IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case number: **LCC 2012/117**

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

1 September 2022 .....

SIGNATURE

In the matter of:

MALANGANE COMMUNITY **Plaintiffs / Claimants**

Concerning:

Various farms described as the Malangane Community at the time of dispossession, comprising: **Remainder of the farm Dewaard No 188, Remainder of the farm Engelbrechtshoop No 53, Remainder of the farm Nooitgezien No 55, Remainder of the farm Hoedeberg No 555, Portion 1,2, 7 and 8 of the farm Oudewerf No 426, the farm Hollandia No 384, the farm Langverwacht No 410, Remainder of the farm Lotskloof No 44, Remainder of the farm Welverdiend No 98, Remainder of the farm Success No 296, Remainder of the farm Uitzicht No 349, Remainder of the farm Sweet Home No 413, Portion 4 of the farm Blaauwbank No 78, and Portion 1 of the farm Zoekmy No 207**

and

MINISTER OF RURAL DEVELOPMENT AND

LAND REFOR **First Defendant**

THE REGIONAL LAND CLAIMS COMMISSIONER KWAZULU NATAL	**Second Defendant**
THE DIRECTOR GENERAL OF RURAL DEVELOPMENT AND LAND REFORM	**Third Defendant**
VALUER GENERAL OF THE REPUBLIC OF SOUTH AFRICA	**Fourth Defendant**
ANTONIE CHRISTOFFEL LOMBARD	**Ninth Defendant**
ESTATE LATE GERT VAN RENSBURG UYS	**Tenth Defendant**
THANGAMI EIEDOMME (PTY) LTD	**Fourteenth Defendant**

JUDGMENT
(Abortive Trial Costs re 9th, 10th and 14th DEFENDANTS)

SPILG, J

1 September 2022

INTRODUCTION

1. The issue concerns the costs occasioned by a postponement because the Valuer General who is the fourth defendant wished to introduce a different basis for determining compensation payable to the 9th, 10th and 14th defendants through an expert witness who had not previously been identified and was unknown at the time the respective parties' experts met and had completed their joint minute.

2. The Malangane Community duly lodged land claims by the 31 December 1998 cut-off. The land from which they were dispossessed covers a large area and affects not only

many landowners but also competing land claimants. The issues range from the validity of the claim *per se* to questions of restorability.

3. The bulk of the land claimed was gazetted as far back as 2004. By reason of s 11 (7) of the Restitution of Land Rights Act 22 of 1994 restrictions were placed on both the claimant community and the landowners with regard to the land in issue and its use. It is therefore axiomatic that the longer the delay in bringing claims to finalisation the greater the prejudice to both the affected communities and the landowners. It is also axiomatic that the community will only be able to re-settle on land once transfer is effected; which means that the amount of compensation to be paid must first be determined by a court unless the parties are able to settle on an amount.

4. The land claim became moribund and in order to expedite its finalisation certain matters were directed to be dealt with separately. One of the separations arose because the Commission was satisfied with the validity of the claim in respect of an area where the landowners in question were agreeable to sell. The landowners were the 9th, 10th, 12th and 14th defendants.

5. On 2 October 2020 this court directed that the issue of just and equitable compensation payable to these defendants would be adjudicated upon separately. I also directed that expert summaries were to be delivered by 12 March 2021.

6. Several pretrial conferences were held in order to bring the matter to trial ready status and allocate dates for the hearing. I conducted each of the pretrial conferences and was satisfied that all the relevant parties, being those represented by the State

Attorney (who on record represents the 1st to 4th defendants[1]), and those represented by Cox and Partners (being the 9th, 10th and 14th defendants) were committed to bringing the matter to finality expeditiously.

7. It was therefore possible at the conference of 16 July 2021 to allocate the entire week of 22 to 25 March to hear the trial. In the interim the only outstanding matters were for the parties to file their expert reports by the end of September, a statement of agreed facts and facts In dispute to be delivered by early November and the experts to file a joint minute on 17 January 2022 after meeting shortly before then.

   At that pretrial conference it was possible to record that the Minister had formally agreed to purchase the land registered in the names of these defendants and had agreed on the compensation to be paid to the 12th defendant.

   The only outstanding issue at that stage was the amount of just and equitable compensation payable to the 9th, 10th and 14th defendants. The parties agreed that compensation would be determined by the court "*on date/s to be allocated by the court in due course and as soon as possible*" (emphasis added).

8. By the end of February 2022 the court was satisfied that the parties had complied with the directives and that the issue in dispute as identified by them concerned the factors taken into account by the DPP valuers, being the valuers relied on by the State parties which included the Minister of Rural Development and Land Reform. This appears

[1] The 4th defendant was formally joined on 27 May 2019

from both the State Attorney's response of 4 February which identified the issues in dispute and also from the contents of the State Attorney's rule 49 notice filed on 24 February in which DPP Valuers and HSK Simpson & Partners were identified as the experts who would testify based on the contents of their reports.

9. At the oversight pretrial of 4 March which had been set up to check whether all the necessary pretrial milestones had been complied with, the parties confirmed that the experts had met and had prepared a joint minute. The minute recorded that the experts were agreed on the market value and that the only issue for determination was whether any of the other factors identified in s 25 (3) of the Constitution applied.

10. By reason of the narrow issues then identified, it was agreed and directed that the respective legal representatives would hold a further conference without the court's participation.

    It was recorded that "*the State Defendants will produce, serve and file a document by 11 March 2022 setting out what the State Defendants contend to be the remaining issues (if any) that still needs to be determined*", that "the *legal teams of the parties will meet at advocate Roberts SC's chambers in Pietermaritzburg on Monday 14 March 2022 …. during which meeting attempts will be made at possibly settling the matter*" and that *"a further virtual pre-trial conference will be held at 09:30 on 17 March 2022 at which conference the parties will report back to the court with regard to the meeting of the legal teams on 14 March 2022."*

11. It is therefore evident that by this stage the only reason why the matter might not proceed to trial was if the parties were able to reach a settlement.

12. The meeting between the parties was held on Monday 14 March, being six court days before the trial was due to commence.

13. At this meeting the State Attorney advised that the Valuer General, i.e. the fourth defendant, intended calling an expert witness. But even then the identity of the expert was not revealed, nor were the enquires raised at that meeting responded to by the State Attorney by the time of the pretrial conference on 17 March.

14. At the pretrial conference of 17 March 2022 *Adv. Mtsweni* appeared for the Valuer General. The other State parties continued to be represented by *Adv. Khuzwayo*. It was then disclosed that the 4th defendant intended calling Prof Manya as its expert witness but no notice had been given under rule 49. The court was informed that a summary of Prof Manya's expert evidence would only be delivered on the day of the trial. It was therefore clear that a necessary meeting of experts could not be reconstituted before the trial date.

15. It is evident from the pleaded issues and the notices filed under rule 49 by the parties that the 9th, 10th and 14th defendants were ready to proceed. It is also evident that the 4th defendant would not be able to proceed with the case it now wished to present and would not be able to adopt the expert reports that until then had been the basis of the case made out on behalf of the State parties.

    Despite these facts, no costs were tendered then or at the earlier pretrial of 14 March by the 4th defendant or any other State party.

THE ISSUE

16. It is obvious that one or more of the State parties is to bear the wasted costs occasioned by the postponement. The question is which one and whether costs should be on the attorney and client scale as contended for by Adv. Roberts.

REASON ADVANCED FOR 11th HOUR CHANGE OF POSITION

17. The chronology set out earlier reveals that at least one of the State parties changed its position regarding the methodology or considerations to be applied in determining just and equitable compensation and that this occurred;

    a. *after* all the pretrial procedures for notifying the other party of the basis on which experts would adduce evidence relevant to the determination of just and equitable compensation had been complied with; and

    b. *after* there had been agreement on the determination of market value.

18. In the most material way therefore, the 4th defendant has renounced the basis on which the State parties represented at all relevant times by the State Attorney have brought their case to court. It is little different to changing the basis of a pleaded case at the doors of court.

19. The explanation tendered is that the Valuer General was unaware of the trial date until effectively just before 14 March. This was all submitted from the Bar. There is no affidavit setting out what occurred or why either the State Attorney, the 1st to 3rd defendants or

the Valuer General had not communicated with one another sooner, bearing in mind the issues which the Valuer General seeks to raise regarding the correct determination of compensation, being a position apparently adopted by the Valuer General in other similar litigation.

20. The explanation also holds little water if regard is had to the letter produced of 22 February which was addressed by the State Attorney to the Valuer General.

The contents of the letter revealed that the Valuer General had been notified that it was a party to the proceedings as far back as May 2019 and in the letter was informed of the trial dates commencing 22 March. The enquiry was whether the Valuer General had engaged other legal representatives, presumably because nothing had been heard from them in the interim. The letter clearly bears the Valuer General's reference number used by the State Attorney for this specific court case. The letter reads:

> LAND CLAIMS COURT – LCC 117 / 2012
>
> YOUR REFERENCE: KN/9/6/1/241
>
> *The above matter refers. Please be advised that the matter is set down for Trial on the 22 to the 24th March 2022. We would appreciate if you could advise us as to whether or not the office of the Valuer General has instructed a legal representative to represent them in the court proceedings as the office was joined in the proceeding through a court order dated 27 May 2019, a copy of the court order was sent to the Office of the Valuer General in a letter dated 29 May 2019 copy of same is attached hereto. We would appreciate a response by the 24th February 2022. We hope that the above is in order and await your response.*

(emphasis added)

21. It can be safely concluded that the Valuer General either accepted the basis of the position taken by the other State parties or simply ignored the State Attorneys letter until a week before the trial. This is because no mention was made at the pretrial of 4 March;

    a. that the 4th defendant intended to rely on a different basis of valuation to the one identified in the experts' joint minute of January 2022

    b. that the 4th defendant had discussed, with the other State parties or the State Attorney, replacing the rule 49 notice which had been filed on 24 February (and which relied on the expert evidence of DPP Valuers and HSK Simpson & Partners) with one for Prof Manya who apparently had been called as an expert on behalf of the Valuer General or another State party in another matter,

    One should also bear in mind that the letter of 22 February written by the State Attorney to the Valuer General could have been responded to immediately, or at least by the requested deadline of 24 February.

22. Accordingly, the reason given that the 4th respondent did not know of the trial date until it was too late cannot be accepted. A reasonable litigant in the position of the 4th defendant, if intent on maintaining its principled position regarding the correct methodology to be employed in determining compensation under law, should have

engaged the State Attorney and the State Attorney should, in good time, have secured proper instructions from its client.

Furthermore, the 4th defendant should have responded promptly to the State Attorney's letter of 22 February, bearing in mind that the trial date was a month away and an urgent response was requested by 24 February. It would also be surprising if the State Attorney did not attempt to contact the Valuer General before the rule 49 notice went out, thereby wedding it to the expert reports of DPP Valuers and HSK Simpson & Partners.

23. A party seeking a postponement of a trial, particularly one which has been nursed to readiness through case management and pre-trial conferences with the active involvement of a judge, must inform the other parties as soon as practicable, and if they do not all agree, then a substantive application for a postponement must be brought forthwith supported by an affidavit indicating whether costs are tendered and if not the reason why- unless there are relevant documents which would adequately address the matter.

In the present case one or more of the State parties believed they could change the case they sought to make through their experts by doing nothing until the eleventh hour. No acceptable or valid explanation was tendered, let alone the wasted costs of the inevitable postponement.

24. While one may anticipate that the other State parties will take the advantages presented by relying on the expert called by the 4th defendant and jettison the experts identified in the rule 49 notice Adv. Khuzwayo said that the other State parties were ready to proceed. Who ultimately should blame for the failure of the 4th respondent to give its attorney of record clear instructions timeously and what may have occurred between the 4th defendant and the other State parties *inter se* is for them to resolve and if need be apportion internally. Suffice it that the 4th defendant, due to its own fault or that of its appointed legal representative or both, is unable to proceed on the allocated trial dates with the case it wishes to make out and is therefore responsible for the payment of the wasted costs.

SCALE OF COSTS

25. Both counsel for the State parties argued that attorney client costs are only awarded in limited circumstances and cited a number of cases including *Public Protector v SA Reserve Bank* 2019 (6) SA 253 (CC) at para 8.[2]

26. *Adv. Roberts* contends that cases such as *Quinella, Nyathi, Swartbooi* and *Nel* ought to be applied in the present case. [3]

---

[2] The extract is from the minority judgment of Mogoeng CJ who at para 36 accepted that: "there *are costs that are meant to be penal in character and are therefore supposed to be ordered only when it is necessary to inflict some financial pain to deter wholly unacceptable behaviour and instil respect for the court and its processes"*

[3] *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others* 2010 (4) SA 308 (LCC) at paras 34-36 *Nyathi v MEC for Dept of Health, Gauteng* 2008 (5) SA 94 (CC) at para 91 where the court referred to "*The respondents, as organs of State, bear a special obligation to ensure that the work of the judiciary is not impeded".* However no special order for costs was made

27. In *BJ Smit Trust And 274 Others V Mutsei* LCC 171/2008 (unrep 12 May 2021) I had occasion to deal with a punitive cost order and relied on *Qwabe-Waterfall Community v Minister of Rural Development and Land Affairs and others* 2018 [ZALCC] 15 where the court referred to indifference and negligence as justifying such cost orders in appropriate cases. In *BJ Smit Trust* at para 16 the following was said:

> *"There are recognised grounds, such as vexatious litigation, for ordering punitive costs against a litigant.*
>
> *This court has however been compelled to make special orders for costs where the conduct of the State body has resulted in a litigant being obliged to approach it, and thereby incur totally avoidable costs, to enforce orders, directives and the court's rules in the face of persistent non-compliance or where the State body persistently ignores correspondence which requires a response in order for the matter to move forward with the expedition required under the framework of the Restitution of Land Rights Act … ."*

Swartbooi v Brink 2006 (1) SA 203 (CC) per Yacoob J at para 27 citing Nel *v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607

> *'The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in A respect of the expense caused to him by the litigation."*

The court has frowned on a party being unnecessarily mulcted in costs in this manner. See Qwabe-Waterfall Community v Minister of Rural Development and Land Affairs and others 2018 [ZALCC] 15 where the court referred to indifference and negligence as justifying a special costs order in appropriate cases.

28. The initial observation I wish to make is that a disclosure of the relevant facts must be made. A court is not expected to embark on conjecture nor should argument by counsel fill gaps in the narrative. A failure to make adequate disclosure is a factor which the court is entitled to take into account when considering a punitive costs order. This is so at two levels.

    Firstly it ensures that the requirements for seeking a postponement are respected, which is in substance an application for condonation setting out a proper explanation. Secondly, if a court finds that the explanation is inadequate, it is entitled to assume that there is fault which cannot be justified on the basis of a bona fide mistake, which leaves only indifference or negligence, particularly when it occurs, as here, after numerous pretrial conference were held in order to nurture the matter to trial readiness on the allocated dates.

29. Without an acceptable explanation on oath or at least one which appears clearly from correspondence or other documents, the court has before it only the letter of 22 February 2022 from the State Attorney to the Valuer General and no indication of a follow up or enquiry between the State Attorney and the Valuer General by 24 February let alone 4 March.

I have already found that the Valuer General either displayed indifference to the imminent court hearing and ignored the urgent request for a response or was prepared at that stage to allow the other State parties to proceed with the issue of compensation on the basis of the case made out by their experts pursuant to the rule 49 notices filed on 24 February.

30. If the court had been informed within the month of the trial, i.e. by 24 February, that the matter could not proceed it would have been able to reallocate matters and possibly the 9th 10th and 14th defendants may have been able to release their experts and legal representatives in good time or at less cost to themselves.

31. The 4th defendant or the State Attorney , as it is the attorney of record, failed to follow up on a case that was set down for hearing by court direction in good time, where the court took care in overseeing the matter to trial readiness so as to ensure that there would be finality in a matter that had had long outstanding and where the 4th defendant was a cited party duly represented by the State Attorney (as the Valuer General's reference number in the State Attorney's letter of 22 February reflects)

32. The conduct or failure on the part of either the 4th defendant or the State Attorney or both have defeated the purpose of pretrial conferences which case manage a matter to trial ready status with sufficient oversight meetings to obtain confirmation by parties as to whether the disputes which they wish to raise have been properly formulated and clarified so that there are no surprises and similarly that there are no surprises with regard to the expert testimony which is intended to be led and that in all other respects

the parties are fully prepared and ready to present their case through the necessary witnesses on the agreed upon trial dates , absent exceptional circumstances.

33. Pretrial conferences of this nature are not about ticking attendance boxes. Their purpose is clear and a slap on the wrist is not an adequate sanction bearing in mind the resources necessary to case manage a matter to trial on the part of the court , its administration and all the other parties who are prejudicially affected.[4]

34. In the present case, as with the majority of cases coming to trial before this court, there are other parties affected by an eleventh hour postponement who must now wait a considerable time before another full week can be allocated to hear the trial. In particular, the Malangane community members will only be able to take transfer of the land and occupy and utilise it for their benefit once the case has been finalised. They must now wait until another trial date becomes available. It should be borne in mind that the claim was acknowledges as prima facie valid when it was gazetted in 2004, nearly 20 years ago.

35. Furthermore, the present landowners have had to fund their own litigation. The 11th hour change of tack in the case they are called to meet results in significant irrecoverable costs and costs that could otherwise have been avoided if a postponement has been requested by 24 February.

The ordinary scale of costs will not provide much by the way of recovery of costs that were unnecessarily incurred had the State parties and their legal representatives

ensured that the pretrial process achieved its intended purpose. there were no gaps in the process.

36. It was the failure to ensure that all the State parties were properly consulted or that they had committed themselves to a common position from inception which has occasion the 9th 10th and 14th defendants to be unnecessarily out of pocket; and it is not suggested that they have deep pockets, rather that they will need to provide further funds to proceed and deal with the belatedly different approach now adopted by the 4th defendant. In real terms the level playing field of litigation is jeopardised should the y be expected to pay fees to experts and legal representatives that will only be partially covered by ordinary party and party costs.[5]

37. A punitive order for costs is warranted in all the circumstances and also in order to send a clear message that;

    a. parties to land claim matters and their legal representatives have a duty to ensure that they are kept abreast of the developments of their case and in

[5] In *Public Protector* Khampepe J on behalf of the majority said at paras 221-223:

[221] .... Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation. (at para 221)

[222] The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.

[223] More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court

particular the need to actively engage in case management and pretrial procedures to properly prepare for trial;

b. an application for postponement which is opposed or where costs are not tendered in good time must set out a proper explanation as to why the matter cannot proceed and where the fault lies;

c. a party who is not ready for trial must make this known to the other party as soon as reasonably possible in order to mitigate the costs that the latter may end up incurring if this is not done, particularly where they do not necessarily have the same financial resources to sustain lengthy litigation or unnecessary postponements. A failure to do so is a breach of a duty or responsibility owed to both the other parties and to the court.

38. The costs sought are:

a. the costs of senior counsel for the period 22 to 25 March 2022;

b. the costs of the expert witness, Mr Stephenson reserved for the period 22 to 25 March;

c. the travelling and accommodation costs of Attorney ABT van der Merwe of Cox and Partners to attend the pretrial in Pietermaritzburg on 14 March 2022.

39. This court cannot usurp the function of the taxing master who makes determinations based on considerations which are in his or her domain, subject only to the review powers of the court.

40. The court is however satisfied that;

a. the parties may be bound to pay counsel and the experts for reserving the full period in circumstances whereby the trial collapses within a particular period before then. This is a matter for the taxing master based on consideration of agreements which are not before the court;

b. the pretrial meeting of 14 March was pointless. The State attorney should have notified Cox and Partners that they could not proceed with the trial because they had shifted their position, were not going to rely on their experts, or that one of them was not going to do so, and that a different case was being made out and certain common cause facts may effectively be withdrawn.

ORDER

41. The court therefore makes the following order:

1. The fourth defendant is to pay the wasted costs on the attorney and client scale occasioned by the postponement of the trial of this matter which was to be heard on 22 to 25 March 2022 inclusive, such costs to include the costs of;

    i. senior counsel

    ii. Mr Stephenson who is the expert witness;

2. The fourth defendant is to pay the wasted costs on the attorney and client scale occasioned by the attendance of Attorney ABT van der Merwe at the pretrial held

on 14 March 2022 in Pietermaritzburg such costs to include the disbursements actually incurred of transport and overnight accommodation

JUDGE B SPILG

DATE OF HEARING	22 March 2022
DATE OF JUDGMENT	1 September 2022
FOR 9,10 and 14 DEFENDANTS	Adv. MG Roberts SC Cox & Partners
FOR 1st to 3rd DEFENDANTS:	Adv. BS Khuzwayo SC State Attorney, KwaZulu Natal
FOR 4th DEFENDANT	Adv. GS Mtsweni State Attorney, KwaZulu Natal