IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT PIETERMARITZBURG

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

25/05/2020

CASE NO: LCC 125/2008

In the matter between:

MAVUNDULU COMMUNITY **CLAIMANT**

and

THE MINISTER OF AGRICULTURE, RURAL DEVELOPMENT AND LAND REFORM **FIRST DEFENDANT**

REGIONAL LAND CLAIMS COMMISSIONER **SECOND DEFEDANT**

DJ SCHEUER FARMING CC **THIRD DEFENDANT**

MANFRED MARTIN HILLERMAN **FIFTH DEFENDANT**

HERMAN THEODOR MEYER **SIXTH DEFENDANT**

EVANGELICAL LUTHERAN CHURCH NEW HANOVER **SEVENTH DEFENDANT**

HOPEWELL TRUST	EIGHTH DEFENDANT
ROLF MATTHEW SCHRODER	NINTH DEFENDANT
UHLMANN FAMILY TRUST	TENTH DEFENDANT
MANFRED VICTOR SCHRODER	TWELFTH DEFENDANT
WOERNER TRUST	THIRTEENTH DEFENDANT
WHITE THORN TRUST	FOURTEENTH DEFENDANT
mmRM MARK FAMILY TRUST	FIFTEENTH DEFENDANT
WITTEMOUNTAIN TRUST	SIXTEENTH DEFENDANT
MANFRED MEYER FAMILY TRUST	SEVENTEENTH DEFENDANT
WERNER MEYER FAMILY TRUST	EIGHTEENTH DEFENDANT
WERNER MARK REDINGER	NINETEENTH DEFENDANT
AMBLESIDE MEATS CC	TWENTIETH DEFENDANT
BRIAN BASIL MITROPOULUS	TWENTY FIRST DEFENDANT
TMJ INVESTMENTS 15 CC	TWENTY SECOND DEFENDANT
DROGEMOLLER LIF & SHORT-TERM BROKERS CC	TWENTY THIRD DEFENDANT
ROLAND GERHARD FRENZEL	TWENTY FOURTH DEFENDANT
COCOHAVEN 1057 CC	TWENTY FIFTH DEFENDANT
ROYHEATH RAMDEWU AND REETHA RAMDEWU	TWENTY SIXTH DEFENDANT
UCL CO-OPERATIVE LTD	TWENTY SEVENTH DEFENDANT
MOOIZICHT TRUST	TWENTY EIGHTH DEFENDANT

Concerning: Land described by the Mavundulu Community (Claimant Community) at the time of the dispossession concerning certain portions/sub divisions of the farm Spitzkop and Mooiplaats situated in New Hanover Magisterial district, KwaZulu-Natal.

Judgment delivered on: 25 May 2020

JUDGMENT

CANCA AJ

INTRODUCTION

[1] At the close of the Plaintiff's case (and that of the first and second defendants), in a trial based on a claim by a community for restitution of rights in land under the Restitution of Land Rights Act, No. 22 of 1994 ("the Restitution Act"), I granted an application for the dismissal of a land claim sought to be based on individual claims, as an alternative to the one lodged as a community claim.[1] That application was brought by the land owner defendants.

[2] Following the grant of the application alluded to above, I indicated to the parties that there was an issue which might be conveniently decided before any other evidence was heard.

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[1] The individual claim/s, which was added by the Plaintiff during October 2017 was dismissed by on the basis that it was not valid in law. That claim was not lodged by 31 December 1998, the cut-off date for the lodging of claims in terms of the Restitution Act. Furthermore, the evidence did not indicate that an individual claim/s was intended.

The issue is whether the Plaintiff, who had lodged the community claim in terms of Section 2(1)(d) of the Restitution Act, has proved that there was a community in existence whose rights in land were derived from shared rules determining access to land held in common by them, and of which they were dispossessed *post* 19 June 1913.

[3] I ordered that the issue be separated in terms of Rule 57(1)(c) of the Rules of this Court[2] and that Heads of Argument be provided.

[4] The crisp legal issue for determination in this judgment is not dissimilar to the one considered by Meer JP in the recent judgment of *Luhlwini Mchunu Community v Hancock and Others* [2020] ZALCC 2 (16 March 2020), namely:

> *"Is the Plaintiff a community as defined in the Restitution of Land Rights Act, No. 22 of 1994?"*

[5] It is appropriate to give a brief description of the genesis of this matter and a summary of the events that have led us to this stage of the trial before considering the issue alluded to in the previous paragraph.

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[2] The Rule provides that " (1) Should the Court, upon application by any party or of its own accord, be of the opinion that there is an issue of law or fact in a case which may conveniently be decided ... (c) separately from some other issue, the Court may order a separate hearing of that issue, and grant any extensions of time periods prescribed in the rules which may be desirable because of the separate hearing."

BACKGROUND

[6] The claim was lodged on behalf of the Mavundulu community on 30 December 1998 by Mr. Sipho Cekekhulu. He was authorized to do so by a resolution dated 9 August 1998. The claimed land consists of property situated in the Magisterial district of New Hanover, a small town located approximately 40 kilometers north-east of Pietermaritzburg, in the Province of KwaZulu-Natal.

[7] The Second Defendant, the Regional Land Claims Commissioner: KwaZulu-Natal ("the RLCC"), accepted and investigated the claim as a community claim. The claim was duly published in the Government Gazette Notice 17 of 2007 ("the Notice").

[8] The list of properties published in the Notice was subsequently amended by Government Gazette Notice 642 of 2011. However, the claim remained gazetted as a community one.

[9] This trial only relates to the farms Mooiplaats No. 1315, which was granted to a Mr. Cornelius J. Laas in March 1853 and Spitzkop No. 1129, which was granted to Mr. Cornelius J. G. Vermaak in May 1851. It is not denied that the aforementioned farms underwent certain sub-divisions and changed ownership over the years, in particular, prior to 1913 and thereafter.

[10] The trial commenced in New Hanover, referred to in paragraph [6] above, and was preceded by an inspection *in loco* of the claimed land on 15 and 16 March 2019.

[11] The Plaintiff, in various parts of its Amended Response to the Referral, states the following:

> 11.1 *"Mavundulu Community's members were in occupation of the claimed land since time immemorial prior to the arrival of the white people who later came to the land surveyed it, subdivided it and registered it in title deeds."*
>
> *11.2 "The claimant community was then compelled to live side by side with the white people."*
>
> *11.3 "The customary rights held by the claimant community to the land were reduced to those of labour tenants over time and gradually reduced to those of farm labourers over a period of time. The claimant community members were forced to work for the various white owners on their land and those who were not willing to be subjected to the labour tenancy and farm labourer system were forced to seek residence in the black townships and black rural areas in the greater KwaZulu-Natal Province including Greytown, Pietermaritzburg, Hammersdale and in Zululand."*
>
> *11.4 "As a pre-cursor to the dispossession, the white people*
>
> > *8.1 In 1903 dismantled the chieftaincy of chief Cebekhulu, Mavundulu by kidnapping him and throwing him in a deep (obidini) which is also one of the live landmarks and left him to die there".*

[12] Mr. Roberts, assisted by Ms. Roberts, for the land owner defendants, and Ms. Naidu, for the State defendants, argued that the Plaintiff's amended response to the referral and the evidence tendered in support of its claim does not support the existence of a community as defined in the Restitution Act but rather that of a group of individuals living on the claimed land as farm workers and/or labour tenants.[3] I agree with counsel that the quoted extracts make it abundantly clear that the claimants are not a *"group of persons whose rights are derived from shared rules determining access to land held in common by such group."* [4]

THE LAW

[13] According to Section 2(1)(d) of the Restitution Act, a person shall be entitled to restitution of a right in land if 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. The claimant for the restitution must have lodged a claim with one of the offices of the Land Claims Commission by not later than 31 December 1998.

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[3] A labour tenant is defined in the Land Reform (Labour Tenants) Act, No. 3 of 1996 and means a person "(a) who is residing or has the right to reside on a farm; (b) who has or had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker."

[4] Section 1 of the Restitution Act.

[14] Section 1(iv) of the Restitution Act defines a "community" as follows:

> *"Community means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group and includes part of any such group."*

[15] A right in land is defined in Section 1(xi) of the Restitution Act as "*any right in land whether registered or unregistered …*"

[16] The law as to what constitutes a community in restitution of rights in land claims is trite: *Department of Land Affairs and Others v Goegelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 119 (CC) at para 45. Also see the authorities giving legal context to the definition of community set out by Judge President Meer in paragraph [8] of *Luhlwini Mchunu*, namely, *In re Kranspoort Community* 2000 (2) SA 124 (LCC); *Department of Land Affairs and Others v Goedgelegen Tropical Fruits* (Pty) Ltd [2007] ZACC 12; 2007 (6) SA 199 (CC) and *Elambini Community v Minister of Rural Development and Land Reform and Others* [2018] ZALCC 11.

[17] Sections 30(1) of the Restitution Act grants this Court the discretion to admit any evidence which it considers relevant and cogent to a matter being heard by it, whether or not such evidence would be admissible in any other Court of law.

THE TESTIMONY OF THE LAY WITNESSES CALLED BY THE PLAINTIFF

[18] Mr. Chithi, for the Plaintiff, over the course of several weeks, led the evidence of eight witnesses, two of whom testified as experts. Their testimonies are summarized below.

[19] Mr. Umbrose Absolom Ndlovu, in support of the Plaintiff's case that they lived as a community, testified that if there was a death, the induna (a person akin to a foreman or a supervisor at the workplace) would announce the death and the place of its occurrence to the rest of the community. No ploughing would take place during that period and that, during the harvest, they would not eat that which they had been reaped until after the Inkosi had blessed the harvest and had tasted the crop. A further example was that, in the event of a wedding, the inkosi had to be notified and he would instruct the induna or certain members of the community to ensure that the ceremony took place without incident.

[20] This witness, however, conceded during cross-examination that, although Mr. Cebekhulu Mavundulu was the Chief/Inkosi of the area in which the claimed land fell when the whites arrived, the whites starting making the rules by which they lived by, particularly after his disappearance in 1903. And, anyone who did not adhere to those rules would have to leave or suffer the consequences for not adhering to the rules. He further stated that the whites restricted their grazing land and the number of

livestock each household could keep. In addition, they identified the grazing and ploughing areas, restricted their right of movement as well as the number of houses which each household could erect in their homesteads. According to Mr. Ndlovu, his family was evicted, *inter alia* because his father's livestock was overgrazing and that he had refused to reduce their number to that set by the farm owner.

[21] Mr. Sipho Wilson Cebekhulu, who was born on 3 March 1947, testified that he was told that the whites, who arrived in the area during the reign of Chief Cebekhulu Mavundla, came with documents, issued by the Government, which authorized them to become the owners of the claimed land. (The land owner defendants' pleadings show that these were grants and that they were issued to a Mr. Vermaak and Mr. Laas during 1850 and 1851 respectively. See paragraph [9] above).

[22] He further stated that his family was evicted during the early 1960s because his father refused to reduce his livestock, which the owners of the farm stated were overgrazing and encroaching on the owners' grazing land.

[23] During cross-examination, Mr. Sipho Wilson Cebekhulu conceded that the owners of the farm made the rules in respect of grazing, movement, visiting rights, functions and occupation rights on the property.

[24] Mr. Makhonda Albert Ntanzi, who did not refer to the claim land at all during his evidence-in-chief, testified that when his father fell ill, and was unable to offer his labour, his mother had to work for the owners in order for them to retain the right to continue living on that property. His further testimony was that they were evicted when his mother, eventually, also fell ill and was unable to continue working for the land owners.

[25] Mr. Ntanzi conceded during cross-examination that after the whites took over, it was them who decided where Black people could stay and bury their dead, not the Inkosi. He also conceded that most of his testimony was based on what he had heard from his mother.

[26] Mr. Mpikayipheli Petros Ngubane, an educator, testified that he was born on 9 February 1954 and that that he and his family left the farm Mooiplaats during 1958 or 1959. He stated that he was informed of their eviction by his grandfathers and uncles and that they settled on another farm. He would have been 4 or 5 years old at the time of their removal to the other farm which does not form part of the claimed land.

[27] Mr. Ngubane did not testify about any land that was held in common by the claimant community.

[28] Mr. Tenman Dludla, who was born in 1960, based his evidence on what he was told by his grandmother given that he was too young at the

time of his family's eviction from a farm, which he said was known as the Bentley farm.

[29] This farm is one of those listed in the Government Gazette which was withdrawn in terms of the Court Order dated 18 January 2010. It does not form part of the claimed land. Consequently, given that his evidence related to property that falls outside the claimed land, his testimony is irrelevant and does not assist the Plaintiff's case.

[30] Ms. Linda Rohoda Qwabe, born Cele, testified that her father's employment was terminated upon his injury at work. A relative then commenced work on the farm on his behalf but left that employ and the farm when she (the relative) got married. She and her family were then evicted from the farm.

[31] A conspectus of the evidence by the above-mentioned lay witnesses, the bulk of which was hearsay, leads, inevitably, to the conclusion that they and their forebears lived (and worked) on the claimed land under the rules of the white farmers. Also, the evictions from the claimed land appear to have mostly been because of a failure to abide by the rules set by the farmers. Therefore, the evictions cannot be classified as having been as the result of racially based legislation or practices.

THE TESTIMONY OF THE PLAINTIFF'S EXPERT WITNESSES

[32] Dr. Ndlovu, who, *inter alia*, alleged that he is a heritage expert because, according to him, land is part of heritage, testified on the anthropological facts pertaining to this claim, given that he is not a historian. He asserted that his MA degree in anthropology, although conceding that he did not study anthropology at an undergraduate level, and a PhD (in rock art), qualified him to testify as an expert in the field of anthropology. His expertise as an expert witness was placed in issue by Mr. Roberts and Ms. Naidu, who both contended that Dr. Ndlovu's evidence be rejected.

[33] Dr. Ndlovu's evidence was mostly based on "*interviews with land claimants*" whose identity he refused to disclose. This is, *inter alia*, evident from page 7 of his expert report where the following is stated:

> *"For the purpose of this report which is characterized by primary data gathered from interviews with the land claimants, I limit my discussion to issues to do with access and rights to land:"*

[34] In brief summary, Dr. Ndlovu's evidence was that, not only was Mavundulu, according to his informants, a "*local name*" "*directly linked to the presence of the land claimants in the area"* but that there was in existence a claimant community who shared traditional rituals and/or rules on the claimed land, although the exercise of same was subject to the permission of the white farmers. He could not elaborate how those rules were implemented and whether they were implemented on land held in common by the claimant group.

[35] Dr. Ndlovu, who conceded under cross-examination that he did not conduct an independent archival research but merely relied on the report of Dr. Whelan, the land owner defendants' expert witness, stated that he neither verified the archival documents of Dr. Whelan nor looked at the aerial photography in respect of the claimed land.

[36] It is, furthermore, noteworthy, as submitted by Mr. Roberts, that Dr. Ndlovu, who was, generally, dismissive of the land owners' archival documents during cross-examination, did not profess to have any skill or knowledge to analyse oral and archival evidence to determine whether there was in existence a community and/or persons who lost rights in land held in common by them subsequent to 19 June 1913.

[37] I agree with Mr. Roberts and Ms. Naidu that Dr. Ndlovu does not qualify as an expert. He has not provided satisfactory evidence or information to satisfy the test whether he is a competent witness or not. No weight is, as a result, placed on Dr. Ndlovu's evidence.

[38] The Plaintiff also called Mr. Schoeman, who has expertise in analyzing aerial photography, to testify as to the existence of people living on the claimed land. He readily conceded that he was not an expert and considered his appointment merely to assist the Court and other experts to make informed decisions.

[39] The photography on which Mr. Schoeman based his testimony only starts from 1937 onwards and included property and structures which did not form part of the claimed land. The gist of this witness' testimony is that there was evidence of commercial, as opposed to subsistence, farming, as well as a number of farmsteads and farming infrastructure on the claimed land as from 1937.

[40] Mr. Roberts contended that Mr. Schoeman's evidence did not advance the Plaintiff's assertion that that there was a community in existence that occupied the claimed land and which land was used by it as a community to the exclusion of the white farm owners. I agree. Mr. Schoeman did not testify about the Plaintiff's alleged status as a community as defined in the Restitution Act.

DISCUSSION

[41] The claimant community bore the onus to prove that it existed as a community as defined in section 1 of the Restitution Act. Such proof entails, *inter alia,* that it or part thereof, existed as a community whose rights in land were derived from shared rules determining access to land held in common by them, and of which they were dispossessed after 19 June 1913. See *Prinsloo v Ndebele-Ndzundza Community and Others* [2005] ZASCA 59; [2005] 3 All SA 528 (SCA) at paragraph [39] where it is stated that:

"...there must be, at the time of the claim,

(1) a sufficiently cohesive group of persons to show that there is still a community or part of a community, taking into account the impact which the original removal of the community would have had; and

(2) some element of commonality with the community as it was at the time of dispossession to show that it is the same community or part of the same community that is claiming."

In addition, the community has to show that it had been victim to racial dispossession of those rights in land. See *Goedgelegen Tropical Fruits* and *Elambini supra*.

[42] The Plaintiff's Amended Response to the Referral, quoted in paragraph [11] above, and the evidence of its lay and expert witnesses, does not establish that the claimants, or their ancestors, are a group of persons whose rights in land were derived from shared rules determining access to land held in common by them. Rather, the aforesaid pleading and the oral evidence points to rights in land held by the white farmers. They made the rules as to who could have access to their land and set the terms on which the claimants and their ancestors could occupy and use designated portions of a particular farm.

[43] The material aspects of the lay witnesses' testimony evidenced labour tenancy rights and/or that they and their forbears were farm workers, and not the rights of a community as defined in the Restitution Act. The fact that the land claimants shared and exercised certain traditional rituals, social interactions, had small allotments, which they used for gardening purposes and keeping kraals for their livestock, the number of which was set by the farmer and, generally, engaged in subsistence farming, does not meet the test of the definition of community. Whilst the evidence does establish that the group did have shared rules, none of this related to shared rules determining access to land held in common by that group. See the dictum of the learned Judge President in *Elambini supra*:

> "[141] *Thus it is settled law that for a community litigant to succeed in a restitution claim it must prove that it existed as a community after 19 June 1913, that it derived its possession and use of the land from common rules, and that it existed as the same community at the time that the claim was lodged. If at the time of dispossession, the possession and use of the land did not derive from common rules, but were supplanted by labour tenancy rules, the rights in land were not held by a community at the time of dispossession."*

[44] Moreover, given the parallels between this case, *Luhlwini Mchunu* and *Elambini*, the dictum of the learned Judge President, at paragraphs [143] – [145] in *Elambini*, and quoted in full in *Luhlwini Mchunu*, is apt in this matter.

CONCLUSION

[45] The Plaintiff has not, in my view, established that the Plaintiff occupied the land held in common by the claimant community under shared rules determining access to land. It was stated in paragraph 11 of the Amended Response, quoted in paragraph [11] above, that the *" customary rights held by the claimant community to the land were reduced to those of labour tenants over time and gradually reduced to those of farm laboures over a period of time,"* This does not support the requirement of *"shared rules determining rights in land held in common."*

COSTS

The fees of the land owner defendants' legal teams.

[46] Although this Court does not award costs to the successful party unless there are special circumstances, it is now settled law that if a private litigant succeeds in constitutional litigation against the State, that litigant should be entitled to a costs order. Sachs J, in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at paragraph 24, states that "*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."*

[47] The Constitutional Court in *Matladi obo Matladi Family v Greater Tubatse Local Municipality and Others* [2013] ZACC 21; 2013 8 BCLR 909

(CC) at paragraph [12], re-iterated the fact that *"a claim for restitution of rights in land is an important constitutional issue."*

[48] The *Biowatch* principles relating to costs have been applied in numerous cases in this Court, including the following: *Midlands North Research Group and Others v Kusile Land Claims Committee and Another* (LCC21/2007) [2010] ZALCC 19; 2010 (5) SA 57 (LCC), paras [18] – [21] and [35]; *Moloto Community v Minister of Rural Development and Land Reform and Others* 2019 (3) 523 (LCC) at para [30].*Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Land Reform and Others* 2010 (4) SA 308 par [35]; *Mathibane and Others v Normandien Farms (Pty) and Others* [2017] ZASCA 163; [2018] 1 All SA 390 (SCA); 2019 (1) SA 154 (SCA) par [77].

[49] Ms. Naidu, who strongly opposed the punitive costs order against the State defendants sought by the land owner defendants, argued, without much conviction, that the Court should follow its practice of not making a costs order unless special circumstances existed. The State defendants have not conducted themselves in a manner which warranted a costs order against them, so the argument continued. Ms. Naidu did not present any "*powerful reasons*" as to why this Court should depart from the very clear rule set by the Constitutional Court in *Biowatch supra* insofar as the State's liability to pay the costs of *"a private litigant who achieves substantial success in proceedings brought against it."* The land owner defendants have demonstrably achieved success in this matter in the light of my finding

that the Plaintiff has failed to prove its claim. They are entitled to costs in this matter.

[50] Ms. Naidu, contended, in the alternative to her submission that there should be no costs order in this matter, that should I be minded to award costs to the land owner defendants, then such an award should be on a party and party scale to include the cost of only one counsel. This was based on the submission that, not only were the land owner defendants the only parties to brief two counsel but that they also had a senior, very experienced attorney and the matter was not a complex one.

[51] I do not think that it is up to this Court to prescribe to land owner defendants or land owner respondents, in land claim matters, the number of legal representatives they should engage in a particular matter. It seems to me that, that is a matter which is best left to those instructing them and the Taxing Master. When a land owner, in matters of this nature, finds him or herself suddenly in a position where they might lose their property to a land claim, it does not seem unreasonable to me for such an individual to seek the best available assistance to either save his or her property or to extract the best possible monetary value for same, should the facts support a particular land claim.

[52] I am, however, not persuaded that the land owner defendants are entitled to a costs order on a scale as between attorney and client, as contended for by Mr. Roberts. The high-water mark for that contention is

the submission in his Heads of Argument that *"a prudent legal representative would scrutinize the evidence and interrogate their witnesses before a trial commences"*. Had that been done, so the contention continues, Ms. Naidu and/or her instructing attorney would, *inter alia,* have known that Dr. Ndlovu was not an expert. And, they should have gleaned from the report of Dr. Whelan that there was no community long before the trial, the contention continued. The legal representatives for the State defendants "*recklessly caused the trial to proceed in circumstances where they ought to have known that there is no prospect of success",* so the contention continued. The contention, in my view, does not rise to the level where a punitive costs order is justified.

[53] In disallowing the land owner defendants' prayer for a punitive costs order against the State defendants in *Luhlwini Mchunu*, the learned Judge President states the following:

> *"It is established law that a Regional Land Claims Commissioner in satisfying herself/himself that a claim has been lodged in the manner prescribed in section 11(1) of the Act, does not adjudicate claims. See Farjas (Pty) Ltd v Regional Land Claims Commissioner, KZN 1998 (2) 900 at 926I – 927E. A Regional Land Claims Commissioner is thus certainly not empowered to adjudicate whether a claim is an individual or community claim. Nor in researching a claim is that official tasked with uncovering evidence that may only be produced later at trial, as has occurred in respect of who occupied the 19th and 20th Defendants' land. I am thus disinclined to grant the punitive order sought…."*

This dictum applies with equal force in this matter.

[54] In the light of all of the above, I find that the land owner defendants are entitled to party and party costs against the State.

The fees of the Plaintiff's legal team.

[55] After posing to counsel the question raised in paragraph [4] above, namely, whether the Plaintiff was a community, I asked Mr. Chithi to also furnish me with written submissions, when responding to the aforesaid question, as to why his fees, and that of those who briefed him, should not be disallowed.

[56] The issue of the possible disallowing of fees for the Plaintiff's legal representatives was raised *mero moto,* as was the case in *Luhlwini Mchunu.* The legal fees for the Plaintiff's legal team, in that matter, were disallowed mostly on the basis that the learned Judge President found the legal team's

> "... *persistence and pursuit on behalf of the Plaintiff with a community claim when there was no shred of evidence to prove the legally established acid test post Goedgelegen that the Plaintiff derived its use and possession of the land from common rules."*

was "*vexatious, frivolous and abusive litigation...*". *Luhlwini Mchunu* at paragraphs [24] and [33].

[57] Mr. Chithi argued robustly that an advocate is duty bound to present his client's case as best he can, even if he is of the view that his client is unlikely to succeed and, therefore, he and those instructing him, were entitled to their fees. I agree that legal representatives are obliged to offer their best possible efforts when representing their clients. That, however, does not permit them to argue cases on manifestly incorrect submissions relating to the law.

[58] A legal representative cannot accept instructions and argue cases that are patently unsustainable in law. For example, if the legal representative has to represent a client facing a damage's claim based on fraudulent conduct, he cannot argue that fraud is not a delict in South African law. That would be patently incorrect. That legal representative may, however, argue that his or her client's conduct was not fraudulent, even if in his own opinion it was fraudulent.

[59] Mr. Chithi is very experienced in matters involving this Court and appears often in the Land Claims Court, particularly in cases emanating from KwaZulu-Natal, where he is based. That province, on the whole, has the most cases on this Court's Roll. Mr. Chithi must (or should), therefore, have been well aware of the fact that a group of persons cannot claim restitution of rights in land in terms of the Restitution Act if their rights in the land were not derived from shared rules determining access to land held in common by that group. It is, moreover, worth noting that Mr. Chithi was

counsel in both *Elambini* and the *Luhlwini* cases in which the definition of "community" contained in the Restitution Act was at issue.

[60] In the present matter, Mr. Chithi knew (or should have known) from the outset that the Plaintiff could not submit any evidence which might satisfy the legal requirements that their rights in land must be derived from shared rules determining access to land held in common by the group and/or community. He should have advised the group that their community claim cannot possibly succeed, and offered to surrender his brief. As can be gleaned from the evidence tendered by the Plaintiff, there is no evidence which shows that the rights of which the Plaintiff was dispossessed, were derived from shared rules within the group and not from the land owners.

[61] Even if Mr. Chithi had not realized the dismal prospects of success of the Plaintiff's claim, it should, given his long experience as a practitioner in Land Claims Court matters, have dawned on him, after sight of the land owner defendants' experts' reports, that the claimants' persistence with the claim was akin to a voyage on the Titanic, doomed to end in failure, as was the case for the majority of its passengers and crew. This was another opportunity for him to surrender his brief on the basis suggested in paragraph [60] above and the one below. An order precluding legal representatives from recovering fees is not novel. See *Minister of Rural Development and Land Reform v Normandiem Farms (Pty) Ltd and Others*, *Mathibane and Others v Normadien Farms (Pty) Ltd and Others* [2017] ZASCA 163; [2018] 1 All SA 390 (SCA); 2019 (1) SA 154 (SCA) par [83].

[62] The following quotation from the *"South African Legal Practice Council's Code of Conduct made under the authority of section 36(1) of the Legal Practice Act, 28 of 2014 published on 10 February 2017; GN 81 of 2017 (GG 40610)" ("the Code")* is apt:

> *"3. Legal practitioners, candidate legal practitioners and juristic entities shall –*
>
> *3.10 advise their clients at the earliest possible opportunity on the likely success of such clients' cases and not generate unnecessary work, nor involve their clients in unnecessary expense;*
>
> *9.9 A legal practitioner shall, in giving any advice about the prospects of success in any matter, give a true account of his or her opinion and shall not pander to a client's whims or desires. However, in any matter in which the legal practitioner's opinion is adverse to the prospects of success, the legal practitioner may upon client's insistence place before a court the client's case for the adjudicating officer to decide the matter and the legal practitioner shall advance that case as .....*
>
> *25.3 Counsel shall upon acceptance of a brief exercise personal judgment over all aspects of the brief and shall not permit any person to dictate how the matter is to be conducted. If the decisions made or advice given by counsel are not acceptable to the instructing attorney or to the client, counsel must offer to surrender his brief, and if the instructing attorney elects to accept the surrender, counsel must forthwith withdraw.*
>
> *26.2 Counsel shall not refuse to accept briefs in an area of practice in which they profess to practice or in a court in which they profess to practice on the grounds*

that they disapprove of the client or of the client's opinions or alleged conduct or because of any disregard in which such person might be held.

60.1 A legal practitioner shall not abuse or permit abuse of the process of court or tribunal and shall act in a manner that shall promote and advance efficacy of the legal process."

[63] The learned Judge President, in *Luhlwini Mchunu,* cited with approval the dictum of Van Niekerk J, in the Labour Court case of *Mashishi v Mdlala and Others* [2018] 7 BLLR 693 (LC). The learned Judge in *Mashishi* states that:

"[14] Judge Owen Rogers recently suggested that it is improper for counsel to act for a client in respect of claim or defence which is hopeless in law or on the facts… Although these assertions are directed primarily at counsel… the same principles apply to attorneys, and indeed all those who have the right of audience before a court….By this he means counsel must be able to formulate a coherent argument comprising a series of logical propositions which have a reasonable foundation in law or on the facts and which, if they are all accepted by the court, will result in a favourable outcome, even if counsel believes that one or more of the essential links are likely to fail. But counsel acts improperly when she is "quite satisfied that one or more of them will fail. In particular, there is an ethical obligation on counsel, to ensure that only 'genuine and arguable' case cases are ventilated, and that this be achieved without delay (at p51).

[15] What is significant about Judge Rogers' argument is his acknowledgement that there is no express or even implied prohibition against pursuing the hopeless case to be found in the General Council of the Bar's Uniform Rules of Professional Conduct. The obligation not to accept or pursue a hopeless case is located outside of the formal rules of professional conduct, in sources that

include the court's power to stay those proceedings that amount to an abuse of process, the court's right to mulct a practitioner in costs (something that necessarily implies impropriety), and the founding values of the Constitution; in particular, effective, efficient and expeditious adjudication." See paragraph [31] of *Luhlwini Mchunu.*

The Labour Court is a court of similar status to that of the Land Claims Court.

[64] Proceeding with litigation that is obviously unsustainable is considered frivolous and/or vexatious and/or an abuse of the process of the Court. See *Luhlwini Mchunu* at paragraph [28] and the authorities cited in that paragraph. The litigation in this matter was funded from the public purse, which cast a fiduciary duty on legal representatives to ensure that the litigation is fully motivated. In the absence of supporting evidence to establish that the claimants are a community, the litigation cannot be said to be fully motivated.

[65] The findings in the case of *Emantanjeni Community v Commission on Restitution of Land Rights and Others* [2019] ZALCC 31 also supports the view that the Plaintiff's legal team is precluded from recovering any fees in this matter:

"[42] Initially, the Respondents sought costs against the Applicant but did not persist with this at the hearing, instead they persist with the claim that the Applicant's legal representatives should not be allowed to recover their legal

costs under legal representation provided in terms of section 29(4) of the Act. There is no need to deal with the legal fees of Advocate Shakoane SC who informed this Court that he volunteered his services and the issue of fees in relation to him does not arise. In my view, the Applicant's legal representatives' costs, should be disallowed following receipt of the answering affidavit. The Applicant's legal representatives should never have advised the Applicant to launch the main application.

...

[44] When public funds have been provided to litigants in terms of section 29(4) of the Act there is a fiduciary duty on the legal representatives to be responsible when instituting litigation and they must bring litigation that is fully motivated. When a legal representative fails to do so and brings unwarranted applications, there is no reason why this Court should not disallow their fees. As soon as the Applicant's counsel became involved in the matter, he must have realized that the application was ill-advised and there is no reason why the Commission should pay his fees."

[66] In the light of the above, and in view of the fact that I consider myself bound by the findings in *Luhlwini Mchunu*, I find that the fees of the Plaintiff's legal representatives should be disallowed in full for the entire matter and that they should repay to the relevant entity that funded the payment on behalf of the State whatever fees they may already have been paid to them.

[67] In the result, I order as follows:

1. It is declared that the Plaintiff is not a community as defined in the Restitution of Land Rights Act, No. 22 of 1994.

2. The Plaintiff's claim for restitution of rights in land in respect of the farms Mooiplaats No. 1315 and Spitzkop No. 1129 is dismissed.

3. The First Defendant, the Minister of Rural Development and Rural Development, shall bear the costs of the Third to Eighteenth Defendants on a scale as between party and party. Such costs shall include the following:

3.1 The employment of two counsel and attorneys in respect of all trial dates, the quantum of which shall be determined by the Taxing Master;

3.2 The costs of counsel and attorneys for attending all pre-trial conferences, the costs incurred in respect of consultations with representatives of the land owner defendants, and the costs in respect of consultations with the land owners' experts, Dr. D Whelan, Mr. C Henderson, Mr. P Hellig, Colonel Cloete and Mr. B Land.

3.3 The qualifying fees and expenses, including travelling and accommodation expenses, of the expert witnesses of Dr. D Whelan, Mr. C Hendersen, Mr. P. Hellig, Colonel Cloete and Mr. B Land, such as to include the costs of inspections *in loco* conducted by them, the consultations by them with the land owner defendants to obtain relevant information to compare their reports, the drafting of the reports and the consultation time with the land owner defendants' counsel and attorneys.

3.4 All costs of drafting maps and obtaining of all aerial photographs and/or making copies thereof for trial.

3.6 All costs incurred by the land owner defendants' attorneys in preparation, indexing and pagination of all bundles of documents, maps and photographs, transcript of court proceedings and making copies thereof.

4. The fees of Plaintiff's legal representatives, Mr. Chithi, Dludlu Attorneys and MC Ntshalintshali Attorneys, are disallowed in full for the entire matter. They are ordered to repay to the relevant entity that funded them on behalf of the State, whatever fees that may already have been paid to them.

MP CANCA

Acting Judge, Lands Claims Court

Appearances:

For the Applicants

Adv M M Chiti

instructed by

Dludlu Attorneys and M C Ntshalintshali Attorneys

For the 1st and 2nd Defendants

Adv P Naidu

instructed by

The State Attorney KZN

For the 3rd to 28th Defendants

Adv M G Roberts SC

with him

Adv E Roberts

instructed by

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