IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case no LCC 18/04

Judgment given on 29 February 2012

In the matter between:

SEROLO JOEL MONYEKI First Claimant

EVELYN MMANOKO MONYEKI (MAKGAI) Second Claimant

and

THE REGIONAL LAND CLAIMS COMMISSIONER, LIMPOPO PROVINCE First Respondent

PORTION 608 NEW BELGIUM CC T/A INDABUSHEE GAME LODGE Second Respondent

THE MAPELA TRIBE Third Respondent

concerning

THE REMAINING EXTENT OF PORTION 9 OF THE FARM NEW BELGIUM 608

JUDGMENT

GILDENHUYS J [PIENAAR AJ and STRÖH (assessor) concurring]:

INTRODUCTION

[1] This matter has a long and tortuous history. It is a claim for the restitution of rights in land lodged by the first and second claimants in terms of the Restitution of Land Rights Act No 22 of 1994 ("the Act"). The claim was referred to this Court by the first respondent under section 14(1)(b) of the Act, by notice of referral dated 2 April 2004.

THE PLEADINGS

THE CLAIM FORMS

[2] The first and second claimants each lodged a claim form for the restitution of land with the first respondent under section 10 of the Act. In both claim forms, the claimed land is described as follows:

> "A certain portion of portion 9 of New Belgium 608 LR."

The land at issue is the remaining extent of portion 9 of the farm New Belgium 608 LR, which belongs to the second respondent. It is presently used by the second respondent as a game farm, with the name Indabushee. I will refer to it as "Indabushee". The claimants previously lived on a tract of land in the north eastern corner of Indabushee. In his evidence, however, the first claimant insisted that the land under claim extends well beyond the confines of Indabushee.

[3] In both claim forms, the grounds for the claims have been recorded as follows:

> "My father and mother lived on the land before it was given over to a White Owner. I grew up there and has lived there all my life.

> My parents and then myself were forced to become labour tenants working for three months with no pay, but we still had land for ploughing and grazing. Then we were stopped from being labour tenants and we lost land. Now we are threatened with eviction from our land."

[4] In the claim form submitted by the first claimant, it is stated that the person who lost the land is "Serolo Joel Monyeki", and that "Makgai Mmanoko Evelyn and her children" might also have an interest in or claim to the land. According to the claim form submitted by the second claimant, the person who lost the land is Makgai Mmanoko Evelyn.

THE REFERRAL

[5] In the executive summary contained in the referral documents, the first respondent described the claim as follows:

> "The claim is for the restoration of rights in land by the Monyeki-Makgai family in the farm [rem of portion 9 of New Belgium] described in the Notice of Referral. The claim for restitution of land rights is brought by the Monyeki-Makgai family in terms of the Restitution of Land Rights Act, 1994 ..... . The claim was lodged separately on behalf of the Monyeki-Makgai family by both Mr S.J. Monyeki and Mrs E.M. Makgai (who were married to each other) on 16th January 1998. These claims were treated as one family claim, ... "

[6] As required under section 11(1) of the Act, the first respondent published a notice of the claim in the Government Gazette of 3 January 2003. The claimed land is described in the notice as "R/E of Portion 9 of the farm New Belgium 608 LR", in extent 1038,6740 ha; in other words, the entire Indabushee. The claim was referred to this Court by notice of referral dated 2 April 2004.

[7] The history of the claimants' occupation of the claimed land is described as follows in the executive summary of the referral papers:

> "The Monyeki-Makgai family lived peacefully on the claimed land, which formed a part of the farm that was previously known as De Brak, from as far back as the 1800s. They lived on this land and enjoyed de facto beneficial and occupational rights until the arrival of the White

people in the late 1920s or early 1930s thereon, who started occupying and using same for their own benefit, supported of course, by the then racial legislation."

[8] The executive summary furthermore contained the following statement:

"In 1948 the farm [portion 9 of New Belgium] was leased to Johannes Snyder in terms of the Land Settlement Act of 1912. ..... In 1958 ownership of this farm was given to Johannes Snyder. Snyder also forced natives on the farm into labour tenancy, thus reducing their beneficial occupation rights on the farm.

"Later, the labour tenancy rights that the Monyeki-Makgai family were left with, were further reduced during the 1960s when labour tenancy was abolished on the farm in conformity with the abolition of labour tenancy across the country in terms of The Black Laws Amendment Act of 1964. The Monyeki-Makgai lived on and continued to use some of the land as labour tenants after Snyder took occupation of the land. This continued after 1958 under the new owner van Jaarsveld. During the 1960s, the labour tenancy rights to land were removed, grazing and ploughing rights were limited, and the Monyeki-Makgai family were reduced to being day labourers and given a bag of maize meal every month."

[9] The first respondent recommended in its referral report that the "farm under claim" be returned to members of the Monyeki-Makgai family, and transferred to the claimants. It is common cause that, at least during the time when the second respondent owned the remaining extent of portion 9, the claimants lived on a small tract of land in the north eastern part thereof, known as the "donkey camp". The tract of land was previously part of De Brak, and became part of New Belgium when De Brak was consolidated into New Belgium.

THE RESPONSES

[10] The claimants delivered a response and a supplementary response to the referral papers. In the first response, they accused the second respondent of "frivolously, vexatiously, protractedly, speculatively and unreasonably" opposing the claim, "solely to delay and frustrate the claimants' rights". Of great importance, however, is that in the first response the claimants "aligned themselves with the factual and legal correctness" of the referral report. In the supplementary response it is stated that in respect of each and every paragraph of the referral report, the claimants "maintained and support the correctness and truthfulness of the Regional Land Claims Commission's findings in this regard". This

includes the correctness of identity of the claimants, the description of the claimed land and the history of its occupation by the claimants.

[11] The second respondent also delivered a response to the referral documents. It stated in its response that the first claimant was employed from about 1970 as a farm worker on Indabushee, and that any rights which he and the second claimant might have been given in respect of land on Indabushee, was linked to his employment. The second respondent alleged that the claimants were not dispossessed of any rights on or before 31 December 1998, and are therefore not entitled to restitution under the Act. The claimants left Indabushee on 4 January 2003, after an eviction order was granted against them by this Court (per MOLOTO J) on 3 September 2002 under the Extension of Security of Tenure Act No 62 of 1997.

THE HEARINGS

[12] After the parties delivered their responses to the referral documents, the Court heard evidence on 16, 17 and 18 April 2007. The hearings were followed by an inspection in loco on 20 April 2007. Evidence was again heard on 13, 14 and 15 August 2007, on 15 October 2007, on 3 and 4 December 2007 and on 25 and 26 January 2008: all and all 11 days of hearing evidence and one day for the inspection. Thereafter, the Court reconvened for argument on 27 July 2009, 19 August 2011 and 3 October 2011. The claimants were represented at the hearings by Mr Shakoane, with him Mr Malowa (except of 19 August 2011 and 3 October 2011). The first respondent was represented by Mr Motepe and the second respondent by Mr Havenga.

WHO IS CLAIMING AND WHAT IS CLAIMED?

[13] On the first day of the hearing Mr Shakoane informed the Court that the claimants intend to present evidence which will show that they were mandated to lodge a restitution claim on behalf of a larger group of people, and also in respect of a much larger area of land, extending well beyond the confines of Indabushee. That was not the basis on which the claim was referred to this Court. In an attempt to address the difficulty, Mr Shakoane suggested the following during the hearing:

"MR SHAKOANE: So the one way I am thinking of that would be possible in terms of the provisions of section 6 [of the Act] are that the Commission itself as the body that has the obligation and duty to assist in the submissions and preparations of claim, they then have to revisit this and correct the claim form properly.

COURT: That may be so but before they do revisit it, we cannot hear it.

MR SHAKOANE: That is so unfortunately.

COURT: Yes."

[14] Later that day, Mr Shakoane indicated that he would ask for time for the first respondent to undertake further investigations. I pointed out that if the claim form was intended to relate to more land, the first respondent will have to investigate it and make an additional referral to this Court. Mr Shakoane agreed. I thereupon recorded that nothing in these proceedings will prevent the claimants from prosecuting a claim for additional land.

[15] I raised the issue again during the hearing on 13 August 2004. The following discussion then took place between the Court and Mr Motepe, who appeared on behalf of the first respondent:

"COURT: If you want the Court to extend its enquiry beyond portion 9, you will have to make a futher referral.

MR MOTEPE: Well, in fact the Commission is already engaged in the exercise. As to how far they have gone I cannot say but we have given them an instruction to do that, so they are investigating.

COURT: It is a pity you cannot say because after the evidence is heard, further evidence which the claimant might wish to bring, we have got to consider a date for when to resume and if we do not know how long the Commission is going to take, it is going to be very difficult. We cannot wait forever.

MR MOTEPE: I am sure we can find that out by tomorrow."

[16] Mr Motepe reported back the next day. The following was said:

"MR MOTEPE: I have enquired. The Commission will require at least about, let's say between two and three months to finalise their investigations and to have a new report, if any, but to finalise the investigation they will need about two to three months.

COURT: So if they get three months and we hear nothing from them, we just continue?

MR MOTEPE: That is the implication.

COURT: If, whatever we get from them, requires something to be revisited, we revisit.

MR MOTEPE: That is so, that is the understanding."

No futher report was filed or referral made by the first respondent. The Court will therefore have to consider the claim in accordance with the referral papers.

THE POSTPONEMENT APPLICATION

[17] After the hearing of evidence was concluded, the case was set down for argument on 26 January 2008. During the hearing on that day, Mr Shakoana applied for a postponement in order to lead evidence from a further witness, an archaeologist. We dismissed the application for a postponement. The claimants then applied for leave to appeal against our decision not to grant a postponement. We refused leave to appeal.

[18] On 14 August 2008 the claimants applied to the Supreme Court of Appeal for condonation of the late filing of their petition, and for leave to appeal against our refusal of the postponement. On 20 November 2008 the Supreme Court of Appeal granted the condonation application, but refused to give leave to appeal.

THE APPLICATION TO SUBSTITUTE THE CLAIMANTS' RESPONSES

[19] After leave to appeal was refused, the matter was again enrolled for hearing on Monday 27 July 2009. On Thursday 23 July 2009 the claimants delivered an application to substitute their existing response and supplementary response by an entirely new "statement of claim/response". In the new "statement of claim/response" it is alleged that:

"The First Plaintiff acts both in his personal and representative capacity on behalf of the Monyeki and Makgai families, and other families, including in particular the Mokoena, Monini, Modimola, Makgae, Majadibodu, Molewa, Mophuting, Mokitlane, Matjila, Ramela, Segodi, Sepolwane, Mokhene and Molekwa families."

[20] According to the new "statement of claim/response", the land claimed is no longer limited to the remainder of Portion 9, but is expanded to incorporate "New Belgium, commonly referred to as Dipoong or The Block".

[21] The Court did not decide the substitution application on 27 June 2009 because it came to light that there existed a competing land restitution claim by the Mapela tribe. The claim was brought in respect of land which not only includes Indabushee but also other land which the claimants seek to claim under the new "statement of claim/response". The Mapela tribe is therefore an interested party in the present litigation. I will deal with the Mapela claim hereunder.

THE COMPETING CLAIM BY THE MAPELA TRIBE

[22] On the day of the hearing (27 July 2009) we were informed that the Mapela tribe has lodged a restitution claim in respect of a large tract of land, which includes Indabushee. The Mapela claim has, at that stage, not yet been settled or referred to this Court for adjudication.

[23] Because the Mapela tribe was an interested party in the present claim, and would be entitled to join in the proceedings, the hearing on 27 July 2009 could not proceed. At that point, we issued the following order:

"1. Judgment is reserved on the claimants' application for amendment dated 22 July 2009.

2. Argument in the main application is postponed sine die.

3. The Regional Land Claims Commissioner is ordered to:

a) Forthwith serve the notice of referral in this case on the Mapela Tribe.

b) Inform the Mapela Tribe that if it wishes to participate in the hearing of the Monyeki-Makgai claim, it must by 17 August 2009 deliver a notice to that effect to:

(i) the claimant, c/o Nkuzi Law Clinic, Modimole;

(ii) the first respondent, c/o the State Attorney, Pretoria;

(iii) the second respondent, c/o Grutter & Grobbelaar Attorneys, Pretoria;

(iv) The Registrar, Rand Claims Court, Randburg.

c) inform the Mapela Tribe-

(i) that the Monyeki-Makgai family is claiming restoration under the Restitution of Land Rights Act of the remaining extent of portion 9 of the farm New Belgium 608 LR; restitution of which same land is also claimed by the Mapela tribe;

(ii) that its attention is drawn to section 35(1) of the Restitution of Land Rights Act;

(c) that futher particulars of the Monyeki-Makgai claim and the court process can be obtained from the Regional Land Claims Commissioner, Polokwane (Mr Mulaudzi).

4. The Regional Land Claims Commissioner must pay all wasted taxed costs incurred by the claimants and the second respondent resulting from the Commissioner's failure to give timeous notice of the referral of the Monyeki-Makgai claim to the Mapela tribe."

[24] Much delay followed. This was partly caused, so I was given to understand, by problems encountered by the claimants and by the Mapela tribe to secure funding for their legal representation. It was also difficult to re-assemble the Court. Pienaar AJ was no longer acting, and lives in Stellenbosch. The assessor, Mr Ströh, lives in Polokwane.

[25] The Mapela tribe was, at a pre-trail conference held on 12 August 2010, given leave to participate in the case. It joined the proceedings as third respondent, and subsequently delivered a formal response. It did not present evidence or require any of the previous witnesses to be recalled.

[26] Mr Seneke (on behalf of the Third Respondent) had informed the Court on 19 August 2011 that the third respondent will abide the decision of the Court on the understanding that the claimants' claim remains as originally pleaded, *viz* a family claim limited to Indabushee only and that the merits of the claim lodged by the third respondent will not be at issue in this case. Mr Seneke was not in Court on 3 October 2011.

NON-APPEARANCE BY CLAIMANTS' LEGAL REPRESENTATIVES

[27] The Court received a Notice (dated 1 August 2011) from the claimants' attorney (Mr Mamabolo of the Nkuzi Law Clinic) that -

> "..... the Plaintiff's attorneys hereby withdraw as attorneys of record for the Plaintiff in this matter due to the withdrawal by counsel for the Plaintiff as a result of non-payment of fees for services rendered."

According to the Notice, it was sent by e-mail to the attorneys for the first, second and third respondents. There is no indication that it was sent to the claimants, or that the claimants were made aware of the withdrawal. After the Court received the notice, and at my request, my secretary telephoned the first claimant and informed him that the matter would be heard on 19 August 2011.

[28] On 19 August 2011 the Court reconvened to hear argument. Mr Motepe appeared for the first respondent, Mr Havenga for the second respondent and Mr Seneke for the third respondent. The first claimant was present in person, but unrepresented.

[29] Funding for the legal representation of the claimants has previously been made available by the Chief Land Claims Commissioner in terms of section 29(4) of the Act. The provision of such funding did not run smoothly, for reasons which I need not set forth.

[30] As I have said, on 19 August 2011 the first claimant attended the hearing unrepresented. He told the Court that he did not know why his legal representatives were

not present. He was, understandably, unwilling to argue the case on his own. We postponed the hearing to 3 October 2011, asked the first respondent to attend to the issue of funding for the claimants, and told the first claimant to ensure that he would be legally represented on 3 October 2011, as it is unlikely that the Court would grant a further postponement.

[31] After the hearing, the State Attorney wrote to the first respondent, for attention Mr Mulaudzi, as follows:

> "Please arrange with Nkuzi Law Clinic (Mr M P Mababolo Cell: 076 3975140) to re-instate themselves as attorneys for the claimants. Also ask him to brief either or both of the advocates who has previously appeared on behalf of the claimants. If not one of the advocates are available he must urgently appoint another advocate. If Nkuzi Law Clinic do not agree to reinstate themselves you must urgently arrange another attorney for the claimants. The court will not allow another postponement."

[32] On 3 October 2011, when the Court reconvened to hear argument, the first claimant was present in person, again unrepresented. Attempts by Mr Mulaudzi (from the first respondent's office) to get in touch with Mr Mamabolo were unsuccessful.

[33] Mr Mulaudzi testified at the hearing on 3 October 2011. He said he had been in touch with Mr Mamabolo on several occasions. He gave an undertaking to Mr Mamabolo that the Commission will continue to bear the costs of the litigation. Mr Mamabolo undertook to have a discussion with the two advocates and thereafter revert to him. If the advocates were unable to appear, he (Mr Mamabolo) would inform the Court. Mr Mamabolo did not revert to Mr Mulaudzi, as promised. He also did not inform the Court that neither he nor the advocates would attend the hearing.

[34] The first claimant did not want a postponement of the hearing, nor did he want to proceed with the hearing without being legally represented. He said he will not talk in the absence of his lawyer. In response to a question from me, he told the Court that, since the previous hearing in August, he had not been in touch with his attorney and advocates to

enquire whether the funding problem had been solved, and whether they would be present in Court at the resumed hearing on 3 October 2011.

[35] We decided not to postpone the hearing. The case had been dragging on since 2004. Mr Havenga pointed out that, taking account of the history of this matter, a further postponement would not necessarily secure the presence of legal representation for the claimants at the next hearing.

[36] In reaching our decision, we took into account that the Court had previously received extensive heads of argument on the merits of the claim from the claimants' counsel, previous delays, and also that the first claimant made no attempt to ensure that his legal advisers attend the hearing. Litigants cannot just sit back and assume that all arrangements for their legal representation are in place. They must check. This is all the more so after I warned the first claimant on 19 August to make sure that there will be legal representation on 7 October 2011.

THE APPLICATION FOR SUBSTITUTION OF THE CLAIMANTS' RESPONSES

[37] We have to decide the application by the claimants to substitute their existing responses by a new response wherein the claim is enlarged, not only by vastly expanding the claimed land but also by increasing the number of claimants, before dealing with the merits of the restitution claim.

[38] The possibility of an amendment was raised by the claimants on 16 April 2006, the first day of the trial, and again on 13 August 2006. That notwithstanding, the application to amend was only brought on 23 July 2009, after all the evidence has been led and the case was ready for argument.

[39] The proposed amendment seeks to withdraw a large number of admissions contained in the two responses delivered by the claimants. The factual and legal correctness of the

research report of the first respondent, in which the restitution claim was dealt with as a family claim for Indabushee only, was repeatedly admitted by the claimants in their responses, and formed the basis on which the first claimant and his witnesses were cross-examined. It is trite law that an application seeking to withdraw admissions must be supported by affidavits. The substitution application brought by the claimants was not so supported.

[40] The enlarged claim, insofar as it includes additional land as well as additional claimants, was not referred to this Court by the first respondent. The claimants, in my view, attempted to broaden the claim before the Court in a manner which is not legally possible. The additional claimants sought to be added did not lodge restitution claims by 31 December 1998, as required under section 2(1)(e) of the Act.

[41] Futhermore, in terms of section 14(6) of the Act, this Court will not have jurisdiction to adjudicate a claim for an enlarged area if it has not been referred to the Court by the first respondent under section 14(1) of the Act. The first respondent made no such referral. I should point out that the only other route by which the additional claimants can get this Court to decide the enlarged claim is through a direct access application under Chapter IIIA of the Act. The application by the present claimants to introduce a new "statement of claim/response" does not purport to be a direct access application.

[42] In our view the application by the claimants to amend their responses through substituting it by a new response, cannot succeed and must be dismissed. The case before the Court must therefore be considered on the papers as they stand.

HISTORY OF OWNERSHIP AND OCCUPATION OF THE NEW BELGIUM FARMS

[43] On 13 April 1913 the brothers William Vesty and Edmond Hoyle Vesty purchased a block of 60 farms (including Schoongelegen, Derdekraal and De Brak) from the New Belgium Transvaal Land and Development Company Ltd, and took transfer thereof on 29 December 1913. The 60 farms were commonly known as the New Belgium Estate. The Estate was managed by a Mr Robert Sharp up to his death on 20 August 1936. Thereafter,

a certain Major Averre was appointed to manage the Estate. They both lived on Derdekraal and managed the farms from there. De Brak was used as a bull camp.

[44] During December 1938, the Government purchased the 60 farms from the Vesty brothers, and took transfer thereof on 1 February 1939. During 1940, 25 of these farms were consolidated to form the farm New Belgium 608 LR. It included the farms Schoongelegen, De Brak and Derdekraal. De Brak was known by the indigenous population as Dipoong, which (freely translated) means the place where the bulls are kept.

[45] Indabushee constitutes a very small portion of the consolidated farm. The northern part of Indabushee is comprised of a section of the former De Brak and the southern part of a section of the former Derdekraal. Prior to their eviction, the first and second plaintiffs lived on land in the north eastern corner of Indabushee. It was previously part of De Brak.

[46] During 1941, the Government decided to develop a land settlement scheme for returning soldiers from the second world war on the Estate. The land which was later registered as portion 9 of New Belgium was allotted to one Johannes Hendrik Snyders as lessee under the Land Settlement Act of 1912.". Before the allotment, full valuations of Derdekraal and De Brak were made. The valuations show four huts occupied by blacks and 40 cattle on Derdekraal, and no huts or "native owned" stock on De Brak.

[47] Mr Snyders took occupation of Portion 9 of New Belgium during 1948. He was given transfer thereof on 24 June 1958, and immediately sold the farm to Pieter Francois van Jaarsveld. After Mr van Jaarsveld passed away in 1962, the farm was transferred to his widow, who in turn transferred it to her sons Wynand Johannes and Pieter Fancois van Jaarsveld on 24 September 1963. In 1970 Wynand Johannes van Jaarsveld transferred his half share in Portion 9 to his brother Pieter Francois van Jaarsveld. After the death of Pieter Francois van Jaarsveld, portion 9 was subdivided, and in 1988 the remaining extent of portion 9 was transferred out of his estate to Violet Sophia van Jaarsveld. She sold it to the second respondent on 12 February 1994. On 4 August 1994 the second respondent took transfer thereof.

THE EVIDENCE

[48] For reasons which I have already set forth, we have to consider the restitution claim as being a family claim lodged by the two claimants on their own behalf, and not as a claim which also includes other families or communities. To succeed in their claim, there must be evidence before us to show that the claimants had a right in land which must be identified and that they were dispossessed of such right as a result of past racially discriminatory laws or practices after 19 June 1913 and not later than 31 December 1998. See Section 2(1) of the Act. The other requirements for restitution as contained in section 2 of the Act are not at issue in this matter.

[49] The claimants called three witnesses from indigenous communities to testify: Mr Lesiba Monini (born about 1918), Mr Lukas Mokwena (born 9 April 1922) and Mr William Mokwena (born 2 February 1922). The first claimant (born 2 June 1935) also testified, but not the second claimant, although she was present in Court. Thereafter, the second defendant presented evidence. It called Mr Richard Carrozzo (a member of the second defendant close corporation), Ms Ester Kgomo (born 1942), Mr Jan Furstenburg (born 11 March 1925) and an expert on the interpretation of aerial photography, Mr Adie Gerber. Mr Motepe indicated that the first defendant would not call any witnesses. Finally, the claimants (with leave of the Court) called another expert on the interpretation of aerial photography, Mr Parker.

[50] With the exception of Mr Carrozzo and the two expert witnesses, all the other witnesses were old or very old people. At times it was not easy to follow their evidence. I am not convinced that they always understood the questions put to them, or that they had a clear recollection of the matters on which they were questioned. I will treat their evidence with caution.

[51] I will commence by considering the evidence relating to when the Monyeki family first settled on De Brak, and make a finding thereon. In the light of that finding, I will consider the other issues before the Court and come to a conclusion on whether the restitution claim can succeed.

[52] The first claimant testified at the trail that he grew up on De Brak, and lived there until he left after an eviction order was granted against him by this Court during September 2002. He originally testified that his "parents told him that they were born on De Brak, that he was also born on De Brak and that he grew up there". Later he said that he and his parents moved to De Brak when he was one year old. They settled in the same area where he and the second plaintiff lived at the time of the eviction order. He denied that he ever stayed on the farm Schoongelegen.

[53] The first claimant furthermore testified that he and his father worked for Mr Piet van Jaarsveld on De Brak as labour tenants under the so-called "three months system", in terms whereof farm workers had to provide three months' free labour to a farm owner in return for being allowed to live on the farm, to crop and to keep cattle. According to the first claimant, the system was abolished by Mr Piet van Jaarsveld. The right to crop was removed and the number of cattle limited to six or ten. The workers were thereby relegated to mere farm workers, being paid with a bag of mealiemeal at the end of each month.

[54] The first claimant was a very poor witness. He frequently contradicted himself on issues such as when he and his parents came to live at De Brak, his own employment history, the alleged claimants on whose behalf he purported to act, and what land he intended to claim. According to the claim forms, only a portion of portion 9 of New Belgium 609 LR Indabushee was claimed, and that was the basis on which the first respondent referred the claims to this Court. In the course of his evidence, however, he chopped and changed, and attempted to magnify the claims to include additional claimants and larger areas. Much of his evidence is untruthful, as I will demonstrate hereunder.

[55] The evidence of Mr Monini and Mr William Mokoena lends some support to the first claimants' version that he and his parents lived on De Brak all their lives, or at least for a very long time. The evidence of Mr Lukas Mokoena was noticeably different. He testified that the first plaintiff moved to De Brak long after the Mokoena family was already there. He said that when the first claimant and his father arrived at De Brak, he "found them there".

[56] Mr Fürstenburg, who lived on Derdekraal at the time, testified that the first plaintiff and his parents originally lived on the farm Schoongelegen. Towards the end of 1969, beginning 1970 the first claimant moved to Derdekraal, and shortly thereafter to De Brak, where he was employed by Mr Piet van Jaarsveld. He received a salary and food, and was allowed to keep a maximum of ten cattle.

[57] Ms Kgomo testified that she originally stayed with the first claimant and his father at Schoongelegen. The first claimant was not yet married at that stage, and "was working all over". The first and second claimants got married whilst the first claimant was still living at Schoongelegen. Some time later, the Monyeki family as well as Ms Kgomo moved to Derdekraal. After a short stay at Derdekraal, the Monyeki family relocated to De Brak.

[58] The second respondent commissioned an expert in the interpretation of aerial photography, Mr Adie Gerber, to examine aerial photographs of the area on De Brak (later, part of Indabushee) where the first claimant said he and his family was living. Mr Gerber looked at photographs dated 1954, 1965, 1973, 1983 and 2002. The photographs prior to 1973 show no signs of human habitation in the area concerned. The 1973 and subsequent photographs do indicate human habitation in the area. This led Mr Gerber to the conclusion that the area only came into use after the 1965 but prior to the 1973 photography.

[59] The first respondent instructed another expert in aerial photography, Mr A. Parker, to do an analysis and submit a report. After Mr Mothepe indicated that the first respondent would not be calling any witnesses, the claimants called Mr Parker to testify. During cross-examination, when asked to comment on Mr Gerber's evidence in relation to the interpretation of the photography, he responded as follows:

> "I have no significant, I do not have any substantial or anything of substance to really query or disagree with his interpretation."

[60] The 1946 valuation of De Brak (to which I have already referred) indicated that at least until then no indigenous people were living on De Brak. Other reports written during that period give the same impression. It is not necessary to deal with them in this judgment. The

aerial photography and the De Brak valuation, together with the testimony of Mr Fürstenburg and Ms Kgomo, makes the conclusion inevitable that the claimants first settled on De Brak (on land which is now part of Indabushee) in or about 1970.

[61] Mr Carrozzo, a member of the second respondent corporation, testified that the second respondent purchased the remaining extent of New Belgium with the intention of ultimately turning it into a game farm. At the time of purchase, the claimants were already living on the farm. The second respondent decided to employ the first claimant, and offered him remuneration of R400 plus a 80 kg bag of maize meal per month. In addition, he would be allowed to keep up to ten cattle on the farm. The first claimant was elated and accepted the offer. Although the first claimant was informed at the time that when Indabushee becomes a game farm the cattle would have to go, he was up to his eviction not prevented from keeping cattle.

[62] The relationship between the first claimant and the second respondent turned sour. He was dismissed after a disciplinary enquiry, and handed a letter on 31 July 1997 calling upon him to vacate the farm by 29 August 1997. He did not leave the farm; instead, on 30 October 1997 he and the second claimants signed restitution claim forms and lodged them with the first respondent. Despite the pending restitution claims, this Court (after protracted litigation) granted an eviction order against them, whereupon they vacated the farm on 4 January 2003.

[63] The first claimant confirmed in his evidence that the second claimant was never a labour tenant, and that she never worked on the farm. Her rights of occupation were derived from her marriage to the first claimant. It follows that she cannot have a separate restitution claim of her own.

[64] In the light of my conclusion that the claimants settled in De Brak only during or about 1970, there is no credible evidence which would justify a land restitution order in respect of the entire remaining extent of portion 9 of New Belgium, or any portion thereof. It is stated in

the referral papers prepared by the first respondent, the correctness of which was admitted by the claimants in their responses, that by 1970 the practice of labour tenancy (the so-called three months system) had already come to an end. In my view, the first claimant was at all relevant times employed as a farm worker. When the second respondent took over his employment, he was given much better employment terms than he previously enjoyed.

CONCLUSION

[65] Whatever rights in land the first claimant might have had in respect of the remaining extent of portion 9 of New Belgium, he was not dispossessed of them as a result of past racially discriminatory laws or practices. He lost them after due process of law, which culminated in an eviction order granted against the claimants by Moloto J in this Court on 3 September 2002. They were required in terms of the order to vacate the second defendant's property by 15 December 2002, failing which the eviction order could be carried out on 6 January 2003.

[66] The claimants' erstwhile counsel, in their heads of argument, placed great reliance on the Constitutional Court decision of *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*, 2007 (6) SA 199 (CC). In the *Goedgelegen* case, it was not in dispute that the claimants were dispossessed. The issue was whether the dispossession resulted from past racially discriminatory laws or practices. In the present case, there was no dispossession prior to 31 December 1998 of any rights in land which the claimants might have had in respect of Indabushee. Their dispossession occurred after 31 December 1998. Section 2(1)(e) of the Act requires a formal claim be lodged by not later than 31 December 1998.

[67] The second claimant did not testify. It is clear, however, that she never had an independent right of occupation of De Brak. Her right to live there was at all relevant times derived from the first claimant's employment on the farm. Her restitution claim can therefore not succeed.

COSTS

[68] A claim for the restitution of a right in land is a claim against the State – see sections 35(1), 42(A)(1) and 42(E) of the Act. The owners of the land under claim may dispute the validity of the claim and may, if the claim has been referred to the Court, participate in the Court proceedings as interested parties.

[69] It was held by the Constitutional Court in the case of *Biowatch Trust v Registrar, Generic Resources, and others*, 2009 (6) SA 232 (CC), that in constitutional litigation -

> "particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it ...."

[70] Litigation concerning the restitution of rights in land is constitutional litigation if it is undertaken to assert or defend a constitutional right (which could be a right to land restitution or a right to property). It was held by this Court in the case of *In re Kusile Land Claims Committee: Land Restitution Claim, Midlands North Research Group and Others*, 2010 (5) SA 57 (LCC) at 64A, that litigation by claimants to obtain restitution of rights in land, and litigation by the land owners to resist the claim for restitution, is constitutional litigation.

[71] Following upon the judgement in the *Biowatch* case, this Court, in the *Kusile* matter and subsequent cases, has made cost orders against the State where land owners have successfully resisted restitution claims over their land. In the present case, Mr Motepe conceded in his argument before us that if the second defendant succeeds in its opposition to the restitution claim, the State must bear the second respondent's costs, except the wasted costs of 19 August 2011. The claimants or their legal representatives are responsible for the postponement of the matter on 19 August 2011. The claimants should therefore be ordered to pay the second respondent's wasted costs caused by the postponement.

[72] Mr Havenga asked for costs on a punitive scale. Although the first defendant may be criticised for its inadequate investigation of the claim, for its continued support of the claim

after it must have realised that the claim cannot succeed, and for informing the Court at a very late stage of the competing claim by the Mapela tribe, I am not convinced that there was any impropriety or wilful neglect of duty on the part of the first defendant's officials. We will therefore order the State, through the Department of Rural Development and Land Reform, to pay the costs of the second defendant.

ORDER

[73] For the reasons set forth above, the following order is hereby made:

(a) The claimants' claims for the restitution of rights in land in respect of the remaining extent of portion 9 of the farm New Belgium No 608 LR are hereby dismissed;

(b) The substitution application brought by the claimants during July 2009 is hereby dismissed;

(c) The State (through the Department of Land Reform and Rural Development) must pay the second defendant's costs, including its costs in all interlocutory applications, but excluding the wasted costs of 19 August 2011, taxed as between party and party.

(d) The claimants jointly and severally must pay the second respondent's wasted costs of 19 August 2011.

A GILDENHUYS

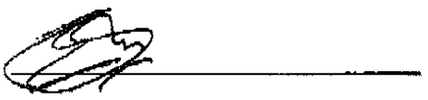
JUDGE OF THE LAND CLAIMS COURT

I agree

J M PIENAAR

ACTING JUDGE OF THE LAND CLAIMS COURT

I agree



E. STRÖH

ASSESSOR

APPEARANCES:

For the plaintiffs (excluding the hearings on 19 August 2011 and 3 October 2011):

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with him

Mr M Malowa

Instructed by

Nkuzi Land Rights Legal Unit

For the first defendant and the Department of Land Reform and Rural Development:

Mr J A Motepe

instructed by

The State Attorney, Pretoria

For the second defendant:

Mr H S Havenga SC

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For the Mapela Tribe

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