THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NO: 74/06

Held at Randburg/Malelane on 2-5 August 2010
and 2-15 September 2010

Before MEER J, and
STEPHENSON (Assessor)

In the matter between:

GREATER TENBOSCH LAND CLAIMS COMMITTEE	1st Plaintiff
THE NGOMANE OF SIBOSHWA	2nd Plaintiff
THE NGOMANE OF LUGEDLANE	3rd Plaintiff
THE NGOMANE OF HHOYI	4th Plaintiff
MKHATSHWA OF MBAMBISO COMMUNTIY	5th Plaintiff
MATSAMO TRIBAL AUTHORITY	6th Plaintiff
MAWEWE TRIBAL AUTHORITY	7th Plaintiff
MLAMBO MAHLALELA COMMUNITY	8th Plaintiff

and

REGIONAL LAND CLAIMS COMMISSIONER	1st Defendant
COMMISSION ON RESTITUTION OF LAND RIGHTS	2nd Defendant
DEPARTMENT OF LAND AFFAIRS	3rd Defendant
MINISTER OF AGRICULTURE AND LAND AFFAIRS	4th Defendant

ONDERBERG PRO-ACTIVE GROUP OF LAND AFFECTED LAND OWNERS	5th Defendant
BAHATI BOERDERY (EDMS) BPK	6th Defendant
D J DE WAAL (PTY) LTD	7th Defendant
ELANLOU BOERDERY (EDMS) BPK	8th Defendant
FINNINGLY ESTATES (PTY) LTD	9th Defendant
G J DU TOIT KOTZé	10th Defendant
S J POHL	11th Defendant
IVAURA ESTATES (PTY) LTD	12th Defendant
J F HUME	13th Defendant
NGWENYA NO 3 SHAREBLOCK LTD	14th Defendant
NGWENYA NO 4 SHAREBLOCK LTD	15th Defendant
J S MARé BOERDERY BK	16th Defendant
LANBOB (PTY) LTD	17th Defendant
LOMATI FARMS (PTY) LTD	18th Defendant
ESTATE LATE I E MULLER	19th Defendant
NICO HORN TRUST	20th Defendant
OOSTERVELD	21st Defendant
RALFE ESTATES (PTY) LTD	22nd Defendant
C RHODES	23rd Defendant
R W PERCY-ROBERTS	24th Defendant
UIM ADMINISTRATORS (EDMS) BPK	25th Defendant
SIERAAD BOERDERY (EDMS) BPK	26th Defendant
IPUNZI BOERDERY (EDMS) BPK	27th Defendant
DIRK WOLFAARDD TRUST	28th Defendant
SNYMAN BELLENGING TRUST	29th Defendant
SOLANE COMMUNITY TRUST	30th Defendant

DIP BOERDERY TRUST	31st Defendant
J F STEYN	32nd Defendant
F W TECHLENBURG	33rd Defendant
THEUNS WEBB TRUST	34th Defendant
HORNISSE INVESTMENT BK	35th Defendant
TRADEQUIK 1007 CC	36th Defendant
L M TIRVEY	37th Defendant
UMHLATHUZI VALLEY SUGAR COMPANY	38th Defendant
GERHAD BASSON TRUST	39th Defendant
VONGOTI FARMS (PTY) LTD	40th Defendant
WINKELHAAK BOERE (EDMS)	41st Defendant
WEIPE TRUST	42nd Defendant
A D KOCK	43rd Defendant
PROPAS INVESTMENTS (PTY) LTD	44th Defendant
GREY-VAN INVESTMENTS (PTY) LTD	45th Defendant
BUFFELSPRUIT PLASE (EDMS) BPK	46th Defendant
PANNAR RESEARCH FARMS	47th Defendant
POTGIETER FAMILIE TRUST-IT 11783/97	48th Defendant
M P STADEN	49th Defendant
WAM TRUST	50th Defendant
CAFETALES	51st Defendant
BARRY JACOBS TRUST	52nd Defendant
BARRY JACOBS	53rd Defendant
MALELANE CITRUS COOP	54th Defendant
INTERVET	55th Defendant
JARANZA BOERDERY	56th Defendant
DE FACTO INVESTMENTS (PTY) LTD	57th Defendant

K5 BOERDERY (EDMS) BPK	58th Defendant
NGWENYAMA PROP CO (PTY)	59th Defendant
J C TECKLENBURG TRUST	60th Defendant
ROOMARYN BOERDERY	61st Defendant
WILD BREAK 29 (PTY) LTD	62ndDefendant
LEOPARD CREEK SHAREBLOCK LTD	63rdDefendant
UMBHABA ESTATES	64th Defendant
KARINO FARMS (PTY) LTD	65th Defendant
RIVERSIDE REEDS (PTY) LTD	66th Defendant
CAPE FRUIT PROCESSORS (PTY) LTD	67th Defendant
TRANS AFRICAN ESTATES (PTY) LTD	68th Defendant
SCOPEFULL 140 (PTY) LTD	69th Defendant
BOLDPROPS 40 (PTY) LTD	70th Defendant
TOMAHAWK FARMING (PTY) LTD	71st Defendant
WESTERN BREEZE TRADING 137 (PTY) LTD	72nd Defendant
TSB SUGAR RSA LTD	73rd Defendant
GOLDEN FRONTIERS (PTY) LTD	74th Defendant
DITMAAKSAAK BOERDERY (PTY) LTD	75th Defendant
SONOMA INVESTMENTS BK	76th Defendant

JUDGMENT

Introduction

1 On 19 July 2010, two weeks before 2 August 2010, the date arranged for the commencement of possibly one of the largest and most complex land restitution trials, involving seven Claimant Communities and some seventy one landowners (The "Landowner Defendants"), the five Applicants in this postponement application, namely the Greater Tenbosch Land Claims Committee, and the Siboshwa, Lugedlane, Hhoyi and Mbambiso Communites, being the First to Fifth Plaintiffs and the Main Claimants ("the Main Claimants"), in the Restitution Trial, launched an application for the sine die postponement of the trial ("The Land Restitution Action"), seeking also an order that the costs of the application be borne by any of the Respondents who oppose the postponement.

2 The trial pertains to competing and overlapping claims for restitution of rights in land in terms of the Restitution of Land Rights Act No 22 of 1994, in which physical restoration is claimed of land in excess of 150 000 hectares in Malelane, in the province of Mpumalanga. Three Communities, namely the Matsamo, Mawewe and Mlambo Mahlalela ("The Competing Claimants"), have lodged competing claims to those of the Main Claimants[1]. The Landowner Defendants have opposed the claims and do not concede the dispossessions. In this judgment, for ease of reference I shall refer to the parties as Plaintiffs and Defendants by number as they are cited in the Land Restitution Action. The parties listed in the heading to this judgment are likewise cited as Plaintiffs and Defendants as they appear in the Land Restitution Action.

3 The trial in the Land Restitution Action was scheduled to commence on 2 August 2010 and continue for the duration of the entire third court term,

1 As the Sixth to Eighth Plaintiffs in the Land Restitution Claims.

until 23 September 2010. The date and duration of the trial had been agreed to by all the parties well in advance, at a conference in May 2009, and the six legal teams numbering approximately 23 legal representatives of whom at least seven are senior counsel, had been reserved, as was the Court, all at huge cost. The legal costs in respect of the Claimant Communities are to the State. This is as a result of the First Defendant, the Regional Land Claims Commissioner for Mpumalanga and Gauteng ("the RLCC") having arranged legal representation for the Claimant Communities either through the State Legal Aid System or at the expense of the RLCC itself, in terms of Section 29 of the Restitution of Land Rights Act No 22 of 1994, which provides for such funding to those who cannot afford to fund themselves. The Landowner Defendants fund their own legal costs.

4 Similarly, well in advance, copious and costly arrangements had been made by this Court to secure a suitable venue for the duration of the trial in the Malelane area, large enough to accommodate the many interested parties and their legal teams. The postponement was sought on the grounds that the Main Claimants were unable to commence the trial because an expert report by a social anthropologist, Dr Fisher, appointed by the RLCC, on direction of the Court, had not been prepared timeously. The report which was due at the end of February 2010 was only made available late in July. The Landowner Defendants were ready to proceed with the trial on 2 August 2010 as were some of the Competing Claimants.

Defendants' Stance on the Postponement Application

5 The First to Fourth Defendants, who in essence represent the State,

did not oppose the postponement. Nor did the Competing Claimants, the Sixth to Eighth Plaintiffs. Their stance was to abide the decision of the Court as abiding parties. They did not seek costs as a consequence of the postponement application.

6 The Landowner Defendants opposed the postponement application. I shall refer to them as "The Opposing Landowner Defendants". Some of the Landowner Defendants filed answering affidavits in the postponement application. The Fifth Defendant, the Onderberg Proactive Group of Affected Landowners, (of whom *inter alia* the Thirteenth to Twenty Third, Twenty Fifth to Fifty First, Fifty Fourth to Fifty Eighth, Seventy Fourth and Seventy Fifth Defendants are members,) opposed the application on a limited basis. They adopted the stance that they would be prepared to agree to the postponement on condition that a cost order was granted against the Main Claimants on an attorney and own client scale, alternatively against the Minister of Rural Development and Land Affairs, the Fourth Defendant, and the RLCC in the alternative, and cumulative to the order against the Main Claimants.

7 The Twenty Fourth, Fifty Second, Fifty Third, Sixtieth, Sixty Fifth to Seventy Fourth Landowner Defendants opposed the application, seeking attorney and own client costs against all the claimants and the RLCC jointly and severally. The Sixty First, Sixty Second and Sixty Third Landowner Defendants, similarly opposed the application, but sought a punitive cost order on an attorney and own client scale against the Main Claimants, alternatively the Regional Land Claims Commissioner in the event of a postponement being granted. The opposition on behalf of the Sixty Fourth

Defendant, Umbhaba Estates was conducted by its owner, Mr Plath, personally.

8 The hearing of the postponement application could not begin on 2 August 2010, the pre arranged date for the commencement of the trial, as the postponement application was not ready for hearing and the court file had not been prepared. The Main Claimants had only filed their replying affidavit that morning, and had not filed heads of argument. This caused the postponement application in itself to be postponed to 4 August 2010 to enable the Main Claimants to get the court papers in order and prepare. On 5 August 2010, at the conclusion of argument for the Main Claimants, the matter was postponed by agreement to 2 September 2010, for the hearing of the expert evidence of Dr Fisher, the aforementioned social anthropologist appointed by the RLCC to investigate the land claims. It was agreed that argument on the wasted costs occasioned by the postponement of the trial on 2 August 2010, would stand over until after the hearing of Dr Fisher's evidence. Having heard the arguments on wasted costs, I now proceed to consider where the costs lie.

Relevant Background Facts

9 From its inception this matter has been hampered by postponements and delays which have prevented its smooth progression and the commencement of the trial. There have to date been seven postponements at least four of which have been due to the Main Claimants' lack of preparedness for trial, as appears from the chronology below, leading up to the present postponement application. The question of costs, must, I believe, be

considered against this backdrop.

10 The restitution claims were lodged with the Regional Land Claims Commissioner in about July 1996 and referred to this Court in May 2006. The land claimed, as was apparent from inspections in loco, is extremely rich in natural resources, has some of the most valuable agricultural land in the Republic and consists of intensive and large scale farming activities. In addition, the area makes a large contribution to the tourism industry because of its unique location adjacent to the Kruger National Park. The Claimant Communities in responses to the referral report, filed by the RLCC after the lodgment of the claims, alleged that they had traditional and /or communal ownership rights over the land which they used for agricultural and grazing purposes until 1954, when they were dispossessed thereof under provisions of the 1936 Land Act, without receiving just and equitable compensation.

11 Large areas of land, estimated to be valued in the region of R1.2 billion have already been restored to the Claimants as a result of mediated settlements facilitated by the RLCC. This includes highly developed farms belonging to the Transvaal Sugar Board which have been leased back to the Board for farming purposes.

12 As the Presiding Judge to whom this case was allocated in 2006, I have had the responsibility, as happens in restitution claims, of managing this case until its resolution. To this end a number of conferences in terms of Land Claims Court Rule 30 have been convened by me. It was at such a conference in February 2007, that the parties first agreed the matter was ready for trial, which was set down for three weeks in June 2007. At the next

pretrial conference in May 2007, it transpired that the Competing Claimants had not filed responses to the referral report, and it was agreed that the trial could not proceed as arranged.

13 A further conference was held on 4 June 2007 at which directives were given for the subsequent conduct of the matter and a trial date was set for 21 November 2007. However just before November 2007 it became clear that the Claimants were not ready to proceed to trial on 21 November. Instead on that date the Court heard and subsequently granted an application by the Nkomazi Municipality under whose jurisdiction the land falls, in terms of Section 34 of the Restitution Act, that in the final determination of the claims, it was in the public interest that certain urban land within the jurisdiction of the Municipality would not be restored. The Section 34 hearing was preceded by a conference at which Counsel for the Main Claimants indicated that the Main Claimants would be ready by June 2008 to start with the trial. Thereafter the parties agreed to a third trial commencement date on 2 June 2008. At a further conference on 14 May 2008, Counsel for the Main Claimants indicated that they would call approximately 16 witnesses.

14 The Court directed expert notices to be filed by 26 May 2008. This directive was not complied with by the Claimants. Instead, four days before the anticipated trial the Main Claimants brought an application for my recusal. The trial due to start on 2 June 2008, and in respect of which costly and copious logistical arrangements had been made for a hearing in Malelane, was thereby derailed and the recusal application instead was set down for hearing on 2 June 2008 at the seat of the Court in Randburg. At the

hearing, Counsel who represented the Main Claimants at the time,[2] asked that the recusal application stand down, indicating they were not ready to proceed. After prevaricating for two days the Main Claimants withdrew the rescission application. The uncontested evidence of the attorney representing the Main Claimants at the time, was that Counsel had been given instructions to prepare for the trial, but insisted instead on bringing the recusal application.

15 It is common cause that the Main Claimants were not ready to proceed to trial on 2 June 2008, unlike many of the Landowner Defendants who had filed expert summaries. The trial was postponed yet again, this time the fourth postponement, and by agreement it was ordered that the Main Claimants would pay the wasted costs of the postponement. However, the Regional Land Claims Commissioner tendered to, and paid the costs on their behalf. After the postponement in June 2008 the Main Claimants' legal team was increased to four counsel. The matter was thereafter enrolled for hearing in March 2009 in Malelane on two specific matters of fact, namely, whether claims had been lodged and what land had been claimed. After evidence was lead for a few days, the Main Claimants requested a postponement for the purpose of settlement negotiations. A fifth postponement was then granted and when by May 2009 no settlement had been reached, at the insistence of the landowners a further trial date was arranged, this time for effectively the whole of the third term of 2010, from 2 August to 24 September 2010, if no settlement had by then been reached.

16 The Court continued to manage the progress of the matter in the interim by way of conferences. When by 14 August 2009, still no settlement

2 A different Counsel currently leads the Main Claimants' legal team.

appeared imminent, it was agreed by the parties at a conference that independent reports would be obtained from Dr Fisher, a social anthropologist, who had already made some input in the matter, and a valuer, in the hope that this would assist a settlement. Once again it was agreed that should a settlement not ensue the trial would continue in the third term of 2010. At a further conference on 8 September 2009, attended by Dr Fisher and Valuer, Mr Griffiths, the Court directed as follows:

16.1 The Regional Land Claims Commissioner would appoint the experts to conduct investigations;
16.2 The experts would furnish their reports to the State Attorney by 26 February 2010, who in turn would furnish same to the parties;
16.3 The parties would thereafter prepare a statement of agreed facts and facts in dispute, which would be furnished to the Court by the State Attorney by 2 April 2010;
16.4 The Regional Land Claims Commissioner would furnish a list of properties considered to be non restorable, by 16 October 2009;
16.5 Should no settlement be reached, the trial would commence on 2 August 2010 and continue for the duration of the 2010 third term.

17 The above time table was not followed. The Fisher report was not furnished in February 2010 as directed and it was clear then that the parties would not have five months to prepare for trial after receiving the report. On 23 March 2010 the State Attorney informed the parties that the Fisher report was expected by 20 April 2010, but it did not materialize by that date despite the State Attorney's best efforts. There followed a flurry of correspondence in which disquiet was expressed at the situation by the Onderberg

Defendants as well as the Registrar, who wrote to the parties on 25 March 2010 expressing concern that the Court directives had not been met, but emphasized that the trial was set to proceed on 2 August 2010 for which all parties were required to be ready.

18 On 2 June 2010 the Main Claimants's attorneys informed the State Attorney of the Main Claimants' inability to prepare for trial in the absence of the Fisher report, without which, it was indicated they had not been able to "procure comprehensive instructions on an informed basis". They blamed what they referred to as "the state of prejudice and paralysis" on the Regional Land Clams Commissioner's failure to deliver in terms of the court directives.

19 On 8 June 2010 the Court convened a conference at which its displeasure was expressed once again at the non compliance with its directives. In an attempt to facilitate the advancement of the matter the Court informed the parties that it was considering making an order on its own accord in terms of Land Claims Court Rule 57 for the separate hearing of the following two issues:

19.1 Is physical restoration of the properties claimed, feasible?

19.2 Have the Claimants received adequate compensation for the alleged dispossession of the land claimed?

20 Parties were invited to furnish written submissions on these two issues by 21 June 2010 . The Court however made clear that should the separation order not be granted, the trial would commence on 2 August 2010, that the Claimants would be required to begin and prove dispossession, the rights in

land of which they were dispossessed, and that just and equitable compensation was not paid. Claimants were directed to file witness statements by 15 July 2010. When the Main Claimants indicated they may not be ready for trial due to the non availability of the Fisher report, the Landowner Defendants noted that they would seek a punitive cost order should the trial be postponed yet again. The Court also directed the Regional Land Claims Commissioner to file by 21 June 2010 a list of properties considered non restorable by the Minister, and the Claimants to respond thereto by 1 July 2010, stating in respect of which properties they would not seek restoration.

21 The parties duly directed submissions to the Court and on 24 June 2010 the Court decided on a consideration of such submissions, in particular those of the Claimants that the separation of issues was not likely to contribute towards the convenient, efficient and expeditious resolution of the matter.

22 The Claimants failed to comply with the directive to file witness summaries by 15 July 2010, and instead launched the postponement application on 19 July 2010, which, as aforementioned, resulted in the trial not commencing on 2 August, but instead, in the proceedings being postponed to 2 September 2010 for the hearing of Dr Fisher's evidence, and thereafter argument on the wasted costs occasioned by the postponement.

23 Dr Fisher gave his testimony based on his report early in September, and his evidence to the effect that the Claimant Communities had not been dispossessed of most of the farms owned by the Defendant Landowners, was unrefuted by the Claimants. The legal teams for all eight Claimant

Communities who had been in possession of Fisher's report for a month before he testified spent in total about an hour and a half cross examining him. The paucity of cross examination resulted in all the court time reserved for the Fisher testimony not being utilized, and when invited, in the circumstances by the court to use the time to begin their testimony, it became apparent that the Main Claimants had no witnesses ready to testify by the time Fisher completed his testimony on 6 September 2010. This, notwithstanding the full complement of their legal team having been in possession of the Fisher report for the preceding month, during which period one would have expected there to have been some priming of witnesses, given the extent to which the Main Claimants indicated they were reliant on the report and the eagerness with which it was awaited. It would appear that of the Claimants, it was only the Eighth Plaintiff who had witnesses ready to testify. As a consequence of Dr Fisher's testimony the Onderberg Defendants (Fifth Defendants/Respondents) delivered a without prejudice notice to the Claimants to withdraw the claims against the Onderberg farms, specifying in this event they would seek costs on a party and party basis, failing which attorney and own client costs would be sought against the Claimants, their legal representatives and the RLCC. The offer was not accepted. Attempts to settle the matter at Malelane after the Fisher evidence similarly bore no fruit and by agreement the trial was once again postponed to February 2011 for two weeks, its seventh postponement.

Costs and Postponements

24 The general principles relating to postponements and costs in respect thereof have been aptly and eloquently set out by former Chief Justice Mahomed[3] in the oft quoted Namibian case, *Myburgh Transport v Botha t/a*

3 in his capacity as an acting Judge of Appeal in Namibia

Truck bodies 1991 (3) SA 310 (NmS) at 314-315, and applied by this Court in *Kara N.O.& Others v Department of Land Affairs* 2005 (6) SA 563 at 566F. Of the general principles enunciated, those which resonate in the instant case are *inter alia* as follows:

"24.1 A court should be slow to refuse a postponement where the true reason for a party's non preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case.

24.2 An application for postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. Where, however, fundamental fairness and justice justifies a postponement, the court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made.

24.3 Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a court will be exercised. What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms.

24.4 Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its discretion might allow the postponement, but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale

of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action as the case may be."

25 The essence, distilled from the above, is that a party who applies for a postponement seeks an indulgence and a postponement will not be given where there is a prejudice which cannot be cured by an appropriate costs order. The approach of this Court to punitive costs, has been set out in a number of cases, most recently in *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others* 2010 (4) SA 308 LCC at 321-325 and *Midlands North Research Group and Others v Kusile Land Claims Committee and Others 2010* JDR 0543(LCC). The view is taken that where, in the interests of justice, circumstances warrant, punitive costs are granted notwithstanding the practice of this Court not to make cost orders for reasons *inter alia* of public interest. See also the following cases where cost orders including special cost orders were made due to special circumstances: *New Adventure Investments (Pty) Ltd &Another v Mbatha & Others* 1999(1) SA776 at 779 G-780 C; *Ntuli & Others v Smit &* Another 1999(2) SA 540 LCC AT 553h -555B; *Hurenco Boerdery v Regional Land Claims Commisioner, Northern Province & Others* 2003 (4) SA280 LCC at 281G -282B.

26 The reason for the Main Claimants' non preparedness for trial as articulated by them, is simply that they were not able to prepare therefor without having access to the report of Dr Fisher and his investigations concerning their land claims. They could not, they contend, appoint their own expert as neither authority nor funding for this purpose would be given

by the RLCC. However they do not deny the allegation by the Fifth Defendant, the Onderberg Landowner Defendants, that the Claimants had the means to fund their own experts, given that they are in receipt of substantial amounts in rental in the region of R1 million per month from the leased land, valued in excess of R1 billion, already restored to them, and that they, unlike, defendants do not fund their own litigation.

27 The Main Claimants do not however explain why they were unable, in the absence of the Fisher report, to call lay witnesses to prove the identity and standing of the Claimant Communities and their representatives, as well as the circumstances of the alleged dispossessions as experienced by the communities. This is standard evidence expected of lay witnesses in any restitution claim either by way of personal accounts or oral history passed down through the generations. It is evidence obtained from consultations with lay witnesses, for which no expert report is needed, and indeed which cannot be prepared for the claimant communities by an expert such as Dr Fisher. It is both incomprehensible and inconceivable that the Main Claimants assisted by an able legal team of four counsel and instructing attorneys could not have prepared such evidence in the many months leading up to the trial, especially given that in May 2008 it was indicated they would call 16 witnesses. Instead, it would appear the Main Claimants were completely dependant on the evidence of Dr Fisher to present their case. The contention by the Defendant Landowners that the Claimants are not legitimately entitled to have their preparation done for them by the expert witness appointed by the state, is apposite in the circumstances.

28 It must be emphasized that the reason for the appointment of Dr

Fisher as an independent expert was *inter alia* to assist with a possible settlement. As pointed out on behalf of the Defendant Landowners, settlement negotiations are distinguishable from preparation for trial. This was implicit in the court directive which made clear that if no settlement was reached the trial would continue. The anticipated report ought therefore not to have prevented the preparation, especially of lay witnesses for trial and the delivery of witness summaries as per the court directive. The conduct of the Main Claimants in not complying with the court directives in this regard and consequently being unprepared for trial was dilatory and is deserving of censure.

29 It is to be noted that even where a postponement has not been necessitated by the blameworthy conduct of a party but by an unforeseen event, our courts throw the burden of the wasted costs on the party applying for the postponement, who seeks the indulgence of the Court. See *Van Rooyen v Naude* 1927 OPD 122 as 122-123; *Ketwa v Agricultural Bank of Transkei* [2006] 4 All SA 262 (TK) at 276-277; *Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa*, Fifth Edition, Volume II, p 759-762; *Westbrook v Genref Ltd* 1997 (4) SA 218 D at 221-222. Thus even if the Main Claimants' unpreparedness for trial had been justified by the delay in the Fisher report, an unforeseen event for which they could not be blamed, they would still have been liable for wasted costs, all the moreso then, in the given circumstances.

30 Another feature relevant to the consideration of punitive costs is the non timeous bringing of the postponement application. As in their abandoned recusal application of two years ago, the Main Claimants waited

until the last minute, as it were, to bring the postponement application, a mere 10 court day before a trial of this magnitude, was due to commence. A postponement, especially in the Land Claims Court must be brought timeously given the circumstances in which the Court operates and the logistical arrangements that have to be made when the Court goes on circuit as in this case. In this regard see Kara *supra* at 567 D – E where applicants who did not apply timeously for a postponement in circumstances not as serious as the present, and where they, unlike the Main Claimants, had no previous record of dilatory conduct, were ordered to pay wasted costs of the postponement including costs of two counsel, reservation fees of counsel and wasted qualifying fees of expert witnesses.

31 Then there is consideration of the crucial aspect of prejudice which looms large in any postponement. The Defendant Landowners who have been ready for trial for some time, who have complied with the Court Rules and directions, and whose legal teams and experts were reserved at great personal expense to them, have undoubtedly been inconvenienced and prejudiced by this postponement, as they have been by past postponements. Those Claimants who have also been ready for trial are similarly prejudiced. Then too there is the prejudice to the Defendant Landowners that all development and expansion plans on their land have been suspended and put on hold for the past 14 years since the claims were lodged, and will continue to be so for as long as it takes for this matter to be brought to finality. The lack of finality, the Landowner Defendants contend, is preventing further investment, development and job creation on the land, and does not inspire confidence in the international investment community who will seek alternative investments.

32 Whilst the Main Claimants admit that the landowners are prejudiced and inconvenienced by yet another postponement, they do not, as aforementioned tender costs to cure the prejudice. Instead they make the curious statement that general rules in regard to costs of a postponement do not apply in the particular circumstances of this case, and do so with apparent disregard for this Court's stance on costs and postponements as per *inter alia* the Kara, Quinella and Kusile judgments referred to above.

33 The prejudice to the Defendant Landowners is moreover exacerbated by the fact that whilst they fund their own opposition to the land claims, all the Claimants have enjoyed funding by the State to the extent, as is emphasized by Defendants, that the State even paid the cost order against the Main claimants in respect of the postponement occasioned by the abandoned recusal application. The Onderberg Defendants consequently complain that the Main Claimants have the luxury of litigating with impunity and can justifiably regard themselves as more equal before the law than the Defendants. The Defendants, on the other hand, they say, have lost millions of rand in funding their own opposition to the claims, which they contend have now turned out to be devoid of any merit.

34 The law, say the Onderberg Defendant Landowners, cannot countenance a situation such as the present. It is patently unfair, both procedurally and substantially for the Defendants to be subjected to postponement after postponement by the Main Claimants, who are funded by the State, and who are already the beneficiaries of land restoration and a substantial monthly income as a consequence. The interests of justice, they

submit can only be served by the levelling of the proverbial playing fields so that the Defendants are granted their total costs caused by the postponement.

35 In all of the circumstances, I agree. From the unfortunate history of these proceedings the Landowner Defendants' cry that they have been subjected to the tyranny of litigation[4], at the behest of the Main Claimants in particular, is not without merit. For the latter, it would appear, unencumbered by the restraint of purse strings, display a decided tardiness to prosecute their claims, referred to the Court as long ago as 2006. The perception that the Defendant Landowners are less equal before the law, is in all of the circumstances understandable, given the extent of legal funding to the Claimants, the value of what has already been restored to them and the financial income they reap therefrom. This is a matter to which attention must, I believe be given, by the requisite authorities. As was said by Sachs J in *Biowatch Trust v Registrar of Genetic Resources,* 2009 (6) SA 232 CC at 242 para 17,:

"Section 9 (1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. No party to court proceedings should be endowed with either an enhanced or a diminished status compared to any other. It is true that our Constitution is a transformative one based on the understanding that there is a great deal of systemic unfairness in our society. This could be an important, even decisive factor to be taken into account in determining the actual substantive merits of the litigation. It has no bearing, however, on the entitlement of all litigants to be accorded equal status when asserting their rights in a court of law. Courts are obligated to be impartial with regard to litigants who appear before them. Thus, litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What

4 Vollenhoven v Hoensen & Mills 1970 (2)SA 368 (C) at 373.

matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution."

36 The conduct of the Main Claimants has, as is evidenced by all of the above, been nothing short of dilatory, as has their repeated and frequent failure to comply with court directives[5]. Seldom has this Court experienced such levels of disrespect and discourtesy from litigants, and the time is fast approaching when the Court itself will be forced to take corrective measures. In the meantime the Main Claimants' lack of preparedness which once again derailed the trial and the reasons therefore, the non timeous bringing of their postponement application, and the prejudice occasioned thereby, are undoubtedly factors which warrant a punitive cost order which I intend granting. I can find no grounds for granting costs against the RLCC or any of the other Claimants in the alternative jointly or severally, neither of whom brought this postponement application. I note also that no party has seriously contended that the RLCC was to blame for the delay in the Fisher report.

37 I am however disinclined to grant attorney and own client costs. I have not been persuaded to depart from my recent finding against an award of such costs, in the Quinella judgment, *supra* the reasons for which appear at paragraph 33, and which I take the liberty of quoting here:

" I am inclined to agree with the reasoning of Stegman J, based on the well known 1946 Appellate Division case of *Nel v Waterberg Landbouwers Ko-operative Vereeneging*, 1946 AD 597 that an award of attorney and own client costs does not as a matter of law achieve anything more than an award of costs on the scale as between attorney and client,

5 The court directives not complied with by the Claimants include *inter alia* directives issued on: 3 May 2007, 4 June 2007, 30 July 2007, 14 May 2008, 8 June 2010 for the filing of expert evidence and directives to be ready for trial on agreed trial dates in June 2007, and on 21 November 2007, 2 June 2008 and 2August 2010. They also failed to comply with a directive of 4 June 2007 to file a schedule by 18 June 2007 specifying exactly which land was claimed and a further directive of 8 June 2010 to file a statement by 1 July 2010 indicating in respect of which properties as contained in a list furnished by the state attorney, they would not seek restoration.

and his refutation that taxation on the attorney client scale,(dubbed in Nel as an intermediate scale), gives little more than taxation between party and party. Stegman J's hypothesis at 183 H-187D is that the law as authoritatively stated in Nel, recognizes that any client (such as costs creditor claiming costs from his costs debtor) may become bound to pay his own attorney certain costs that cannot justly, and therefore cannot lawfully, be recovered from a costs debtor in any circumstances."

I grant the following order:

1. The First to Fifth Plaintiffs/Main Claimants are ordered to pay to the Opposing Landowner Defendants:

1.1 The costs of the application for the postponement on a scale as between attorney and client, inclusive of the costs of two counsel where applicable, the costs of 2 and 3 August 2010 when the application stood down, and the costs of 4 and 5 August 2010 when the application was argued.

1.2 The costs occasioned by the postponement of the trial on a scale as between attorney and client, including:

1.2.1 The costs of two counsel where applicable;

1.2.2 Reservation fees for the hearing in respect of two counsel, where applicable and one attorney for the period up to 2 September 2010, limited to two days per week;

1.2.3 The wasted qualifying fees of the Defendants' expert witnesses where applicable.

_____
MEER J

I agree.

_____
A STEPHENSON
(Assessor)

For First to Fifth Plaintiffs: *R.D. Levin SC, M. Naidoo, K. Mokotedi* and *G. Shakoane* instructed by *Maseko Tilana Incorporated Attorneys, Park Town, Johannesburg.*

For Sixth and Seventh Plaintiffs: *V.S. Notshe SC, J.A. Motepe* and *M.M. Mojapelo* instructed by *Lingenfelder & Baloyi Attorneys, Pretoria.*

For Eighth Plaintiff: *S.P. Motlhe SC* and *M.P.D. Chabedi* instructed by *Matloga Attorneys, Pretoria.*

For First to Fourth Defendants: *P. De Jager SC* instructed by *S. Mathebula, The State Attorney, Pretoria.*

For Fifth Defendant and Sixth to Tenth Defendants, Thirteenth to Twenty Third, Twenty Fifth to Fifty First, Fifty Fourth to Fifty Eighth, Seventy Fourth and Seventy Sixth Defendants : *F.H. Terblanche SC; H. Havenga SC* instructed by *A.B.T. Van der Merwe Cox and Partners Attorneys, Vryheid.*

For Twelfth Defendant: *R. Plath, Umbhaba Estates (Pty) Ltd, in person.*

For Twenty Fourth, Fifty Second, Fifty Third, Sixtieth and Sixty Fifth to

Seventy Fourth Defendants: *R. Du Plessis SC, J. Stone* instructed by *Du Toit Smuts Mathews Posa c/o Van der Merwe Du Toit Incorporated, Pretoria.*

For Sixty First – Sixty Third Defendants: *M.M. Oosthuizen SC* and *G.J. Bensch* instructed by *Luneburg and Janse van Vuuren Inc. White River, c/o Pieter Moolman Attorneys Bryanston.*