Respondent's legal representative must file heads of argument no later than five Court days before the hearing of any opposed application.
- (3) Where the nature of the application does not allow sufficient time to comply with the time periods referred to in paragraphs 1 and 2, the applicant's legal representative must approach the presiding Judge for a direction as to the time periods for the filing of heads of argument.
- (4) The applicant's legal representative must communicate the direction to the respondent's legal representative in writing and a copy must be filed with the Registrar of the Land Claims Court.
- (5) The presiding Judge may excuse the parties' legal representatives from compliance with this direction where appropriate.”

[22] The applicant relied on paragraph (2) of the practice direction for alleging that the heads of argument for the first three respondents were late and sought, in addition to an order for a postponement, that the first three respondents pay the costs of the postponement.

[23] Mr Shakoane, for the first, second and third respondents contended that the applicant was itself late with its heads of argument, having filed them one day short of the required ten days. The applicant did not apply for condonation of the late filing of its heads. The applicant did not approach the presiding judge in terms of paragraph (3) of the practice direction.

[24] Mr Havenga, who appeared for the fifth respondent, also opposed the application. He argued that counsel cannot be heard to complain that he did not receive his colleagues' heads of argument, as these are for the Court's convenience and not for counsel's convenience. Mr Havenga went on to argue that if a postponement is granted, then the applicant must bear the costs occasioned by the postponement.

[25] Notwithstanding the fact that the applicant did not seem entitled to a postponement, in the interests of justice, a proper ventilation of the matter requires that a full response by the applicant must be allowed. I therefore granted the application. The only prejudice to the respondents was the question of costs which can easily be resolved by making an appropriate costs order against the applicant.

Interlocutory application

[26] The parties brought a number of interlocutory applications during the proceedings. Most, if not all of them were of a technical nature and would not take the matter any further. There were, for example, an application to strike out, objection to *locus standi* and a supplementary affidavit to amend. I asked the parties at the commencement of the hearing to consider agreement on technical issues so that the Court may proceed with the merits. The parties agreed in principle to the request, although it emerged during argument that the parties were not completely *ad idem* on what they had agreed were technicalities.

[27] For the record and for the sake of completeness I deal with these points as hereunder, even though they were not argued:

Application to strike out

[28] The applicant applied to strike out some evidence on the grounds that such evidence was hearsay hence inadmissible. That was evidence relating to the loss of a right in land, which evidence is permissible in terms of section 30 of the Act.¹⁰ It would be premature at this stage to adjudicate on the merits of the claims by the fourth and fifth respondents. It was for the Court to review certain alleged decisions and actions by the first three respondents. In the light of the conclusion I come to on the review application it would be premature to adjudicate on the admissibility of such evidence. This does not mean that the admissibility of such evidence may not be adjudicated upon at the right time.

Supplementary affidavit and its filing

[29] The applicant had cited the third respondent as the Land Claims Commission. A supplementary notice of motion was then filed on behalf of the applicant to correct the citation to the “Commission on Restitution of Land Rights” and to make some minor editorial corrections to the founding affidavit.¹¹ As these corrections were not intended to change the evidence, I see no reason not to accept the supplementary affidavit and it is accordingly admitted into evidence.

The Argument

Interpretation of section 6(1)

10 Section 30 provides:

- “(1) The Court may admit any evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law.
- (2) Without derogating from the generality of the foregoing subsection, it shall be competent for any party before the Court to adduce-
 - (a) hearsay evidence regarding the circumstances surrounding the dispossession of the land right or rights in question and the rules governing the allocation and occupation of land within the claimant community concerned at the time of such dispossession; and”

11 See para [18] above.

[30] Mr de Villiers argued on what he termed the “principle of legality”. Based on that principle he submitted that the action of the first, second or third respondents in receiving claims for restitution as set out in section 6(1)(a)¹² of the Act, is “subject to the provisions of section 2”. The relevant subsection of section 2 reads:

- “(1) A person shall be entitled to restitution of a right in land if -
- (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
 - (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
 - (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who -
 - (i) is a direct descendant of a person referred to in paragraph (a); and
 - (ii) has lodged a claim for the restitution of a right in land; or
 - (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
 - (e) the claim for such restitution was lodged not later than 31 December 1998.”

[31] Therefore, so the argument went, at the time of receipt of the claim form¹³ in terms of section 6(1)(a), the contents of the form must comply in every respect with section 2(1). In other words, where the claim is by a community, as in this case, the particulars in the claim form must definitively show that the claimant is a community, the community was dispossessed of a right in land, the dispossession took place after 19 June 1913, the dispossession was as a result of past discriminatory laws or practices and the claim was lodged not later than 31 December 1998. Should the particulars in the form fall short of any of the abovementioned criteria, the claim form becomes liable to rejection and the receiving official (the regional land claims commissioner or the Chief Land Claims Commissioner or the designated person) must refuse to receive such form. That should be the end of the claim. Receiving it would make such receipt reviewable and liable to be set aside. Therefore, he argued, in this case the first, second

12 See n 9 above.

13 The claim is lodged formally on a form prescribed by rule 2(1) of the Restitution of Land Rights Rules published in Government Notice R703, Government Gazette 16407, 12 May 1995. The claim form is Annexure “A” to the said rules.

and third respondents must be ordered to reject the claims. I was referred to case law in support of the above argument.¹⁴ These cases deal with the situation where one provision of the law is subject to another, in particular in legislation. The situation can best be illustrated by quoting from *S v Marwane*¹⁵ which is referred to with approval in all three judgments. The quotation from *Marwane* reads:

“The purpose of the phrase ‘subject to’ in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is ‘subject’, is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be ‘subject to’ the other specified one.”¹⁶

[32] While I agree with the interpretation of “subject to” as explained in the *Marwane* case and the other cases referred to by counsel, I do not agree with Mr de Villiers’ proposition that it should be applied the way he suggested with respect to section 6(1)(a) of the Act. To do so, would bring about absurd results in that it would not only negate some of the sections of the Act, but would render the entire Act nugatory. It would negate the following sub-paragraphs of sub-section 6(1) of the Act, some of which require the first, second and third respondents to assist the claimants. See section 6(1)(b) and (cA) above.

Section 11(2) which reads:

“(2) The regional land claims commissioner concerned may, on such conditions as he or she may determine, condone the fact that a claim has not been lodged in the prescribed manner.”

And section 12(3) which provides that:

14 *Sentra-Oes Koöperatief Bpk v Commissioner for Inland Revenue* 1995 (3) 197 (A) at 207C-G; *Zantsi v Council of State, Ciskei and Others* 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at para [27] and *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para [62].

15 1982 (3) SA 717 (A).

16 Above at 747H-748A.

- “(3) If a claimant is not able to provide all the information necessary for the adequate submission or investigation of a claim, the regional land claims commissioner concerned shall direct an officer contemplated in section 8 to take all reasonable steps to have this information made available.”
(my emphasis)

[33] There is another point to bear in mind with regard to the “subject to” clause in section 6, and that is that only subsection 1(a) is so subject to section 2. The rest of section 6 is not subject to section 2. A correct interpretation, therefore, should be that if a claim form is received which falls short of the requirements of section 2, the provisions of the remainder of section 6 must be brought into play to ensure that the provisions of section 2 are complied with. Once they are complied with, the form must then be “accepted” in the sense explained above.

[34] These above sections set the context in which the first, second and third respondents must carry out their functions, namely to assist claimants in the preparation and submission of their claims and to investigate the merits of claims. In other words, the said officials are not just adjudicating referees, but rather are supposed to assist the claimants by finding information where such information cannot be found by the claimant and assist claimants to prepare and submit claims. This means that whether or not a claim form is fully completed, they must investigate the claim and where information is lacking, find it; where the information is complete, investigate the veracity of such information. Indeed it is conceivable that a fully completed claim form might turn out to contain allegations that are not supported by the facts. Yet on the other hand, an incomplete claim form might be found, on investigation, to be a valid claim. To reject the claim at the lodgment stage merely because the claim form is incomplete or some of the information required by section 2 is missing, might result in a worthy claim being rejected. Indeed such an interpretation would render the very existence of either the Commission or the Court unnecessary. Either the Commission receives a foolproof claim, in which case the Commission might as well grant the relief sought, or the claim form may as well be lodged with the Court for the Court to either grant or dismiss the claim without further evidence. Such result cannot have been the intention of the legislature.

[35] It needs to be borne in mind that the majority of the people dispossessed of land rights were poor, semi-literate or even illiterate. The Act enjoins the first, second and third respondents to assist

them. The purpose of the Act, which may be rendered nugatory if Mr de Villiers' interpretation were to be adopted, can be gleaned from the portion of the preamble which reads:

“AND WHEREAS legislative measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken to promote the achievement of equality;”

[36] An interpretation of section 6(1) that would be consonant with the Act and its purpose is one which reads into the word “receive” where it appears in that subsection, the word “accept”. In other words, if a claim form is defective in any of the respects listed in section 2, the first, second or third respondent must act in terms of section 6(1)(b) to complete the form fully and then “accept” the claim form for further investigation of the merits of the claim. I therefore disagree with Mr de Villiers' submission that Dodson J applied a limited test in *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal*¹⁷ because he did not investigate the “subject to” clause in section 6(1).

[37] Section 11(1)(b) reads as follows:

“(1) If the regional land claims commissioner having jurisdiction is satisfied that -

(b) the claim is not precluded by the provisions of section 2;

...

he or she shall cause notice of the claim to be published in the Gazette and shall take steps to make it known in the district in which the land in question is situated.”(my emphasis)

It is clear from this subsection that the regional land claims commissioner must be satisfied that the claim is not precluded by section 2. To be so satisfied, the relevant regional land claims commissioner must investigate the case. In investigating the case he or she may, and does often, research information which is not necessarily contained in the claim form, but which is relevant to the claim. He or she will not always be satisfied by only the information supplied in the claim form, as such information is usually scanty and cryptic.

17 1998 (2) SA 900 (LCC); [1998] 1 All SA 490 (LCC).

[38] In response to a question from the bench, Mr de Villiers submitted that the person responsible for opening mail in the first respondent's office must reject off-hand any claim forms falling short of the requirements of section 2 of the Act at that stage of opening the mail. I cannot agree with this submission. The logical conclusion of this submission is that very few restitution claims would be entertained. In my experience virtually all cases before this Court have had defects in the claim forms, which defects were cured by the investigations and research carried out by the staff of the regional land claims commissioner concerned. The Act sets out to redress injustices of racial discrimination. The vast majority of people dispossessed of rights in land were either poorly educated or not educated at all. To use their illiteracy (the result of past racial discrimination) to deny them access to redress of past racial discrimination (which is the purpose of the Act) is to thwart that very purpose.

[39] The first, second and third respondents stated in their affidavits that a decision to either accept or reject the claims of the fourth and/or fifth respondents relating to the Croc Ranch has not yet been taken. No evidence to suggest the contrary has been proffered. There is only the argument that they should have been rejected immediately on receipt. That they were not so rejected does not mean that they are therefore accepted. The first, second and third respondents stated that they have not yet applied their minds to that issue because of lack of capacity, and the prioritising of the claims.

[40] In the light of my finding on the interpretation of section 6(1)(a); the explanation of the first, second and third respondents that they have not yet applied their minds to the claims of the fourth and/or fifth respondents relating to the Croc Ranch and the absence of any evidence to suggest the contrary, I find that the first, second and third respondents have not yet applied their minds to the rest of the matters raised in the notice of motion. Therefore, but for the prioritisation, there is no decision of the first, second or third respondent to be reviewed or set aside.

[41] The applicant appears to use a deductive argument in alleging that such decisions exist and the deduction seems to go somewhat as follows:

[42] The first, second and third respondents should have rejected the claims immediately on receipt of them because section 6(1)(a) is subject to section 2. They have not so rejected the claims. Therefore

they took the decisions not to dismiss the claims as frivolous or vexatious (prayer 1.2); alternatively not to advise the fourth and fifth respondents that their claims do not meet the acceptance criteria of the Act (prayer 1.3); not to advise the fourth and fifth respondents that their claims do not meet the acceptance criteria of the third respondents rules (prayer 1.4) that the factual basis for the claims submitted by the fourth and fifth respondents have to be investigated by the first respondent, alternatively the second respondent, alternatively the third respondent (prayer 1.5).

[43] Prayer 1.6 deals with the decision to prioritise certain claims over claims for the Croc Ranch. This is not entirely correct. The batch of five claims prioritised in annexure “FP” to the founding affidavit, it was explained, includes claims for the Croc Ranch. These are claims at paragraph (v) being “all claims involving private farms and game reserves”. These claims may be at the bottom of the prioritised batch, but they are nonetheless prioritised over all other claims in the first respondent’s office. In addition, a dedicated staff member has been transferred from one office to come and attend specifically to these claims. The publication of certain claims¹⁸ by the family of four tribes in the Government Gazette¹⁹ before others is a consequence of the prioritisation made in annexure “FP”.

[44] It was contended on behalf of the applicant that the prioritisation is prejudicial to the applicant because prospective investors in the applicant’s eco-tourism venture are turned off by the claims on the Croc Ranch. This is a market force which cannot be helped. It is in the nature of the restitution process that any land subject to a claim will not be as attractive to would-be investors as land free of such a claim. This however, does not mean that claims lodged with respect to land that may be of interest to prospective investors should always be prioritised above all else. .

18 The claims described in annexure “FP” as “(i) All claims involving the area within the Kruger National Park between the Great Letaba and Olifants Rivers.”

19 General Notice 2550 published in Government Gazette 21357, 14 July 2000.

[45] Prayer 1.7 deals with the alleged failure to provide reasons for the decisions and actions referred to above. But for the decision to prioritise, no decision has been taken or action undertaken, hence there can be no reasons to provide. Reasons for prioritisation have been given.²⁰

[46] Prayer 1.8 deals with the alleged decision not to take any steps to finalise the claims submitted by the fourth and fifth respondents. I have just referred to the publication of some of the claims by the family of four tribes in the Government Gazette. Such publication is done in terms of section 11(1) of the Act, and is a step towards finalising the claims. I mention in passing that in the first, second and third respondents' supplementary answering affidavit it is mentioned that Mr Kotsedi Caiphus Mothibe is the staff member who was transferred from the Regional Land Claims Commissioner's office in the Northwest Province to attend to the claims by the family of four tribes. I notice also that Mr Mothibe is involved in this application, as he has deposed to an affidavit. It is not clear to what extent, if at all, his involvement in the case affects progress towards finalising the fourth and fifth respondents' claims.

[47] Prayers 2 and 3 are for certain specific orders. Prayer 2 seeks an order declaring that the claims submitted by the fourth and fifth respondents do not meet the acceptance criteria of the Act. Prayer 3 seeks an order dismissing the claims submitted by the fourth and fifth respondents as frivolous or vexatious. To grant the two prayers would be premature and irregular, because that would be tantamount to reviewing decisions and/or actions which have not yet been carried out by the first, or second or third respondent.

[48] Prayers 4 and 5 seek an order compelling the doing of certain actions by the first, second or third respondents or referring the matter back to one of the said respondents to do certain actions. Similarly to prayers 2 and 3 above, such orders would not only be premature but would also be irregular for the same reasons.

[49] Prayer 6 relates to costs. Before I deal with the question of costs, I want to deal with some issues raised in relation to the merits, which were not spelt out in the order prayed.

20 See paras [14] and [19] above.

[50] Mr de Villiers contended that the fifth respondent substituted the fourth respondent in the claim for the farms Glip, Brand and Ram after 31 December 1998,²¹ and therefore such substitution should be declared invalid as it occurred after the deadline. Mr Havenga argued that if a -

“claimant had an incorrect understanding of the nature of the rights held and later on, as more information becomes available during the investigation, amends the claim to correctly reflect the nature of the rights, this would be in order as it would not affect the validity of the claim.”

Mr Havenga continued to argue that the first respondent has a duty in this respect, in terms of rule 5(a), to ensure that outstanding information required in respect of the claim to establish the law the furthering of whose objects the dispossession occurred, and to investigate the nature of the right claimed.²²

[51] The problem I have with Mr de Villiers' submission is that even if he may be right (which I am not deciding) that such a substitution is invalid if it occurred after 31 December 1998, the first or second or third respondent still has to consider whether the joint claims (as supplemented by the separate claims of the fourth and fifth respondents which were lodged before 31 December 1998) are valid or not. Another issue to be decided (and which I am also not deciding) is the assertion by the Ba-Phalaborwa tribe that they are one community, and if so, the effect of a claim lodged by one part (the fourth respondent) of the community on behalf of another part (fifth respondent) or the whole community. Until the first respondent has applied his mind to the claim, it would be premature, in my view, for me to determine these issues.

[52] Another issue which was argued on behalf of the applicant was the effect of annexure “FK”. It was argued that the Regional Land Claims Commissioner had written to the Ba-Phalaborwa, including the fourth and fifth respondents, to the effect that their claims did not meet the acceptance requirements, therefore the first, second and third respondents are bound by annexure “FK”. (Let me mention here that the Regional Land Claims Commissioner who wrote annexure “FK” has since left that office and

21 See section 2(1)(e) of the Act.

22 Rule 5(a) of the Restitution of Land Rights Rules. See n 13 above.

the author of annexure “FP” is a different person). What is not mentioned in this argument is the fact that annexure “FK” was written for a purpose other than the rejection of the claims. Annexure “FK” was written to explain why the sale of some other farm (not forming part of the Croc Ranch) could not be interdicted, as it was not clear whether that farm falls within the area claimed.

[53] Furthermore, annexure “FK” states elsewhere that-

“[t]his does however not imply that any claim against the land by members of the Ba Phalaborwa Community or any other community which in the past fell under the jurisdiction of the Ba Phalaborwa is excluded. In this regard please take note that the closing date for instituting restitution claims for rights in land in terms of the Restitution of Land Rights Act 22 of 1994 is the 30th April 1998.” (my emphasis)

The last sentence of this quote quite clearly indicates that the claimants were at liberty, in the view of the author, to file new claims which comply with the requirements. It was always open to the claimants to amend the claims they had already lodged. This was done by the lodging of the eleven claims through attorney Mr Steytler, which claims were said to supplement the earlier claims. The closing date for the lodging of claims for restitution of land rights in terms of the Act was extended to 31 December 1998.²³ The claims lodged by Mr Steytler on behalf of the Be-Phalaborwa were therefore lodged in time. Clearly the situation has changed dramatically since the writing of annexure “FK”. It is for the first, second or third respondent to assess the claims as supplemented and decide whether they meet the requirements. This has yet to be done.

[54] It was also argued on behalf of the applicant that the applicant has *locus standi* to bring these proceedings by reason of item 23 of Schedule 6²⁴ to the Constitution.²⁵ The relevant portion reads as follows:

“(2) Until the legislation envisaged in sections 32 (2) and 33 (3) of the new Constitution is enacted-

23 See section 2 of the Act as amended by section 3(1) of the Land Restitution and Reform Laws Amendment Act, 63 of 1997.

24 Item 23 of Schedule 6 to the Constitution has since been superseded by the Promotion of Access to Information Act, 2 of 2000 and the Promotion of Administrative Justice Act, 3 of 2000.

25 The Constitution of the Republic of South Africa, Act 108 of 1996.

- (a) section 32 (1) must be regarded to read as follows:
 - '(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.'; and
- (b) section 33(1) and (2) must be regarded to read as follows:
 - 'Every person has the right to-
 - (a) lawful administrative action where any of their rights or interests is affected or threatened;
 - (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
 - (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
 - (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened' . ”

[55] I have already found that the first, second or third respondents have not yet applied their minds to the claims by the fourth and fifth respondents. It was argued on behalf of the fifth respondent that the act of prioritising was not a reviewable act within the meaning of the Act. I disagree. The Act provides that this Court may review any act or omission of the first, second and third respondents.²⁶ However, to the extent that the first respondent prioritised certain claims, the applicant was furnished with the relevant reasons. There is nothing irregular about the prioritisation. On the other hand, the first respondent is enjoined by section 11(6) of the Act to advise the owner of land of the publication of a notice in terms of section 11(1). The Croc Ranch or any of the properties constituting the Croc Ranch is not among the properties the claims of which have been published in terms of section 11(1). To the extent that such publication is viewed by the applicant as prioritisation, the first, second and third respondents were under no duty to inform the applicant of such publication.

[56] The other issue raised was that the claims were dealt with in a jumbled and piecemeal fashion. It might have appeared so to the applicant or might indeed have been so, but I fail to see why that should be of concern to the applicant. However jumbled and piecemeal the approach to the claims

26 See section 36 of the Act.

might be, the first respondent had his reasons²⁷ for that approach. Some of the reasons given by the first respondent are factors that the Act stipulates²⁸ must be considered in prioritising claims. The reasons given by the first respondent are that the claims prioritised over those relating to the Croc Ranch involve a lot more farms than the Croc Ranch farms; all four tribes (forming the family of four tribes) are involved in those claims; it is easier to get transfer of the farms prioritised over the Croc Ranch because they are state-owned and the claims involve more people than the people involved in the Croc Ranch claims. These many people are also said to have suffered substantial losses, including loss of mineral rights, as a result of the dispossession. While I do not agree that the claims are dealt with in a jumbled and piecemeal fashion, I do not understand how a jumbled and piecemeal approach can be a ground for review of the first, second or third respondents' decisions or actions.

[57] It was also contended that mining was given as a reason for prioritisation, yet there is no mining on any of the prioritised farms. In this regard Mr de Villiers referred to some of the farms on documents entitled "Schedule claim 2A" and "Schedule claim 2B" namely Genoeg 15 LU; R/E of Leeuwkop 10 LU; Portion 1 of Leeuwkop LU; R/E of Baderoukwe 11LU; R/E of N'Dole 12 LU; R/E of Sable 13 LU; R/E of Belasting 7LU; Portion 1 of Belasting 7LU; R/E of Portion 2 of Belasting 7LU and Portion 3 of Belasting 7LU as prioritised farms yet no mining is carried out on any of them. However, the applicant did not dispute the assertion by Mr Thabo Donald Seneke, deponent to first, second and third respondents answering affidavit, that the term "Letaba Ranch claims" refers to claims covering Letaba Game Reserve, part of the Kruger National Park and Phalaborwa Town inclusive of the areas of the Phalaborwa Mining Company and the Foskor Mine.

[58] The next issue raised on behalf of the applicant was that the farms Remaining Extent of Belasting 7LU; Portion 1 of Belasting 7LU; Remaining Extent of Portion 2 of Belasting 7LU and Portion 3 of Belasting 7LU are claimed by only one of the family of four tribes (the Selwane tribe) therefore not many people are involved in that claim. That being the case, so the argument went, these claims should not have been prioritised. I cannot agree with this submission. The factors to be taken into account

27 See paras [14] and [19] above.

28 See section 6(2)(d).

when prioritising go beyond the number of people affected. The first, second and third respondents did not give a reason or reasons for each prioritised claim, but stated the reasons they gave as affecting the prioritised claims generally. It is quite conceivable that some of the reasons applied to some of the claims only and not to all. The applicant did not enquire from the first, second and third respondents which reason applied to which claim. It may be that these farms were prioritised because of one or some of the other reasons given.

[59] Finally it was argued on behalf of the applicant that the applicant had no other way of defending the claims of the fourth and fifth respondents other than by launching this application. This is obviously incorrect. It is open to the applicant to oppose the claims once it has been notified of them in terms of section 11(6).

Costs

[60] The applicant prayed for a costs order against the fourth and/or fifth respondents on the ordinary scale, against the second and/or third respondents jointly and severally with any costs order against the first, fourth and fifth respondents also on the ordinary scale and against the first respondent on an attorney and client scale jointly and severally with any order against the second, third, fourth and/or fifth respondents. However, in argument the order was asked for in the following manner:

- (a) costs on an attorney and client scale against the first, second and third respondents and
- (b) costs on the ordinary scale against the fifth respondent.

[61] I deal first with costs claimed against the first, second and third respondents. It was contended that the record of the decision taken by the first, second and third respondents to prioritise the Letaba Ranch claims had not been filed; that letters to the State Attorney, the first, second and third respondents went unreplied; that the first, second and third respondents opposed the application on technicalities and that the first respondent said he was going to oppose the application at all costs.

Record of decision to prioritise Letaba Ranch claims

[62] The applicant's attorney first wrote to the first respondent on 9 June 2000 demanding that the first respondent reject the claims of the fourth and fifth respondents. That letter is annexure "FL" to the founding affidavit. The next letter (annexure "FM" to the founding affidavit) was written on 3 July 2000. The letter refers to the discussion on 14 June 2000 between Mr Mothibe (presumably the official transferred from Northwest Province to deal with the claims of the Ba-Phalaborwa) and Mr Bekker (the applicant's attorney). In the discussion of 14 June 2000 Mr Mothibe informed Mr Bekker that the applicant's matter had not been investigated yet as Mr Mothibe was busy with the investigation of claims relating to Letaba Ranch and that the Letaba Ranch claims had been prioritised. Yet another letter (annexure "FO" to the founding affidavit) was written by the applicant's attorneys on 6 July 2000. In this letter reference is made to a telephone conversation between Mr Mothibe and Mr Bekker on 5 July 2000. Annexure "FO" confirms that:

- (a) Mr Mothibe was preparing a written reply to the letters of 9 June 2000 and 3 July 2000.
- (b) Mr Mothibe stated that a meeting would be held the following day pertaining strictly to the Letaba Ranch dispute.
- (c) Mr Mothibe stated that the Commission on Restitution of Land Rights would not reject the claims for the Croc Ranch without further investigation.
- (d) Mr Mothibe had only been appointed (supposedly transferred) on 9 May 2000 and had only been able to investigate claims on Letaba Ranch and Kruger Park.

No record of a decision in the sense of a record of the proceedings leading up to a decision, was requested in these letters. Indeed annexure "FL" states, among others, "[p]lease advise us when we can expect a decision by you whether you accept the claim."

[63] On 7 July 2000 the first respondent wrote annexure "FP", being the written reply promised in the discussion of 5 July 2000. Annexure "FP" sets out the chronology of the prioritised claims, including

claims against the Croc Ranch. The penultimate paragraph of annexure “FP” sets out the circumstances under which, in the view of the first respondent, a decision in terms of section 11(4) of the Act may be taken. Naturally there can be no record of a decision which has not been taken yet. The reason for the decision to prioritise was also given in annexure “FP”, as ease of transfer of state-owned farms as compared to transfer of privately-owned farms. Obviously transfer of privately owned farms is preceded by negotiations for the price, followed, where no agreement is reached, by an expropriation process which may end up in court proceedings. Further reasons for the prioritisation were filed during the prosecution of this application. That notwithstanding, the applicant persisted in being given “relevant documentation” without saying what documentation that was. The applicant also insisted on being given a file it was clearly told is irrelevant and confidential. The file was not given to the applicant as it was irrelevant and confidential. I am satisfied that there is no record of a decision to prioritise as such a decision, by its very nature, does not follow on an inquiry or some hearing. It is reached after perusing the claims and then applying the requirements of section 6(2)(d).

Letters to the first, second and third respondents not replied

[64] From an analysis of the decision to prioritise above it is clear that five days after the first letter (annexure “FL”) was written, Messrs Mothibe and Bekker were in discussion during which certain answers were given. Then again on 5 July 2000, two days after the writing of annexure “FM”, another discussion between the two men ensued, followed by a written reply by Mr Mothibe two days later. This reply (annexure “FP”) provided the applicant with what was needed to decide either to accept the reply or to launch the motion proceedings. However, the applicant persisted in writing letters repeating its demands. The subsequent letters are:

(1) Annexure “FQ” dated 19 July 2000. In this letter it is stated, among other things, that:

“5 The purpose of this letter is further to demand within fourteen days a proper response to our client’s demand that you:

5.1 Reject the claims by the Baphalaborwa ba gaMaseke tribe and the Ba gaiSha tribe (*sic*) (‘the claimants’) and by the ‘Ba-Phalaborwa Ba-Shai Ga-Mashishimale’ tribe to our client’s land;

Alternatively and should you accept the claimants’ claims,-

5.2 Provide our client with reasons for your decisions;” (my emphasis)

and

(2) Annexure “FS” dated 25 August 2000 (after issuing the notice of motion): addressed to the State Attorney. In this annexure the following is mentioned about decisions and records of decisions:

“5.3 You further informed the writer that Mr Seneke had brought 3 (three) files with him relating to the Croc Ranch Farms but that neither you nor Advocate Shakwane [presumably Shakoane] had to date had the opportunity to go through these files.

5.4 You further advised that you doubt whether there is any record and that reasons would therefore have to be constructed after perusal of the files and further consultation with Mr Seneke.

...

7 Firstly, with regard to your request for a postponement to dispatch to the Registrar the record of the proceedings and all documents relevant: . . .”

The above paragraphs appear to be contradictory. Firstly the State Attorney is said to have expressed doubt that there is any record, yet he is said to seek a postponement to enable him to despatch the record to the Registrar of this Court. Again, the applicant is persisting with issues already disposed of in annexure “FP”.

[65] I have another concern with correspondence from the applicant’s attorneys, namely that the letters are unnecessarily long. Annexure “FL” is eight pages; annexure “FM” is five such pages; annexure “FQ” is twelve pages; annexure “FS” is five pages. In the main they are repetitive, and burden the record. The Notice of Motion and affidavits in support of the application are also unnecessarily long and tautologous.

First, second and third respondents opposed application on technicalities

[66] It was argued on behalf of the applicant that the first, second and third respondents opposed the application on technicalities. No examples of the technicalities raised by the first, second and third

respondents were given. Therefore, I am not able to agree with applicant's counsel on this submission. If, however, by technicalities the applicant refers to the points raised by the first, second and third respondents relating to *locus standi* of the applicant and the name of the third respondent, then the issues need to be seen in perspective.

[67] Firstly, a defence of lack of *locus standi* is a valid defence, which, if sustained, has the distinct advantage of curtailing legal proceedings. It is trite law that anybody purporting to act for another (in particular a legal persona such as a company) must furnish his or her authority to so act. Secondly, the mis-citation of the third respondent was not raised as a defence but as a mere fact.

[68] The applicant is also guilty of litigating on technicalities. It forced a postponement because heads of argument were filed late.

Opposing the application at all costs

[69] I fail to understand the applicant's complaint about this issue. Anybody who has doubt about the righteousness of his cause is well advised to negotiate a settlement. However, it would be folly for anyone convinced of the veracity of his cause not to defend that cause at all costs unless a settlement provides him with satisfactory results. Whether that is expressly stated or not is immaterial. Indeed I would be surprised if the applicant itself did not prosecute these proceedings at all costs.

[70] The first, second and third respondents asked, in their answering affidavit, that the application be dismissed with costs on an attorney and own client scale. At the hearing of argument, Mr Shakoane, for the first, second and third respondents asked for such costs to be paid *de bonis propriis* by the applicant's attorney. This latter prayer evoked an objection that the applicant's attorney needed notice of intention to apply for an order *de bonis propriis*. Argument had started in this matter on 17 January 2001 when the matter was postponed. The matter came up again for argument on 9, 12, 13 and 14 March 2001 and then again on 16 and 17 May 2001. The application for an order for costs *de bonis propriis* was made on 13 March 2001. Both Mr de Villiers and Mr Havenga (for the fifth respondent)

argued that there is a rule of practice requiring notice to be given before an order *de bonis propriis* is made. The rule, they argued, is premised on the following:

- (a) the need to observe the *audi alteram partem* rule
- (b) the fact that the attorney is not a party to the proceedings so he/she may need to arrange his/her defence
- (c) the fact that, because he/she is not a party to the proceedings, at least up until the order is applied for, he does not run the risk of a costs order.

[71] After argument on the question of notice to the attorney of a prayer for a costs order *de bonis propriis*, the application (for costs *de bonis propriis*) was postponed to a date to be arranged and the Court asked Mr Havenga and Mr de Villiers to submit authority for their contention. The Court is indebted to the two legal representatives for their submissions. However, as the main application also had to be postponed from 14 March 2001 to 16 May 2001, the application for costs *de bonis propriis* was also heard during the two days (16 and 17) in May 2001.

[72] The grounds for asking for costs *de bonis propriis* were given as follows:

- (a) The application for a postponement on 17 January 2001 was voluminous and yet the reason for the postponement was not clear.
- (b) The time spent preparing the postponement application could have been spent reading the first, second and third respondents heads of argument.
- (c) “Scurrilous attacks” on the first, second and third respondents were made in the papers.

- (d) Allegations were made of conspiracy between the first, second and third respondents on the one hand and the fifth respondent on the other.
- (e) The applicant filed a supplementary affidavit without leave of the Court.

[73] I deal with the grounds *seriatim*:

(1) Application for postponement on 17 January 2001

I have already dealt with this issue.²⁹

(2) Time spent preparing postponement application

Mr de Villiers answered the argument that he spent time preparing for the application for a postponement instead of reading the heads of argument on behalf of the first, second and third respondent by saying that he did analyse the cases but because the Court suggested a change of approach (when the Court suggested agreements on technicalities) he also changed his strategy. He handed his analysis from the bar. The analysis was not done before 17 January 2001. I am satisfied with Mr de Villiers' explanation on the point.

(3) “Scurrilous Attacks”

The applicant made certain attacks on the respondents patently and insinuated others. The allegation that was repeated quite often was to the effect that the first, second and third respondents have not furnished the “record of decisions” or “all relevant documents”. This, despite having been told by the first, second and third respondents that all relevant documentation had been furnished to it and that there is no record of

29 See paras [20] - [25] above.

decisions. The insinuation of these assertions by the applicant was that these respondents were being dishonest.

There was attribution of hostility to the first, second and third respondents.

The applicant alleged that the first, second and third respondents have decided to oppose the application at all costs “at public expense”, suggesting extravagance and financial recklessness on their part with the tax payers’ money.

(4) Conspiracy between the respondents

There were allegations of collusion between the first, second and third respondents on the one hand and the fifth respondent, on the other, with respect to drafting affidavits.

I have already referred to the allegations that the respondents enjoyed certain relationships with Court officials and judicial officers and that they communicate with such officers behind the back of the applicant.

(5) The applicant filed a supplementary affidavit without leave of the Court

It is true that the applicant filed a supplementary affidavit without leave of the Court, but such irregular step was one of the technicalities the Court admonished against taking advantage of at the beginning of argument. The parties agreed to resolve these issues by negotiations to enable the Court to deal with the merits.

The fifth respondent prayed for costs on an attorney and client scale against the first, second and third respondents resulting from the postponement on 17 January 2001 if the Court found that failure to file heads was the reason for the postponement, otherwise applicant must pay such costs. The grounds for the higher scale were that the fifth respondent is an innocent party and is suffering; that the leaders of the fifth

respondent came from Phalaborwa to hear the case on 17 January 2001 only to return without hearing it.

The fifth respondent also asked for attorney and client costs against the applicant on the following grounds:

(1) That the applicant was advised of the true facts regarding the taking of decisions, but consistently ignored those facts. I have already dealt with this issue above.

(2) The accusation of dishonesty such as the allegation stating:

“The lie that all four Ba-Phalaborwa tribes submitted claims and the inferences to be drawn from that.” (my emphasis)

and

“It is insulting to describe the drafting by the other respondent’s counsel as ‘a clumsy attempt’. He conveyed his instructions on the reasoning. It is dishonest to fabricate reasoning after the event, not clumsy to record instructions. As stated, I submit that counsel’s instructions were false in any event.”(my emphasis)

To object to a description “clumsy attempt” and in the same breath accuse an opposing colleague of dishonesty, fabrication and falsehood is incomprehensible.

(3) The submission that the fifth respondent litigates by ambush

This allegation of ambush litigation was made by counsel for the applicant in his argument. I do not believe that it is in bad taste to make such submission, provided it is true. In this instance, the dissatisfaction with the submission emanates from the fact that the submission is based on a claim that certain documents should have been furnished earlier; yet in the same breath it is

conceded that there was no duty to furnish such documents. If there was no duty there can be no ambush. On the contrary the applicant's counsel should have been grateful for the documents.

[74] An award of costs on the attorney and client scale is said to be based on "special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party . . ." ³⁰ I am satisfied that the special considerations mentioned above about the circumstances which gave rise to the action and the conduct by the applicant of its case, justify an award of attorney and client costs. In addition to the abovementioned special considerations there is the fact that the applicant concedes that if certain documents filed in the case by the fifth respondent are intended to supplement the claim by the fifth respondent for restitution of Croc Ranch, then the fifth respondent's case is supplemented. This concession was made as early as in the founding affidavit, yet the applicant persisted with the application. The applicant's case has always been that the fifth respondent's claim does not meet the requirements of the Act. When the fifth respondent has filed documents which make its claim to meet such requirements, I fail to understand how the applicant can say that it does "not know whether this document is intended to supplement the claims bundle If it forms part of the fourth and fifth respondents' claim documents, these papers will be supplemented." In any case if the applicant did not know whether the documents are intended to supplement the fourth and fifth respondents' claims, the simplest and most inexpensive way to find out, was a telephone call or letter to the fifth respondent's attorney, rather than find out through litigation. Had the applicant made such inquiry there would not have been any need for litigation. This conduct calls for censure.

[75] Whether the costs order should be *de bonis propriis* depends on the conduct of the legal representative. Examples of such conduct are serious cases such as "dishonesty, wilfulness or negligence in a serious degree". ³¹ The attorney for the applicant conducted himself in a reprehensible manner in these proceedings, by prosecuting a case he had conceded; by the language he used against his

30 *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607. See also *Epstein and Payne v Fraay and others* 1948 (1) SA 1272 (W) at 1276.

31 *Cilliers Law of Costs* 3rd ed (Butterworths, Durban 2000) at para 10.25.

colleagues, government officials and judicial officers; by suggesting dishonesty, and deceitfulness on the part of his colleagues and by burdening the record with repetitive prayers and allegations. With regard to this kind of behaviour, the learned author Cilliers³² had this to say:

“In recent years the court has often warned practitioners that they may be ordered to pay unnecessary costs *de bonis propriis* in certain circumstances. Such warnings have occurred where there had been a gross delay in seeking amendments, where an attorney had failed to comply with rule 16(4), or where there had been unnecessary documentation.”

Later the learned author says:

“[t]he court made it clear, however, that its discretion to award costs *de bonis propriis* is not restricted to cases of dishonest, improper or fraudulent conduct and that no exhaustive list existed: it includes all cases where special circumstances or considerations justify such an order.”³³

[76] Applicant’s attorney must be warned that his conduct in this case technically falls within the ambit of circumstances justifying an order *de bonis propriis*. Should this manner of conducting litigation be repeated, this Court will not hesitate to give such an order.

Order

- (1) The application is dismissed.
- (2) The applicant to pay costs on an attorney and client scale, such costs to include costs occasioned by the postponement on 17 January 2001.

ACTING JUDGE J MOLOTO

32 Above n 31.

33 Above n 31 at para 10.25.

For the applicant:

Adv De Villiers instructed by *Jurgens Bekker Attorneys, Johannesburg.*

For the first, second and third respondents:

Adv Shakoane instructed by the *State Attorney, Johannesburg.*

For the fifth respondent:

Adv Havenga instructed by *Steytler Nel & Calitz attorneys, Pietersburg.*