IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at RANDBURG on 7 - 10 Oct 2002, 1 Nov 2002, 9 Dec 2002 **CASE NO**: LCC 3/00
before **Moloto AJ** and **Wiechers** (Assessor)

Decided on: 23 December 2002

In the matter of

THE NDEBELE-NDZUNDZA COMMUNITY

concerning

THE FARM KAFFERSKRAAL NO 181 JS

JUDGMENT

MOLOTO AJ:

[1] The Ndebele-Ndzundza Community claimed restitution of a right in land known as the farm Kafferskraal No 181 JS in the district of Groblersdal, Mpumalanga Province, measuring 4 210,8312 hectares in extent, in terms of the Restitution of Land Rights Act[1] ("the Act"). I shall refer to it as "the farm". The farm has undergone some name changes over time. It was first known as Kafferskraal No 1330, then Kafferskraal No 62 and finally, Kafferskraal No 181 JS. Originally it was part of the district of Middelburg. It has since been subdivided into several portions and some portions were consolidated again. It is now subdivided into three portions. These three portions have existed from at least 1902 to date. The claim included seventeen other farms, but the claim for these is still being processed in the Regional Land Claims Commissioner's (RLCC) office. No explanation for the separation of the claims has been proffered.

[2] The claimant is a branch of the Ndebele called the Ndebele-Ndzundza tribe, residing on a farm called Goedgedacht (also known as "Goedehoop") in the Nebo district of the Limpopo Province. The claimant elected a committee called Sibuyela Ekhaya Land Claims Committee to

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1 Act 22 of 1994, as amended.

prosecute the land claim on behalf of the Community. The Committee in turn authorised its Chairman, Mr Zulu Simon Shabangu, to act on its behalf in prosecuting the claim and to sign all documents relating to the claim. A copy of the resolution of the claimant and the Committee, as well as a list of the names of the members of the claimant form part of the documents in support of the referral of the claim by the RLCC to the Land Claims Court in terms of section 14(1) of the Act.

[3] The participating parties initially comprised the Department of Land Affairs ("DLA"), against whom the claim lies, the respective owners of portions 1, 2 and 3, being Doringvallei Boerdery, Mrs M C Prinsloo, the Botha Family Trust, and the respective bondholders over portions 1 and 2, being the Land and Agricultural Bank of South Africa and ABSA Bank of South Africa. The Land and Agricultural Bank and ABSA Bank withdrew their opposition against an undertaking by the DLA that in the event that the Court orders restoration of the farm to the claimants, the indebtedness to the bondholders would be settled before payment of any compensation to the owners of the various portions. At the beginning of the hearing of the case the attorney for Doringvallei Boerdery advised that a settlement had been reached between her client and the claimants. The terms of settlement have not yet been disclosed to the Court, presumably pending a decision on the opposition by the other two landowners. The trial proceeded in respect of Portions 2 and 3 only. I shall refer to the owners of Portions 2 and 3 collectively as "the opposing parties". The DLA supported the claim.

[4] The parties agreed to refer to trial, in terms of rule 57 of the Rules of Court, the question whether the claim is valid, before dealing with the rest of the case. Put differently, the issue to be determined is whether the claimant is entitled to restitution as contemplated in section 2 of the Act. The relevant portions of section 2 read-

> "(1) A person shall be entitled to restitution of a right in land if-
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> . . .
>
> (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
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> (e) the claim for such restitution was lodged not later than 31 December 1998.
>
> (2) No person shall be entitled to restitution of a right in land if-

(a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or

(b) any other consideration which is just and equitable,

calculated at the time of any dispossession of such right, was received in respect of such dispossession".

A "person"includes a community or part thereof.[2]

[5] A "right in land" means

"any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question".[3]

Finally "racially discriminatory practices" means

"racially discriminatory practices, acts or omissions, direct or indirect, by-

(a) any department of state or administration in the national, provincial or local sphere of government;

(b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation".

[6] In order to determine whether the claimant is entitled to restitution as contemplated in section 2 of the Act certain questions need to be answered. These are:

(a) whether there was a community as contemplated in the Act on the farm at any stage after 19 June 1913, and if so, what the identity of that community was.

(b) If there was such a community, what rights in land such community held in respect of the farm.

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2 Section 1 of the Act.

3 Section 1 of the Act.

(c) If the community held a right or rights in land in respect of the farm, whether there was a dispossession of such right or rights as a result of past discriminatory laws or practices.

An answer to this question will entail the following:

(i) When the dispossession occurred, if it did take place at all.
(ii) By whom the community was dispossessed of such right or rights.
(iii) How the community was dispossessed of the right or rights.
(iv) Whether the dispossession was as a result of past racially discriminatory laws or practices.

(d) Whether a claim was lodged for restitution of those rights in compliance with section 2(1)(e) of the Act and whether there was substantial compliance with the procedure prescribed for lodgement of claims in terms of section 10 read with section 6(1)(a) and rule 2[4] of the Rules[5] of the Commission on Restitution of Land Rights ("the Commission"). The answer to these questions include the following:

(i) Whether the claim was lodged by the community or part of the community.
(ii) By whom and when the claim was lodged.
(iii) Whether the person or persons who lodged the claim was or were duly authorised.

(e) Whether the claim is not excluded in terms of the provisions of section 2(2).

To answer the above question the following must be answered.

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4 Rule 2 has been repealed by Government Notice R706 of 2001.

5 The Commission's Rules are contained in Government Notice 703 published in Government Gazette 16407 of 12 May 1995, as amended.

(i) Whether the claimant received any compensation as contemplated in section 25(3) of the Constitution[6] or any other consideration.

(ii) Whether such compensation or consideration if calculated as at the time of dispossession would have been just and equitable.

I proceed to examine the evidence in answer to the above questions:

(a) **Whether there was a community as contemplated in the Act on the farm at any stage after 19 June 1913, and if so, what its identity was.**

[7] Evidence on behalf of the claimant was to the effect that the history of the claimant starts with Ndzundza who is the first known leader of the tribe. A chart showing the succession of the Kings and Chiefs of the claimant was handed into evidence by consent and marked Exhibit "D". Exhibit "D"was said to have been prepared on behalf of the opposing parties. It listed Ndzundza as the first King of the tribe, with subsequent Kings' and Chiefs' names to the present day. Mr Mbulawa Abraham Mahlangu ("Mahlangu") testified for the claimants. He stated that he was born on 12 September 1938. He is a member of the Ndebele-Ndzundza tribe. He has a sound knowledge of the history of the Ndebele-Ndzundza community, having developed an interest in the community's history in 1962. His knowledge of the history of the community starts with Ndzundza and extends to Ndzundza's descendants and other Chiefs. Mabhoko (mentioned in Exhibit "D") was one such Chief. Although it was not expressly stated, it seems Mabhoko is the person whose name was later misspelt as Mapoch and after whom the Mapoch War and Mapochsgronde are named. Mahlangu testified that the Ndebele-Ndzundza community, under these Kings and Chiefs, occupied the area from Mapochsgronde (where Mabhoko had built a fortress for the community) and Roossenekal in the east to the Olifants River in the west, including the farm. The history of the fortress, the war with Mzilikazi and the Mapoch War make interesting reading but are not absolutely relevant for purposes of this judgment. At the time of such occupation, before whites came to the Transvaal, the area so occupied was not divided into farms, it was just land of the Ndebele-Ndzundza community. The community established itself on this land, reared livestock and cultivated the land.

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6 Act 108 of 1996.

[8] Mahlangu testified further that in 1883 a war broke out between the white government of the Republic of the Transvaal and the community and the war was called the Mapoch War. The community was defeated and the Government split the community. The Volksraad of the Republic of the Transvaal decided to "break up the nation of Mapoch". The community's land was subdivided and allocated to whites who would be conferred with ownership of their allotments after staying on them for 18 months. Preference was given to the whites who had fought in the Mapoch War. The Ndebeles who had fought under Nyabela (one of the Chiefs) against the Republic were ordered to be indentured for 5 years on farms in the area and the rest of the then Transvaal. To date the indenture was never formally terminated. That way the claimant's land was given to whites. The community was scattered around on the same land between Mapochsgronde and Olifants River. Those belonging to royalty stayed on the farm. Mahlangu's father and grandfather, Jafta Madzidzi ("Madzidzi"), lived on the farm. Madzidzi was installed by the community as their chief in 1901 on the farm. Mahlangu's father moved from the farm in 1939 (when Mahlangu was about a year old) when the community moved to Goedgedacht, their present place of residence.

[9] In about 1902 one J W Henwood ("Henwood") acquired Portion 2 of the farm and told the community that they had to pay rent for staying there or vacate the land. The community accepted they were vanquished, therefore, had no choice but to pay rent. They paid rent under protest. The community were nonetheless eager to regain their property, so they initiated negotiations in the 1920s to purchase Portion 2 from Henwood who was willing to sell to the community, but the sale was frustrated by the Natives Land Act[7]and later the Native Trust and Land Act[8] in that the farm was not in a scheduled area.[9] The government of the day, therefore, refused permission that it be sold to Africans. Attempts at purchasing the farm went on until around 1955, according to the bundle of correspondence handed in as Exhibit "A". This correspondence adds insight into the matter. I quote from some of it.

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7 Act 27 of 1913.

8 Act 18 of 1936.

9 In terms of Act 27 of 1913 and Act 18 of 1936.

Letter dated 8/11/1921 from J W Henwood to Chief Fene Andries Mapoch[10]

> "re Purchase Farm Kafirskraal 62
>
> Your letter of the 7th instant has been handed to me by your son Cornelius. We have talked the matter over and I have given him my word that a reasonable time will be given you to inspect the farm and to conclude the purchase of same.
>
> You are quite free; subject to the Native Commissioner's permission to take possession and live on the farm with your followers.
>
> I would suggest as a reasonable time one month from this date to make and conclude this matter but should the time be too short I will extend it to meet your requirements in reason."

Letter dated 14/12/1921 from the Department of Native Affairs to the Secretary for Native Affairs[11]

> "Application of Chief Mfene Mahlangu @ Andries Mapoch for permission to purchase portion of farm "Kaffirskraal" No. 62, Middelburg District
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> I have the honour to inform you that Chief Mfene Mahlangu @ Andries Mapoch, has made application on behalf of himself and his followers for permission to purchase a portion of the farm Kaffirskraal No. 62 in the Middelburg District, in extent 1400 morgen, at 30/- per morgen.
>
> Chief Mfene Mahlangu, with approximately 217 adult male followers, is at present living on the farm welgelegen no. 544 in this District on rent paying conditions. I understand that this Chief was recognized as a Chief by the Government shortly after the South African War and that he has some claim to favourable consideration by the Government. This history of the tribe is of course known to you. I understand that there will be no objection from the Sub Native Commissioner, Pokwani in whose district the farm is situated. A large number of Mfene's people are already living on the farm. Though the farm is not in a Native Area, I strongly recommend the application and I request that it be treated as a special case. The price is considered to be fair and reasonable.
>
> A copy of a letter from the Vendor is put up. I am of opinion that the tribe will be able to meet their obligations. I am unable to say what amount of cash the Natives would be able to pay but they are prepared to agree to the institution of a tribal levy."

Letter dated 24/07/1922 from the Secretary for Native Affairs to the Native Commissioner, Middelburg[12]

> "Land for Chief Mfene Mahlangu
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> As you are aware, Chief Mfene Mahlangu has long been endeavouring to acquire land on which to settle with his followers.

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10 At page 1 of Exhibit "A".

11 At page 2 of Exhibit "A"

12 At page 19 of Exhibit "A".

The Government considers that these people have a good claim to *(sic)* consideration and is anxious to satisfy them if possible.

At the beginning of the current year, Mfene made application for permission to purchase the farm "Kafferskraal", No. 62, in your district, but as the acquisition of this property by Natives was very strongly opposed by the Member of the Legislative Assembly for Middelburg, the Government felt unable to countenance the application.

The Right Honourable the Minister would, however, like you to consult Mr Heyns and other prominent Europeans with a view to ascertaining whether there is any land in the district, purchase of which by Mfene and tribe may be regarded as free from objection.

Will you kindly take the matter up on these lines and favour me with a report as soon as practicable"

Letter dated 15/03/1935 from Department of Native Affairs, Cape Town to the Assistant Native Commissioner, Pokwani[13]

"Insake Plaas Kafferskraal : Aankoop vir Nedersetting van Ndebeles

Na aanleiding van die gesprek wat u enige dae gelede met my gehad het, insake bogenoemde onderwerp, en ook met verwysing na die memorandum wat u in hierdie kantoor opgetrek het, wil ek u meedeel dat die plaas Kafferskraal nie in &n vrygesette streek geleë is nie. Kaptein Jaftha Mhlangu en Hoofman Motsodi Msindo het, namens hulle volgelinge, in die verlede reeds aansoek gedoen om genoemde plaas aan te koop, maar omdat dit nie in &n vrygesette streek geleë is nie, kon die Departement dit toe nie goedkeur nie.

Onder die omstandighede, voel die Departement dat hy niks verder in die saak kan doen nie, behalwe om miskien aan die hand te gee dat &n poging aangewend word om een of ander plaas, wat wel in &n vrygesette streek geleë is, vir nedersetting van Ndebeles, aan te koop.

Letter dated 7/04/1936 from the Native Commissioner, Pokwani to the Native Commissioner, Middelburg[14]

"Proposed Purchase of a farm to settle Ndebeles : Goedgedacht No. 379

I have the honour to advise you that there are some 6000 Ndebele in this area. All these Natives are farm labourers and have no home of their own. These Ndebeles have their own Chief in my area but he is himself resident on a farm. It has long been felt that it is desirous to have a good farm to allow these Natives to settle down and have a permanent home of their own. Many of the older Natives are rendered practically homeless owing to the fact that their services are no longer desired by the European farmers in this area.

I have received a letter from Mr C O Jacobsz offering his farm for sale to the Department. The farm is considered to be one of the best farming propositions in this area, has a good water supply and a considerable portion of the farm is suitable for cultivation purposes; (I understand that during the dry season of 1935 Mr Jacobsz reaped 440 bags of wheat) The price of £4000 is

13 At page 36 of Exhibit "A".

14 At page 43 of Exhibit "A".

considered fair and reasonable as the farm is 3065 morgen in extent, and is within the proposed released area.

Under the circumstances may I suggest that the Department be approached to purchase the farm for the benefit of these natives with a view to either reselling the farm to the natives on favourable terms or settling the old families there and in that way provide a permanent home for these natives who are at present entirely dependant on European generosity for their homes".

Letter dated 6/09/1936 apparently from Native Affairs Department, Pretoria to Assistant Native Commissioner, Pokwani[15]

"Land Matters : Pokwane

My dear Joubert,

You will recall that while I was at Pokwani we discussed several land matters, viz:

1. The question of the possible acquisition of that portion of the farm Bothasspruit No. 160, which is owned by Mr C A Luus.

   This matter will be considered by the Native Affairs Commission at its meeting on the 7th instant.

2. The suggested acquisition of the farms Veeplaats No. 107 and others along the Oliphants River.

3. Acquisition of land for the settlement of the Ndebele Natives.

These are questions which should properly be investigated by Members of the Native Affairs Commission when they visit your area and the papers will be referred to them accordingly."

Letter dated 5/8/1938 from N L Henwood to the Secretary, Native Affairs Department, Pretoria[16]

"I understand that the Native Affairs Department is buying farms for the Government for various schemes that the Government has on hand.

I would like to sell my farm Kaffirskraal No. 62, District Middelburg, Transvaal; in extent 1,470 morgen. This farm has been a native area for many years and is totally unimproved. The soil is excellent, but the water supply on the farm is not good at present. There are several fountains dotted about and the Bloedrivier cuts across one corner of the farm, but this is useless for irrigation purposes.

The area of irrigable land is negligible, but with three or four small dams thrown across the kloofs, at least 200 morgen could be put under water. The area of arable land is, I should think, half the farm (700 morgen).

The distance to the nearest Railway Station (Stoffberg) is, to the best of my knowledge, about 10 miles.

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15 At page 47 of Exhibit "A".

16 At pages 48 and 48a of Exhibit "A".

> I might mention that the Chief of the Mapoch Natives (Jonas Machechan) lives on this farm with his tribe. His father and grandfather before him, for the past fifty odd years or more, have done so. No white people have ever lived there, and it is, and always has been, entirely a Native farm
>
> My rock bottom price for the farm is thirty-five shillings (35/-) per morgen.
>
> I shall be glad to hear from you in this matter at your convenience."

Undated letter No 132/308 from Secretary for Native Affairs to N L Henwood[17]

> "Offer farm Kafferskraal No 62 : District Middelburg Transvaal
>
> Sir
>
> With reference to your letter of the 5th instant in the above connection, I have the honour to inform you that the farm Kafferskraal No. 62 is not situate within a released area and its acquisition by the South African Native Trust is consequently not contemplated".

[10] The government of the day refused the claimant permission to purchase the land notwithstanding that the community lived on the farm and neighbouring farms. This community lived in this area as the Ndzundza branch of the Ndebele tribe under various Kings and Chiefs as outlined in Exhibit "D". Some of the Kings and Chiefs are referred to in Exhibit "A" as being involved in the attempts to purchase the farm for the community. The government urged the community at every opportunity to purchase land in the scheduled[18] and later also in released[19] areas. This culminated in the government purchasing[20] land for the community in the Nebo district which was earmarked for homeland consolidation. The farm Goedgedacht was purchased for the community[21] and later became part of the Lebowa homeland. The community relocated to Goedgedacht in or about 1939, although some members of the community remained on the farm and surrounding farms under labour or labour tenant conditions. Some members of the community were given trekpasses in terms of some of the Acts regulating the lives of Africans.

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17 At page 49 of Exhibit "A".

18 In terms of the Natives Land Act, above n7.

19 In terms of the Native Trust and Land Act, above n8.

20 See para 3 of letter dated 6 September 1936, para [9] above, read with pages 66 to 73 of Exhibit "B".

21 See letter dated 7 April 1936 at p43 of Exhibit "A" quoted above at para [9]. However see also letter dated 6/9/1936 at p 47 of Exhibit "A" and letter dated 24/4/1936 at p 45 of Exhibit "A" in which the Secretary for Native Affairs states, in respect of the proposed purchase of land for the community in the released areas, that the Department (of Native Affairs) was not considering the purchase of land for Native Settlement until the Native Trust and Land Bill had been passed by Parliament.

Some of these Acts, which were mentioned in evidence are the *Master and Servants Law 13 of 1880*; *The Transvaal Proclamation of 24 July 1893; Law No. 121 of 1895* (also known as the Squatters Law); *Master and Servants Law (Transvaal and Natal) Amendment Act 6 of 1926*; *The Native Service Contract Act of 1932.* All these Acts are racially discriminatory as will appear later. White owners of the farm and surrounding farms used some of these laws to evict people (including members of the claimant) from these farms. One evictee who became well known because he used to return to the farm each time he was evicted was a Mr Mooiman. He would refuse to vacate and would be arrested. He hired an attorney who secured his release but was arrested again. He was arrested and released repeatedly for many years. He refused to vacate because he argued that the farm was his land with his people the Ndebele-Ndzundza. He was the son of Chief Jafta Madzidzi. Mr Mooiman was part of the group that did not relocate to Goedgedacht in 1939. His resistance of the eviction attempts is said to have lasted from about 1952 when he was first served with a trekpass, to 1964 when he finally vacated. He was old and frail. He was moved from the farm. In time, some of the remaining members of the community left the farm for Goedgedacht, yet others remained to this day.

[11] Mahlangu denied that the people moved voluntarily. Their reason for finally vacating the farm was that they were made to work for no pay on the farm. Hence they called Goedgedacht Kwa-Dlaulale (Eat-and-sleep). He said they were moved by the "white government" of the time because the Rooikraal Dam was built next to the farm and the government was concerned that the community's sewerage would flow into the dam whose water was consumed by the whites. Some of the remaining members of the community were moved by the farmers and the government in 1967. They were transported in government lorries, which Mahlangu says he saw. Goedgedacht was never intended to be the community's permanent home. It was a temporary place. The community was promised a place but never got it. The community were "thrown" there (at Goedgedacht) and were never happy until today. Goedgedacht is "dooie grond" and the community wants to return to Kafferskraal "their natural place, because they built homes there, ploughed and reared cattle and were happy." Although Madzidzi died on Goedgedacht, he was buried on the farm. The claimant only received ownership of Goedgedacht farm in 1994, not at the time of dispossession.

[12] The above evidence was corroborated to a large extent by the two other witnesses called for the claimant, namely Mr Lukas Petrus De Waal who was called as an expert due to his experience as an employee of the Native Affairs Department for a period of 30 years from about 1964, and his knowledge of the Department of Interior of the then government and Mr Simon Shabangu, the chairman of Sibuyela-Ekhaya Land Claims Committee.

[13] The opposing parties called two witnesses, first Dr Christo Jansen Van Vuuren ("Van Vuuren") who holds a doctorate in Anthropology, as an expert and Mrs Johanna Magdelina Cornelia Prinsloo ("Prinsloo"), the owner of portion 2 of the farm. Van Vuuren referred to the report he filed and stated that he stood by it. According to this report the Ndebele-Ndzundza settled at Kwa-Simkhulu near Belfast and upper Steelpoort River around 1630 to 1688; then at Kwa-Maza near Blinkwater and Stoffberg around 1688 to 1822 during which period they were apparently scattered by Mzilikazi and at KoNomtjharhelo (Mabhoko's [Mapoch's] Caves) around 1822 to 1883. The report goes on to state that the majority of Ndebele-Ndzundza were indentured on farms on the "former" Transvaal highveld from around 1883 to 1888 and that some remnants of them gathered under Madzidzi at Kafferskraal and in the region around 1883 to the 1940s. The main group under Fene Mahlangu is said to have settled at Kwa-Hlanga near Delmas around 1916 to 1922. The Ndebele-Ndzundza settled at KwaSimu, near Weltevreden, old KwaNdebele, the report continues, under Mayisha I, the son of Fene from 1922 to the present. The Ndzundza of Nebo under the descendants of Madzidzi settled there from 1940 to the present.

[14] Under cross-examination Van Vuuren said that the claimed area was contested between Pedis and Ndebeles; that the colonisation of the Transvaal started around 1852 and that the first land grants were in the late 1850s. It was put to him that the name Kafferskraal signified that the farm had always been a black kraal occupied by blacks and the name was used since the 1850s with no other European name given to it. He agreed with the proposition and stated that hence he conceded that the Ndebeles could have been on the farm before 1883. Under re-examination he went further to state that Ndebeles came to the farm around 1682 to 1688. Notwithstanding any dispute about the location of the claimant before 1883, it was common cause that from 1883 the claimant occupied the farm until it was removed in 1939.

[15] Prinsloo testified that she is the owner of Portion 2 of the farm and the farm Waterval. Her grandfather, Willem Jacobus Grobler, bought the farm in 1941 and Waterval in 1916. Willem Jacobus Grobler referred to in Exhibit “C2" is her grandfather. I shall refer to him as “Grobler”. Exhibit “C2” is a tabular Deeds history of the farm. Grobler lived on Waterval. Grobler gave Portion 2 of the farm to Prinsloo’s father, Mathias Pieter Grobler, in 1944 and from 1949 both Prinsloo and her father lived on Waterval. Prinsloo’s father died in 1960. Prinsloo and her husband took over farming. Her two sons currently farm on the farm. Her parents and herself had contracts with black people on their farm regulating the latter’s conditions of stay. If the black people did not agree to the conditions they had to leave. She could not say whether her grandfather had similar arrangements.

[16] The opposing parties tendered into evidence a report on the history of the ownership of the farm as recorded in the Deeds Registries Office. The report was Exhibit “C1”. According to the report the farm was first given in grant to Abraham Johannes Korf under Deed of Grant No 24/1873 dated 01/12/1872. There was a note on the Grant that a portion of the farm was immediately reserved for Gerhardus Johannes Korf, the son of the first grantee. The history is traced down the generations to the present owners. It is not necessary to repeat the history here, except to note what was emphasised on behalf of the opposing parties that, since the grant in 1872, the farm has always been in white people’s ownership, has never been owned by any black person, least of all the claimant. That was the evidence on behalf of the opposing parties.

[17] From the above it is quite clear that the Ndebele-Ndzundza community has existed for a very long time. It existed on the farm before whites arrived in the Transvaal (according to Mahlangu). Van Vuuren confirms this by conceding that the community was on the farm from about 1682 - 1688. Van Vuuren and De Waal confirm further that after the Mapoch War of 1883, the community was scattered on the farm and surrounding farms. Those on the farm were under Madzidzi who is listed as one of the chiefs (although according to Van Vuuren it is disputed among academics whether he was a chief). The community was defeated in the 1883 war and indentured on the farm and surrounding farms. The indenture was supposed to be for five years but continued beyond 1888. In 1902 J W Henwood started claiming rent from the part of the community that was on Portion 2 of the farm. The community was on the farm until it was

removed from the farm in 1939. All the time they had their home on the farm, they cultivated the soil and they kept livestock, sharing the land as a community. They used part of the farm for the initiation of young men into adulthood. There is no evidence of their use of the land being dictated by the white owners except when Prinsloo's father acquired Portion 2 in 1941. What is common cause between Van Vuuren and the witnesses for the claimants is that the claimant has been on the farm from at least 1883 to the 1940s. Mr Havenga, appearing for the opposing parties, also argued that Portion 2 was used as a residential area for the labourers. I am satisfied that a community did exist on Portion 2 of the farm as lessees from 1902 when Henwood bought it. The bulk of this period is after 19 June 1913. On Portion 3 and surrounding farms they were labourers. The identity of this community is clearly the Ndzundza branch of the Ndebele who lived on the farm, at least, from about 1883 to the 1940s under tribal conditions ruled by various chiefs and whose rights in land derived from shared rules determining access to land held in common by them. The claimant is further identified by the list of the members of the claimant which forms part of the record. It was contended on behalf of the opposing parties that the list of the names of the claimant includes people who are not on the farm but who reside on neighbouring farms, and that therefore the claimant is not the dispossessed. The initial Ndebele-Ndzundza community was scattered around the neighbouring farms in 1883, therefore, these people from neighbouring farms are part of the same community. Besides, there is no prohibition against admission of new members to the community. It is immaterial whether the rules determining access to land were determined by the white farm owner or the community through the Chief. However, it is noted that whenever negotiations about the farm were undertaken, it was always with the chief, for example, the negotiations by Henwood to sell and later by his son G L Henwood. It is possible that even arrangements for the community's stay on the farm were undertaken by the chief. It needs be mentioned that when the community left for Goedgedacht in about 1939 they left as a community with their chief although part of the community remained behind. The letters referred to above, from the Department of Native Affairs, recognised the claimant as a community under various chiefs at various times. The Community used the land for residence, ploughing and grazing according to such rules as were determined.

[18] It was argued on behalf of the opposing parties that the payment of rent was by individual families, which were therefore a group of individuals acting independently and not a community.

No evidence was adduced as a basis for this argument. The only real evidence of rent payment were receipts for rent which form part of Exhibit "A". From a reading of the receipts and the circumstantial evidence the probabilities seem to indicate that the rent was for the entire tribe. The receipts do not describe a specific kraal or piece of land within Portion 2 to which they relate. Mahlangu testified that he recognised the receipts. One receipt stated that the sum of £1-0-0 was received from Willeman. Mahlangu said Willeman was his grandfather's brother. His grandfather was Madzidzi who is mentioned in exhibit "D". Mahlangu's family was royalty, who managed the affairs of the tribe. The correspondence that was entered into in negotiating the purchase of the farm was always on behalf of the tribe. It would be a departure from that representative action if families negotiated their individual rent. All the available receipts seem to indicate one person only - Willeman - as the payer, on behalf of everybody else.

It is clear that the claimant is a community with a clear identity.

(b) **What rights in land did such community hold in respect of the farm**

[19] The evidence on behalf of the claimants was that they held the farm (and all the land they claim) as owners. From the first time the claimant occupied the farm, so the evidence went, it saw itself as the owner. After being defeated in 1883 they continued to stay on the farm without interference. It was argued on their behalf that they stayed on the farm *nec vi, nec clam, nec precario*. In this regard, it is noteworthy that although the farm was held in private hands by registered title, there is no evidence of any white owner occupying the farm or claiming occupation or exercising ownership rights in the period 1872 to 1902 when Henwood claimed rental. There was a time when the community paid rent and this time, according to evidence, appears to stretch from 1902 to 1924.[22] From then on up to the time the chief and part of the community moved in 1939 (a period of some fifteen years), it appears they had undisturbed occupation of the farm. If not undisturbed occupation, they might have rented from Gerald Leslie Henwood, the son of John William Henwood. Gerald Leslie Henwood, like his father before him

22 See page 101 of Exhibit "A" which is a copy of the latest receipt for rental.

in 1921[23], was willing[24] to sell Portion 2 to the community. That being so, the nature of the right the community had in respect of the farm would be lease or beneficial occupation for a continuous period of not less than 10 years prior to dispossession. The latter is the right the community claims to have had and claims to have restored. It is immaterial what residential arrangements were put in place from 1941, when Prinsloo's grandfather acquired Portion 2 to date, as the claimant had satisfied the requirement of the Act under this heading when it relocated to Goedgedacht in 1939.

(c) Dispossession of the rights in land as a result of past discriminatory laws or practices

[20] In order to succeed in a claim for restitution, a claimant must show, amongst others, that the dispossession was as a result of past discriminatory laws or practices. Mr Havenga referred to a number of discriminatory laws to which he said the claimant was subjected during the relevant period. These laws are:

(i) Master and Servant Law 13 of 1880;
(ii) The Transvaal Proclamation of 24 July 1883;
(iii) Law II of 1887 of the Volksraad of the South African Republic;
(iv) Law 21 of 1885 - also known as the Squatters Law;
(v) The Natives Land Act 27 of 1913;
(vi) Masters and Servants Law (Transvaal and Natal) Amendment Act 26 of 1926;
(vii) The Native Service Contract Act 24 of 1932; and
(viii) The Native Trust and Land Act 18 of 1936.

It was in terms of these laws that the claimant was turned into a community of labourers or labour tenants on their own land or land which they had occupied as their own. It was also in terms of these laws, which were discriminatory on racial grounds, that the claimant community, or those

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23 See letter dated 8/11/1921 from J W Henwood to Chief Fane Andries Mapoch, at para [9] above.

24 See letter dated 5/8/1938 from N L Henwood to Secretary, Native Affairs Department, Pretoria, at para [9] above.

of the community who were regarded as being in excess of the quotas allowed on a particular farm, were evicted.[25] Most importantly, it was in terms of these laws, especially the Natives Land Act,[26] later read with the Native Trust and Land Act[27] that the claimant community was dispossessed.

[21] The dispossession was effected as follows:

(a) by the enactment of the racially discriminatory Native Land Act on 19 June 1913 which excluded the farm from the scheduled areas, thereby depriving the claimant of whatever rights it hitherto had on the farm.

(b) by the racially discriminatory act of the government in refusing to give permission to the claimant to purchase Portion 2 when John William Henwood offered it to the claimant for sale in 1921.

(c) by the racially discriminatory act of the government in refusing to give the claimant permission to buy Portion 2 when Gerald Leslie Henwood offered it to the claimant for sale in 1938.

(d) by the racially discriminatory act of the government in urging the claimant to rather purchase land in the scheduled areas.[28]

(e) by the racially discriminatory act of the government in actually acquiring[29] the farm Goedgedacht for occupation by the claimant in order to give effect to its homeland policies which were clearly racially discriminatory.

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25 *Dulabh v Dulabh, in re: Erf 1687 King William's Town* [1997] 3 All SA 635 LCC at para [31].

26 Above n7

27 Above n8

28 See letter dated 15/03/1935 from Department of Native Affairs quoted above, para [9].

29 See n 20 and 21 above.

(f) by the government in legislating the racially discriminatory laws in terms of which the owners of the farm sought the eviction of the claimant from the farm.

(g) by the farm owners actually evicting some members of the claimant in terms of the said racially discriminatory laws and the government granting orders for such eviction through its courts.

(h) by the enactment of the racially discriminatory Native Trust and Land Act which excluded the farm from the schedule of released areas.[30]

(i) by the racially discriminatory act of the government in omitting to grant the claimant permission in terms of section 12(1) of Act 18 of 1936 to purchase Portion 2.[31]

The cumulative effect of these racially discriminatory laws and practices, which over a period of time eroded the rights of the claimant to the farm, directly or indirectly induced the claimant to vacate the farm. Forceful removal is not a pre-requisite for dispossession.

[22] Evidence of the sense of accomplishment of the dispossession on the part of the government can be gleaned from a quotation[32] from a letter said to be dated 20 September 1940. The letter was written by the Assistant Native Commissioner of the Pokwani area in the Middelburg district to the Secretary for Native Affairs. It reads in part: "Chief Jafta Mahlangu, of the Mapoch tribe, has been settled on Goedehoop 279, and with his followers allotted lands on Vierfontein and Paardeplaats, some nine miles from Goedehoop". The quotation clearly demonstrates the hand of the government in the relocation of the claimant. The Referral Documents continue to state that the letter mentioned that the measure was a temporary one

30 See *Dulabh v Dulabh*, n25 above.

31 In terms of section 12(1) of Act 18 of 1936 the Governor-General could grant permission to a disqualified person to acquire land in an area that is designated for occupation or acquisition by people other than himself or herself.

32 At page 148 of the Referral Documents by the Regional Land Claims Commissioner in terms of section 14(1).

because there was insufficient accommodation for the members of the community on the said land.

(d) **Lodgement of claim in terms of section 2(1)(e) and section 10 read with section 6(1)(a) and rule 2 of the Commissions Rules**

[23] A claim form dated 6 November 1997 is said[33] to have been lodged on the same date, which date is prior to 31 December 1998.[34] It may be mentioned that prior to the lodgment of this claim form, another claim form had already been lodged by Chief M J Mahlangu in his capacity as the chief of the tribe. The claim form by Chief M J Mahlangu is dated 18 September 1995 and was lodged sometime in 1995.

[24] Section 10(1) of the Act requires that the representative of the claimant must provide in the claim form a description of the land claimed, the nature of the right in land of which the claimant was dispossessed and the nature of the right or equitable redress being claimed. I have two criticisms against the Commission in respect of the requirements of this sub-section. The first is that the claim form does not provide for all the questions raised by the sub-section. It makes provision only for a description of the land claimed, but not for the nature of the right in land of which a claimant was dispossessed and the nature of the right or equitable redress claimed. These issues must be pertinently raised in the claim form if a claimant is to comply with the Act. The second criticism is the failure of the Commission to act in terms of the Act, in particular Section 6(1)(b).[35] The relevant RLCC should have assisted the claimant to complete the form to the extent possible. Some of the questions left unanswered on the form could have been easily answered, for example, questions 2 and 6. In fact at question 6, answers to the questions referred to above which are raised in section 10(1) and for which there is no provision on the form, could be furnished.

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33 See Referral Documents, para 2.1.2.4 at p 16.

34 Section 2(1)(e) requires lodgement of a claim before 31 December 1998 to be valid.

35 Section 6(1)(b)of the Act enjoins the Commission to take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims.

[25] Notwithstanding the lack of information on the issues raised in section 10(1) of the Act, the RLCC accepted the claim as valid, either because some accompanying information answered those issues or because the RLCC condoned, in terms of section 11(2) of the Act, the failure to comply with the prescribed requirements. In either case the RLCC would have been entitled to act.

[26] Section 10(3) requires that a representative claimant must furnish proof of mandate. A resolution[36] of the claimant community mandating the Sibuyela Ekhaya Land Claims Committee to prosecute the claim and the Committee authorising the chairman, Mr Z S Shabangu to act on behalf of the committee is part of the documents filed with the Referral Report by the RLCC.

[27] Mr Havenga argued that this mandate was not filed simultaneously with the claim form and is dated 29 October 1998 while the claim form is dated 6 November 1997. He argued further that the proviso to section 10(3)[37] of the Act permits only the lodging of the mandate at a later stage, not the taking of a resolution containing the mandate at a later stage. Claimants' uncontested evidence was that the claimant had resolved to claim and elected a Committee prior to 29 October 1998, although the witness could not remember the date. The meeting of 29 October 1998 was called by the RLCC, presumably in terms of section 10(4). What happened on 29 October 1998 was a mere recording of the prior resolutions. It is, in any case, trite that actions by representatives may be ratified by their principals by resolutions taken after the event. In addition in interpreting the law affecting any of the rights protected in the Bill of Rights, a court is urged to interpret liberally towards the grant of the right.[38] I am satisfied that the representative of the claimant was duly authorised.

[28] Section 6(1)(a) provides that the Commission shall, 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 the Act. Section 2 in turn provides that a person (including a community) shall be entitled to restitution of a right in land on complying with certain

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36 See p 77 of the Referral Documents.

37 The proviso authorises the RLCC to receive the authorising resolution at a later stage, if same was not submitted with the claim form.

38 *S v Zuma & Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 410 (SA) at para [14]-[15]; *South African National Defence Force Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para [28].

requirements.[39] To the extent that the claim form may be said to be incomplete[40] for purposes of satisfying the requirements of section 2, the regional land claims commissioner may, acting in terms of section 6(1)(b) and (1)(cA), have found the requisite information. What is clear is that he/she did not dismiss the claim for lack of such detail in the claim form. I have referred to possible reasons for not so rejecting the form. I am satisfied that the claim has been lodged substantially in compliance with the requirements of the Act and Rules.

(e) **Is the claim not excluded in terms of the provisions of section 2(2)?**

[29] Section 2(2) of the Act excludes a claim where a potential claimant has received compensation that is just and equitable in terms of section 25(3) of the Constitution or any other consideration that is just and equitable.[41] When the claimant moved from the farm in about 1939 it relocated to Goedgedacht (Goedehoop) in the Nebo district of the then Lebowa homeland. The Referral Documents[42] refer to a letter that was dated 20 September 1940 from the Assistant Native Commissioner, Pokwani to the Secretary for Native Affairs. I have already mentioned above[43] that the Referral Report states that that letter advises that the relocation of the claimant to Goedgedacht was a temporary measure because the area was not enough accommodation for the claimant. Therefore, Goedgedacht could not have been intended as compensation "calculated at the time of ... dispossession of such right ...." The dispossession occurred over a period of time, thus precluded such computation. There was in fact no intention to compute any compensation as Goedgedacht was not given as compensation. No compensation was computed at the time of the dispossession. Whether the claimant may have acquired Goedgedacht later is irrelevant to the inquiry here as it was not so acquired as compensation "at the time of ... dispossession". Goedgedacht was only registered in its name in 1994, after the new political dispensation. Mr De Jager, for the claimant, argued that in any case, Goedgedacht, having been provided as part of homeland consolidation, a discriminatory act in itself, cannot now be accepted as compensation

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39 See the requirements in the relevant sub-section of section 2 at para [4] above.

40 See my comments at para [24] above.

41 See para [4] above.

42 at p 148.

43 At para [22] above.

for past discriminatory acts. There is merit in his argument. The Constitution[44] and the Act provide for remedying the very acts of relocating people to accommodate racially discriminatory policies such as the homeland policy. To accept as compensation, land given in furtherance of such policies would be tantamount to buttressing the very acts the Constitution and the Act are intended to undo.

Costs

[30] It was contended on behalf of the opposing parties that far from having a valid claim in terms of the Act, the claimant lodged the claim at the invitation of the RLCC in order to stop evictions of members of the claimant from the farm. Therefore, so the argument went, the RLCC acted *mala fide* and should be mulcted with a costs order. A number of other arguments were raised in support of the prayer for costs. These were:

> "62.1 It is common cause that the State pays the legal costs of the Claimants, including the costs of the attorney and counsel.
>
> 62.2 It is common cause that the State and the Commission have appointed their own counsel at State expense to attend the trial.
>
> 62.3 The Department has made no attempt to be of assistance in this case and has conceded the claim even though it was clear that the merits of the claim are suspect.
>
> 62.4 The Department of Land Affairs has forced, through its attitude, the land owners to protect their interests and oppose the case at their own costs.
>
> 62.5 Whatever the outcome of the Court case, it is submitted that the opposition on behalf of the land owners was reasonable given the facts of the case.
>
> 62.6 The very reasoning by this Honourable Court not to award costs against an unsuccessful Claimant, should equally apply to an opposing land owner in a case such as this. The land owner should not be mulcted in costs under these circumstances. Such a result can only be obtained if the Department of land Affairs is ordered to pay the legal costs of the opposing land owners in the present case, as they have done and are doing in respect of the claimants and the Commission's legal costs.
>
> 62.7 The Commission and the Department of Land Affairs were given due notice of this request for a cost order in a letter dated 1 October 2002 as appears from exhibit "B" at page 55."

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44 Act 108 of 1996.

[31] Mr Rautenbach, for the DLA and the Commission argued that no *mala fides* can be visited on the RLCC for her actions because in terms of section 6(1)(b)[45] of the Act it is the duty of the RLCC to assist claimants with the preparation and submission of claims. In addition, he did not cross-examine the witnesses during the trial. Therefore it cannot be said the DLA or Commission was biased.

[32] I am satisfied that the RLCC was not *mala fide* in inviting the claim. She must have been aware of the existence of the claim because a claim form had been submitted by Chief M J Mahlangu earlier. In order to give the claim a fair chance the status quo had to be maintained.[46] It is part of the RLCC's duties to ensure that the status quo is maintained.

[33] I do not agree that the first four points (62.1 to 62.4) above are reason to award costs against the DLA and the Commission. The reason for costs is generally that the party ordered to pay such costs has lost. That the State pays its own costs or costs of the claimants cannot be a reason for the State to be ordered to pay the opposing parties' costs. The State pays its own costs and those of the Commission because it and the Commission had certain views about the case which they wanted to represent in the trial. The State did not disclose to the Court why it paid the claimant's costs, and was entitled not to do so. Similarly, it is not correct to say the Department (presumably the DLA and the Commission) made no attempt to assist in the case and conceded the claim. They assisted by engaging counsel to argue the case from their point of view and the Court found such argument invaluable. Point 62.4 sounds like the opposing parties would have preferred that the DLA and Commission should have argued the case on their (opposing parties) side. That is a choice that the State (DLA and the Commission) made based on their understanding of the case.

[34] Points 62.5 and 62.6 are argument on which the Court will exercise its discretion in deciding the question of costs. Given the view I hold of the case, and the order I believe is appropriate in the circumstances, I am not persuaded to exercise the Court's discretion in favour of an award of costs against the State.

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45 See n35 above.

46 See section 11(7) generally and 11(7)(b) in particular.

[35] Point 62.7 is a procedural matter and I need not comment on it except to say it was magnanimous of the opposing parties to give notice of their intention to ask for costs.

[36] The following order is made:

(a) The claimant is entitled to restitution as contemplated in section 2 of the Restitution of Land Rights Act, 22 of 1994.

(b) The claimant is granted leave to set the matter down for hearing of the remaining issues.

(c) There is no order for costs.

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ACTING JUDGE J MOLOTO

I agree

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PROF M WIECHERS (ASSESSOR)

For the claimants:
Adv P J J De Jager instructed by *De Wet du Plessis Inc,* Pretoria.

For the landowners:
Adv H S Havenga, instructed by *Grütter & Lombard Attorneys*, Pretoria.

For the Department of Land Affairs:
Adv J G Rautenbach instructed by the *State Attorney*, Pretoria.