IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.

9 October 2023

SIGNATURE DATE:

CASE NO: LCC 164/2021C

In the matter between:

MPOFANA COMMUNITY LAND CLAIMANTS First applicant

(aka AMANGWE 2)

JONNY SITHOLE Second applicant

and

THE REGIONAL LAND CLAIMS COMMISIONER

KWAZULU-NATAL PROVINCE First respondent

THE CHIEF LAND CLAIMSCOMMMISIONER Second respondent

THE MINISTER OF AGRICULTURE, RURAL

DEVELOPMENT AND LAND REFORM Third respondent

CASE NO: LCC 164/2021

In the matter between:

MPOFANA COMMUNITY LAND CLAIMANTS	First applicant
(AKA AMANGWE 2)	
JONNY SITHOLE	Second applicant

and

THE REGIONAL LAND CLAIMS COMMISIONER	
KWAZULU-NATAL PROVINCE	First respondent
LEBYANE HARRY MAPHUTA	Second respondent
THE CHIEF LAND CLAIMSCOMMMISIONER	Third respondent
THE MINISTER OF AGRICULTURE, RURAL	
DEVELOPMENT AND LAND REFORM	Fourth respondent

JUDGMENT

COWEN J

1. There are two applications before me, which were argued together on 1 September 2023. The first is an application to rescind an order that this Court granted on 21 June 2023 (the June 2023 compliance order).[1] The second is a contempt of court application directed at those responsible for complying with the June 2023

[1] The parties refer to an order of 15 June 2023. The order was in fact delivered on 21 June 2021 but was erroneously dated.

compliance order and the prior order of my brother Justice Ncube dated 29 November 2021 (the 2021 order). The June 2023 compliance order is directed at ensuring compliance with the 2021 order and I will refer to the proceedings that led to its grant as the compliance proceedings.

2. The applications concern a dispute between the Mpofana Community Land Claimants (the Mpofana Community) and a Mr Jonny Sithole – in whose favour the 2021 order and the June 2023 compliance order were granted – and the Regional Land Claims Commissioner (KwaZulu-Natal) (the Regional Commissioner). The dispute concerns the duty of the Regional Commissioner to publish the land claim of the Mpofana Community in the Government Gazette in terms of section 11(1) of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act).

3. The 2021 order was sought and obtained by the Mpofana Community and Mr Sithole as applicants. Its primary import was to require the Regional Commissioner (the first respondent in those proceedings) to publish the land claim of the Mpofana Community in the Government Gazette. For convenience, I recite the material terms in full:

> '5. The [Regional Commissioner's] ongoing and persistent failure to cause notice of the land claim lodged by [Mpofana Community] to be published in the Gazette notice in terms of section 11(1) of the [Restitution Act] is hereby declared to be inconsistent with the Constitution, particularly section 9, 10, 25(7), 33, 195 and 237.
> 6. The decision or action of the [Regional Commissioner] in failing to publish or to take a decision to publish the land claim lodged by the Mpofana Community in the Gazette notice is hereby reviewed and set aside.

7. The [Regional Commissioner is ordered] to cause notice of the claim lodged by the First Applicant to be published in the Government Gazette, within thirty (30) days of this Order.
8. The [Regional Commissioner], within five (5) days after the Notice referred to in prayer 7 above [is ordered to] advise the owners of the land claimed by the [Mpofana Community] and any other party which the [Regional Commissioner] is of the opinion … might be interested in the claim, that the land claimed by the Mpofana Community has been published in [the Gazette].
9. The Regional Commissioner is ordered to make available the following information to the Mpofana Community, namely:
    9.1 Gazette Notices
    9.2 Research Reports
    9.3 Validation Report
    9.4 Verification Report.'

4. The central import of the June 2023 compliance order, also sought and obtained by the Mpofana Community and Mr Sithole, was to require the Regional Commissioner to comply with the 2021 order within ten (10) days of the date of that order. The June 2023 compliance order was granted in circumstances where it was common cause that the Regional Commissioner had not complied with paragraphs 5 to 8 of the 2021 order, which had been immediately enforceable.[2] The reason the Regional Commissioner gave for non-compliance was that after the 2021 order was granted, he had caused the Mpofana Community land claim to be researched and investigated and after receipt of the research report, he decided that the claim should be dismissed in terms of section 11(3) of the Restitution Act.[3] In the result, he said, there was no claim to publish and if the Mpofana Community wanted the order enforced it must first review and set aside his decision. The

[2] The effect of the order, as explained in paragraph 4 of my judgment of 21 July 2023, is to require compliance with paragraphs 5 to 8 of the 2021 order. As I noted then, an unusual feature of the 2021 order is that the prayers found in paragraphs 5 to 8 were granted 'in the alternative' to paragraphs 1-4. There was no dispute that paragraphs 5 to 8 were immediately enforceable and were so understood by the parties.
[3] Section 11(3) provides:
'A frivolous or vexatious claim may be dismissed by the regional land claims commissioner concerned.'

reasons for the Court's decision directing compliance are contained in my judgment of 21 July 2023 (the July 2023 judgment).

5. I also recite the terms of the June 2023 compliance order in full:

> '1. The [Regional Commissioner] is directed to comply with the order of this Court dated 29 November 2021 within ten (10) days of the date of this order by:
>
> 1.1 Causing notice of the claim lodged by the [Mpofana Community] to be published in the Government Gazette;
>
> 1.2 Within 5 (five) days of its publication, advising the owners of the land claimed by the [Mpofana Community] or any other party which the [Regional Commissioner] is of the opinion might be interested in the claim, that the land claimed by the [Mpofana Community] has been published in the Gazette.
>
> 1.3 By making available the following information to the applicants;
>
> 1.3.1 The Gazette Notices;
>
> 1.3.2 The Research Reports;
>
> 1.3.3 The Validation Report;
>
> 1.3.4 The Verification Report.
>
> 1.4 This order must be complied with irrespective of any decision of the [Regional Commissioner] taken or communicated in terms of section 11(3) of [the Restitution Act.]
>
> 1.5 The [Regional Commissioner] shall pay the applicants' costs on a party and party scale.
>
> 1.6 The applicants are granted leave to apply to the Court on the same papers duly supplemented for further relief in the event that the order of this Court is not complied with.'

6. As matters transpired, the Regional Commissioner did not comply with the June 2023 compliance order and to date has not complied with the 2021 order. Rather, on 30 June 2023, the Regional Commissioner, the Chief Land Claims Commissioner (the Commissioner) and the Minister of Agriculture, Rural Development and Land Reform (the Minister) applied to rescind or alternatively to

vary the June 2023 compliance order. The rescission application is opposed by the Mpofana Community and Mr Sithole.

7. On 12 July 2023, the Mpofana Community and Mr Sithole instituted parallel contempt proceedings. In doing so, they cited the Regional Commissioner as first respondent, Mr Lebyane Harry Maphuta (who is the Regional Commissioner) as second respondent and the Commissioner and the Minister as the third and fourth respondents, respectively. The respondents oppose the contempt application.

8. Due to the multiplicity of proceedings, and to avoid confusion, I refer to parties by name rather than with reference to their party status. Where convenient, I refer to the Regional Commissioner, the Commissioner and the Minister and (when dealing with the contempt application) Mr Maphuta as the State parties.[4] I deal first with the rescission / variation application and thereafter the contempt application.

9. Before doing so, I deal with a preliminary issue which traverses both applications. Specifically, a submission on behalf of the State respondents that the June 2023 compliance order has replaced the 2021 order and that there is now only one order in place, the June 2023 compliance order. That is not so. The June 2023 compliance order is directed at requiring compliance with the 2021 order, which remains a distinct court order. As matters stand, there is non-compliance with both orders. There has at no stage been any attempt to rescind the 2021 order or to appeal or vary it. As submitted on behalf of the Mpofana Community, the State respondents cannot avoid the consequences of the 2021 order merely because there is now a compliance order in place to enforce it.

[4] Mr Maphuta is however cited in his personal capacity.

The rescission / variation application

10. The State parties contend that the June 2023 compliance order should be rescinded because it was void from inception. In doing so, they rely on section 35(11)(b) of the Restitution Act read with Rule 64 of the Land Claims Court Rules.[5] Section 35(11) provides, in relevant part:

> '(11) The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it-
>
> *(a)* …;
>
> *(b)* which was void from its inception or was obtained by fraud or mistake common to the parties; …'

11. Specifically, the State parties contend that the order was void from inception because this Court did not have jurisdiction to make the order in circumstances where the Regional Commissioner had already dismissed the claim and there was accordingly no claim to publish. Specifically, the Court could not make the order as granted which required publication of the claim irrespective of any decision the first respondent had taken or communicated in terms of section 11(3) of the Restitution Act. The Court had no jurisdiction to make the order because, it was submitted, its effect is to render invalid the Regional Commissioner's decision to dismiss the claim in circumstances where there was no application before the Court to review that decision. The latter contention is advanced on the basis that the

[5] 64 **VARIATION AND RESCISSION OF ORDERS**
(1) …
(2) Any party seeking the rescission or variation of an order in terms of section 35(11) or (12) of the Restitution of Land Rights Act or in terms of subrule (1) may do so only upon-
(a) application delivered within ten days from the date upon which he or she became aware of the order; and
(b) good cause shown for the rescission variation.
(3) Any party applying under this rule must deliver notice of his or her application to all parties whose interests may be affected by the rescission or variation sought.

Court erroneously considered that the Regional Commissioner had neither taken a decision to dismiss the claim nor communicated it.

12. In the alternative, the State parties contend that the order should be varied to read: '*The application is adjourned sine die pending finalisation of the review application against the decision of the [Regional Commissioner to dismiss the land claim].*'

13. In my view, the grounds raised to rescind the order are, in their nature, grounds to be raised by way of an appeal process. They do not point to any absence of jurisdiction nor to any mistake common to the parties.[6] There is no suggestion of fraud.

14. On whether there was a mistake, the State parties contend that the Court erroneously granted the order on the mistaken understanding that the Regional Commissioner had not taken a decision to dismiss the land claim when he had. In this regard, the July 2023 judgment records in paragraph 7, that it is not clear whether the decision had been formally taken, referring to the fact that while it is stated in the answering affidavit that a notice of dismissal of the claim had been issued, purportedly attached, it was not attached. Mr Giba, for the State parties, submitted that this was erroneous in that a notice of dismissal of the claim, while not attached to the answering affidavit, was attached to the State parties' counter-claim albeit only delivered shortly before the hearing. Mr Giba submitted further that the Court was also incorrect when concluding, again in paragraph 7, that the Regional Commissioner had not communicated any decision to dismiss the claim

[6] *Njemla v KSD Local Municipality* (583/2011) [2012] ZASCA 141 (28 September 2012); [2012] 4 All SA 532 (SCA) at para 18.

to the claimants.[7] Reliance was placed in argument on the notice to dismiss the land claim attached to the State parties' counter-claim. In response, Mr Mzila submitted that no reliance can be placed on that notice because on the State parties' own version, they had (as alternative relief in the counter-claim) sought an adjournment, in part to furnish the land claimants with the Regional Commissioner's decision.[8] He confirmed that the first time that the notice to dismiss was drawn to his or his clients' attention was when the counter-claim was delivered, which was at the end of May 2021, well after affidavits had been exchanged in the compliance application, even after the applicant's heads of argument had been delivered and shortly before the hearing.[9] It is in my view apparent from the above analysis that the alleged mistake was not a 'mistake common to the parties'. If a material mistake was made, it is of a nature that would require correction on appeal.

15. The variation application must fail for the same reason. This Court is effectively being asked to decide the matter again, which it cannot do as it is *functus officio*.[10] Accordingly, both the 2021 order and the June 2023 compliance order stand and must be complied with.

The contempt application

[7] With the result that the decision was not final.
[8] See paragraph 17 of the founding affidavit in the counter-application.
[9] The heads of argument on file are stamped 12 May 2023.
[10] *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others, Mathibane and Others v Normandien Farms (Pty) Ltd and Others* (370/2017) [2017] ZASCA 163; [2018] 1 All SA 390 (SCA); 2019 (1) SA 154 (SCA) (29 November 2017) at para 53.

16. In the contempt application, the Mpofana community and Mr Sithole seek the following substantive relief:

16.1. A declarator that the Regional Commissioner and Mr Maphuta be declared in contempt of the 2021 order and the June 2023 compliance order.

16.2. An order imprisoning Mr Maphuta for a period of 60 days or such period as the Court deems fit.

16.3. In the alternative to 16.2, an order that the Regional Commissioner and Mr Maphuta be sentenced to a fine of R1000 a day for every day until both orders are complied with.

16.4. An order that the Regional Commissioner and Mr Maphuta be ordered to comply with the 2021 order and the June 2023 compliance order within 48 hours of the order of the Court or such time as the Court deems fit.

16.5. An order for costs against the Regional Commissioner and Mr Maphuta on an attorney and client scale.

17. The test for contempt of court was recently restated in *Zuma* as follows (footnotes omitted):[11]

> 'As set out by the Supreme Court of Appeal in *Fakie*, and approved by this Court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.'

[11] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021) (*Zuma*) at para 37.

18. The Constitutional Court held further (footnotes omitted):[12]

> 'It cannot be gainsaid that orders of court bind all to whom they apply. In fact, all orders of court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside. This, in addition to typifying common sense, the Constitution itself enjoins. Section 165(5) of the Constitution itself provides that an order or decision binds all persons to whom it applies. The reason being that ensuring the effectiveness of the Judiciary is an imperative. This has been confirmed in multiple cases, including *Mjeni,* in which the Court stated that "there is no doubt, I venture to say, that [complying with court orders] constitutes the most important and fundamental duty imposed upon the State by the Constitution". …'

19. To the extent that the applicants seek a committal or imposition of a fine, the standard of proof applicable to the proceedings is proof beyond a reasonable doubt, whereas proof on a balance of probabilities suffices where the remedies sought 'do not have the consequence of depriving an individual of their right to freedom and security of the person.'[13]

20. The State respondents raise two preliminary points in response to the contempt application, which I deal with upfront. First, they contend that the contempt proceedings are irregular proceedings because the operation and execution of the June 2023 order is suspended pending the determination of the application for rescission and variation of the order. They rely on Rule 65(1)(c)[14] and Rule

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[12] *Zuma* at para 59.

[13] *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15, CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017) (*Matjhabeng Local Municipality*) at para 67 in which the preceding paragraphs are summed up.

[14] Rule 65 is titled **SUSPENSION OF ORDERS** and Rule 65(1)(c) provides:

(1) Subject to subrule (2), where-

(a) …;

(b) …; or

(c) an application has been made to correct, vary or amend an order of the Court, the operation and execution of the order in question is suspended pending the determination of the application or appeal.

32(3)(c).[15] The difficulty with this submission is that even assuming proceedings constitute an 'irregular step' for this reason, the issue is not properly before me as the State parties failed to follow the process required by Rule 32(5) in addressing the complaint.[16] Nevertheless, the provisions of Rule 65(1)(c) remain relevant to whether contempt is established and I return to this below.

21. Second, the State parties contend that Mr Maphuta, the Regional Commissioner, should not have been joined in his personal capacity. I disagree in light of *Matjhabeng Local Municipality*:[17] This is a case where the alleged contemnor's rights to freedom and security of the person provided for by section 12(1) of the Constitution are in the balance and his joinder in his personal capacity is necessary to safeguard his rights.

22. On the merits, there is no dispute that there has been no compliance with either order. In respect of the June 2023 order, the requirements for contempt are not established. Although the institution of the rescission application did not, in this case, have the effect of suspending the June 2023 order, the variation application did have that effect, in terms of Rule 65(1)(c). I have found the application to be unmeritorious and accordingly, upon delivery of the judgment, that order must now be complied with.

[15] Rule 32(3) provides:
'Should any party –
(a) ….
(b) ….
(c) Deliver any document which does not comply with these Rules or with any order or direction of the Court;
(d) Perform any act in contravention of these Rules or of an order or direction of the Court,

[16] That process entails providing the defaulting party with notice to rectify before initiating process.

[17] Supra n 13 at para 90-94.

23. The alleged contempt in respect of the 2021 order stands on a different footing, because the alleged contempt persisted for a long period prior to the grant of the June 2023 compliance order and because there has been no attempt to appeal or vary that order. The 2021 order must be complied with for the reasons I set out in my July 2023 judgment. However, the issues that arise in the contempt application are different to those that arise in respect of the proceedings leading to the June 2023 compliance order. The question now is whether the test for contempt as restated by the Constitutional Court in *Zuma* is met.

24. In my view, the Mpofana Community and Mr Sithole have established:

    24.1. The 2021 order was granted against the Regional Commissioner: there is no dispute that Mr Maphuta is responsible for complying with it.

    24.2. Mr Maphuta was supplied the order and had personal knowledge of it, albeit not personally served.

    24.3. The Regional Commissioner has not complied with the order.

25. Wilfulness and *mala fides* are accordingly presumed, and the alleged contemnor bears the evidentiary burden to establish a reasonable doubt. The Regional Commissioner declined to provide an affidavit explaining his non-compliance. Rather, the answering affidavit was deposed to by Mr Sifiso Ndlovu, the Director of Legal Services in the office of the Regional Commissioner. It is not wholly clear why the Regional Commissioner did not, himself, explain his conduct. He is entitled to elect not to testify.[18] However, it is possible that the decision, if in fact advisedly made, was made on a mistaken understanding regarding his joinder: as

[18] *Matjhabeng Local Municipality* supra n 13.

indicated above, the State respondents contended that he ought not to have been joined at all. I return to this issue below.

26. Mr Giba, who appeared on behalf of the State parties, submitted at first that the Court can draw the necessary inferences regarding the reasons the Regional Commissioner has not complied from the objective facts that Mr Ndlovu has placed before the Court. In sum, Mr Ndlovu contends:

26.1. When the Mpofana Community and Mr Sithole instituted the proceedings leading to the grant of the 2021 order, the State parties intended to oppose the application, set down for 29 November 2021. However, due to counsel's inability to join the proceedings, Mr Ndlovu applied to adjourn the proceedings which application was refused. The 2021 order was then granted directing the Regional Commissioner to publish the Mpofana Community's claim in the government gazette.

26.2. Since the Regional Commissioner is statutorily obliged first to investigate the claim to verify whether the claim is indeed a community claim as defined by the Restitution Act, it was agreed that the Regional Commissioner must first investigate the claim.

26.3. An independent service provider (researcher) was appointed to conduct the investigation and compiled a report in May 2022. The Mpofana Community and Mr Sithole did not challenge the report, but instead – on 30 August 2022 – instituted the compliance proceedings which ultimately led to the grant of the June 2023 compliance order.

26.4. On 21 September 2022, the Regional Commissioner instituted a notice of intention to dismiss the claim in terms of section 11(3) of the Restitution Act. The Mpofana Community and Mr Sithole were invited to make written submissions, which they did on 2 December 2022.

26.5. On 13 February 2023, the Regional Commissioner issued a notice of dismissal of the claim. This notwithstanding, the Mpofana Community and Mr Sithole set down the compliance proceedings for hearing on 15 June 2023.

26.6. When the Regional Commissioner issued a notice of dismissal of the claim, he became *functus officio* and there was no claim to publish. This means that the June 2023 compliance order is void from inception and susceptible to rescission and in turn means that the order cannot be complied with.

26.7. The Mpofana Community and Mr Sithole ought, rather, to have instituted proceedings to review and set aside the Regional Commissioner's decision and only if successful could the order then be complied with.

26.8. In paragraph 6.11 of the answering affidavit, Mr Ndlovu states that contrary to a claim made by the applicants' attorney during the hearing of 15 June 2023, the notice dismissing the claim was in fact "served on or about 13 February 2023 and again on the _____."

26.9. The June 2023 compliance order was void from inception and the alleged contemnors cannot be said to have wilfully disregarded a void court order or be held in contempt when exercising their right to seek redress and have

that order set aside. They contend that they are entitled to the relief in the rescission and variation application.

26.10. Although the non-compliance is deliberate, the alleged contemnor may genuinely, albeit mistakenly believe himself entitled to act in the way alleged to constitute contempt. Moreover, delay in compliance is, in itself, not enough.

26.11. Mr Ndlovu contends further that the contempt application itself is not brought with clean hands and is frivolous and vexatious in view of the rescission / variation application, which was instituted without delay.

26.12. He reiterates that the Regional Commissioner's decision to dismiss the claim is both justified and stands until set aside.

27. In my view, Mr Ndlovu's explanation for what had ensued must be viewed in separate stages: the conduct before the June 2023 compliance order and the conduct thereafter. In respect of the conduct thereafter, I have concluded above that that order was suspended when the variation application was instituted. In those circumstances, there can be no contempt for non-compliance. The position regarding the conduct before the June 2023 compliance order, however, stands on a different footing. I highlight some of the concerns below.

28. First, it is apparent from Mr Ndlovu's affidavit that the State respondents were dissatisfied with the 2021 order, had in fact wanted to oppose the proceedings and had unsuccessfully sought to have the matter postponed. This stance appears to set the tone for the State conduct thereafter.

29. Second, Mr Ndlovu states under oath that there was an agreement that the Regional Commissioner must first investigate the land claim before publishing it in the Government Gazette pursuant to the court order. He puts up no evidence of this agreement, nor explains when, how or between whom it was concluded. He says the agreement was reached because the Regional Commissioner is statutorily obliged to first investigate the claim. As explained in the July 2023 judgment, that is not so and the approach is inconsistent with *Gamevest.*[19] The deponent to the replying affidavit, Mr Sithole, disputes that there was any such agreement. In this regard, the Court was referred to the correspondence exchanged between the parties at that time, which was attached to the founding affidavit in the compliance proceedings. The correspondence shows that on 8 December 2022, the State Attorney wrote to the attorneys for the Mpofana Community and Mr Sithole, requesting an extension of 90 days to comply with the terms of the Court Order of 29 November 2021. The letter is attached to that affidavit. On 10 December 2022, the claimants' attorneys replied advising that they insisted on compliance with the order. It was in February 2022 that the claimants' attorneys then delivered a notice to comply in terms of Rule 32(5). Further events followed. On the information to hand, I am unable to accept on the affidavits[20] the wholly unsubstantiated claim that such an agreement was reached.

30. Third, what the objective facts before me seem to suggest is that rather than intending to comply with the Court order and publish the land claim, the Regional

[19] *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga and others* [2002] ZASCA 117 (*Gamevest*) at para 7. In paragraph 12 of the July 2023 judgment and relying on *Gamevest*, I hold that the Restitution Act entails that thorough investigation generally ensued after publication.

[20] Applying the principles in *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) at 634H-635C and *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008(3) SA 371 (SCA) at para 13.

Commissioner was insistent on first proceeding with a full investigation, which ultimately led to his initiating a process to dismiss the claim. It is difficult to understand how this approach could be followed, while still asserting that there was an intention to comply with the court order. On the approach followed, whether or not there would be compliance would always be contingent upon the outcome of the investigation.

31. Fourth, in the affidavit, it is claimed that the decision to dismiss the claim was "served on or about 13 February 2023 and again on the _____." Not only is the gap left unfilled, but there is no proof of any service as alleged took place in February 2023, the explanation is not consistent with the answering affidavit in the compliance proceedings, and ultimately Mr Giba, during argument, did not rely on any such service but on the attachment of the notice of dismissal to the founding affidavit in the counter-application in the compliance proceedings filed at the end of May 2023.

32. For at least these reasons, the objective facts as put up by Mr Ndlovu do not appear to assist the State respondents, specifically the Regional Commissioner and Mr Maphuta. What the objective facts appear rather to suggest is dissatisfaction with the fact that the order was granted in the first place and conduct designed to avoid complying with it at least unless or until a full investigation had been finalised that supported the claim.

33. There are other difficulties too. One of these is that the attachment of the decision to dismiss the claim to the founding affidavit in the counter-application does not and did not constitute an effective communication of that decision to the land claimants so as to render the decision final and effective. I reach this conclusion

based on legal principle but the conclusion is strengthened by the fact that the State respondents themselves accepted in their founding affidavit that there was still a need to inform the intended recipients.

34. It is fundamental to the rule of law that administrators communicate their decisions to affected persons as it signals finality and provides certainty about the status of rights.[21] What constitutes effective communication will differ in different circumstances. In *SARFU,*[22] the Constitutional Court held, in connection with the President's appointment of a commission of enquiry:

> '… [it] only takes place when the President's decision is translated into an overt act, through public notification. In addition, the Constitution requires decisions by the President which will have legal effect to be in writing. Section 84(2)(f) does not prescribe the mode of public notification in the case of the appointment of a commission of inquiry but the method usually employed, as in the present case, is by way of promulgation in the Government Gazette. The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could have deprived him of that power.' (Footnotes omitted.)

35. In *Ntamo*,[23] a full bench of the Eastern Cape High Court considered that a decision to recognise a headman was ripe for review notwithstanding that it had not yet been published in the Government Gazette and a recognition certification had not yet been issued under the Eastern Cape Traditional Leadership and Governance

[21] *Retail Motor Industry Organisation and Another v Minister of Water & Environmental Affairs and Another* (145/13) [2013] ZASCA 70; [2013] 3 All SA 435 (SCA); 2014 (3) SA 251 (SCA) (23 May 2013) at para 24 and 25.
[22] *President of the Republic of South Africa v South African Rugby Football Union* (CCT 16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) (*SARFU*) at para 44.
[23] *Premier of the Eastern Cape and Others v Ntamo and others* (169/14) [2015] ZAECBHC 14, 2015 (6) SA 400 (ECB), [2015] 4 All SA 107 (ECB) (18 August 2015) (*Ntamo*).

Act 4 of 2005. In doing so, the Court emphasised that that question did not turn on whether a decision had been 'formalistically notified',[24] and held:

> 'It is clear from the appellants' own evidence that the decision to recognise Yolelo has been taken, communicated to both himself and to the people of the Cala Reserve and that he is performing the functions of a headman and being paid by the government to do so. There can be no doubt that the decision has had an impact — it has had, in the words of the PAJA, an adverse effect on rights, in the sense of having the capacity to affect rights adversely, and a direct, external legal effect. It is thus ripe for challenge, even if two formalities have not been complied with yet. *Furthermore, because, even in the absence of the formalities, it is a final decision, having been made public, the MEC is functus officio and cannot alter his decision, even if he wished to*. …' (Footnotes omitted and emphasis supplied)

36. In concluding that the decision was a final decision, the Court relied on the decision of the Supreme Court of Appeal in *Kirland*[25] (a case where there had been no communication of one of the decisions in issue)[26] and in which the following passage in *Hoexter's Administrative Law in South Africa* was cited with approval:[27]

> 'In general, the *functus officio* doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it.'

37. This passage was, similarly, cited with approval and applied in *Manok Family Trust*[28] in which the SCA considered what constitutes communication of a decision

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[24] *Referring to Chairman, State Tender Board, v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and others* 2012 (2) SA 16 (SCA) at para 20 in which the Supreme Court of Appeal makes it clear that a decision may be ripe for hearing in a review even if not yet communicated: 'Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process.'

[25] *MEC for Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA) at para 15.

[26] As recorded in para 14, the decisions in question 'were never communicated to [the affected party] and neither were they made public in any way. The evidence is clear: the letters that would have informed Kirland Investments of the refusal of their applications lay, unsigned and unsent, in a file in the department.'

[27] Then in its 2nd edition cited in fn6 as Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 278. The text is currently in its 3rd edition and the same passage found at p 382. See Cora Hoexter and Glenn Penfold *Administrative Law in South Africa* 3 ed (2021).

[28] *Manok Family Trust v Blue Horison Investment 10 (Pty) Limited and Others* [2014] ZASCA 92; [2014] 3 All SA 443 (SCA); 2014 (5) SA 503 (SCA) (*Manok Family Trust*) at para 14.

of a regional commissioner of the Commission to dismiss a land claim, in other words, a decision of the same sort in issue in this case. On the facts in that case, the SCA concluded that the decision had been communicated and was final, on the following basis:

> In the present matter the decision of the regional commissioner that the land claim lodged by Kgoshi Manok on behalf of the Manok clan 'has been precluded in terms of the [Act]' was conveyed to the claimant as required by s 11(4) by way of the letter dated 14 June 2000. All indications are that Kgoshi Manok and his community became aware of the decision. There is no suggestion to the contrary. That that is so is also clear from the letter from Mr Moleke addressed to the Mpumalanga Land Claims Commissioner for the attention of Mr Modise, the first sentence of which reads: 'We had noted the decision by the commission to dismiss the original claim submitted by the Manok Family.' The regional commissioner's decision therefore became final when it was conveyed to Kgoshi Manok.

38. On the facts before me, I am unable to conclude that the decision has been effectively communicated to the land claimants or that they are aware of it. At best, some members of the affected group of persons will be aware of it as a result of their active participation in the court proceedings. The Regional Commissioner himself accepted in the compliance proceedings that there was still a need to furnish the land claimants with the decision. And there is no evidence confirming that the letter has in fact been sent to the land claimants. In the result, the State respondents have to date failed to demonstrate that there has been any effective communication of the decision to dismiss the claim, and the decision can thus not constitute any impediment to publishing the land claim at this juncture as required by the 2021 order.

39. But even if there has been effective communication at this point, it is in my view, not open to an administrator, unnecessarily and deliberately, to take an administrative decision that precludes the same administrator from complying with an existing court order, and then to stand back and tell the aggrieved party that they must approach a Court to have that decision set aside if they have grounds to do so. In my view, even if in good faith, such conduct would subvert the rule of law, interfere with judicial authority[29] and would be unlawful: put differently, such a decision is susceptible to review for these reasons alone. In other words, quite independently of whether the decision is otherwise procedurally compliant or passes muster under the applicable standard of review.

40. It is of course well established – for rule of law reasons – that where an administrator is *functus officio,* an administrative decision stands until set aside.[30] However, in the circumstances of this case, there is no reason why the aggrieved party, the Mpofana Community and Mr Sithole, should themselves have to do this and why the Regional Commissioner should not himself approach the court on review. In *Merafong,* the Constitutional Court re-emphasised the duties of organs of state as constitutional citizens and their duties themselves to rectify unlawfulness, in the following terms:[31]

> [61] … This court has affirmed as a fundamental principle that the state 'should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help'. What is more, in *Khumalo* this court held that state functionaries are enjoined to uphold and protect the rule of law by inter alia seeking the redress of their departments' unlawful

[29] Section 165 of the Constitution which vests judicial authority in the courts and in section 165(3) provides:
(3) 'No person or organ of state may interfere with the functioning of the courts.'
[30] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA), [2004] 3 All SA 1 (*Oudekraal*), *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014) (*Kirland*) at para 106.
[31] At para 41.

> decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty 'to insist that the state, in all its dealings, operate within the confines of the law and, in so doing, remain accountable to those on whose behalf it exercises power'. Public functionaries 'must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it'. Not to do so may spawn confusion and conflict, to the detriment of the administration and the public. A vivid instance is where the President himself has sought judicial correction for a process misstep in promulgating legislation.'

41. To the extent necessary, a Court can be approached urgently to ensure that a court order can be duly and timeously complied with.

42. In the circumstances, the Mpofana Community and Mr Sithole are entitled at this stage at least to an order requiring compliance with paragraphs 5 to 8 the 2021 order within 7 calendar days of delivery of this judgment.

43. This does not however dispose of the remainder of the relief sought but in my view, it is premature to deal with this for the following reason. When the Court asked Mr Giba why Mr Maphuta had not himself explained his non-compliance, Mr Giba indicated that on reflection he perhaps ought to have and sought a postponement to allow this, whether by way of affidavit or *viva voce* evidence. Mr Mzila did not agree with this approach, both on the basis that in his submission, contempt has been established on the affidavits and because of the costs involved, which are being borne by his clients and not funded by the public purpose. I deal with costs below, but in my view, and while Mr Maphuta is entitled to elect not to testify, fairness demands that he be afforded a further opportunity to further consider his

position, to consider advisedly whether he wishes to testify or not, and to consider whether and how he may wish to deal with the concerns raised in paragraphs 28 to 32 of this judgment. He may have answers to these concerns or wish to raise others and he should be given a further opportunity to do so.

Costs

44. Subject to *Biowatch Trust*,[32] this Court only orders costs in special circumstances dealing as it does with social legislation. In my view, the matters before me are justify the grant of a costs order in favour of the Mpofana Community and Mr Sithole. The contempt proceedings are constitutional litigation concerning contempt of court and compliance with court orders. Viewed substantively, even at this juncture and notwithstanding my findings as regards the July 2023 compliance order, substantial success has been achieved against the Regional Commissioner. Defence of the rescission application, in context of the facts of this matter, is integrally linked with the attempts to ensure compliance. In my view costs on an attorney and client scale are justified in respect of the contempt application because this is the second time that the aggrieved parties have had to engage this court in enforcing compliance. That alone suffices to warrant censure and these parties should not be out of pocket in those proceedings. These costs should include the costs occasioned by the postponement. The costs of the postponed proceedings must remain reserved.

[32] *Trustees for the Time being of the Biowatch Trust v the Registrar Genetic Resources and others* 2009(6) SA 232 (CC) (*Biowatch*). Importantly, in para 24, the Constitutional Court held in context of constitutional litigation 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.'

Order

45. I make the following orders:

45.1. The rescission and variation application instituted on 30 June 2023 is dismissed with costs.

45.2. In the contempt and compliance application:

45.2.1. The Regional Commissioner is directed to publish the claim of the first applicant in the Government Gazette within seven calendar days of the date of this decision.

45.2.2. The relief sought in prayers 2 to 4 of the notice of motion is postponed to a date to be arranged with the Registrar.

45.2.3. The Regional Commissioner and Mr Maphuta are granted leave to supplement their response to the contempt application by no later than 27 October 2023.

45.2.4. Should either party contend that *viva voce* evidence must be heard to resolve the matter, that party must request a case management conference as soon as reasonably possible.

45.2.5. The first respondent is directed to pay the costs incurred to date on an attorney and client scale including the costs occasioned by the

postponement of the relief sought in prayers 2 to 4 of the notice of motion.

45.2.6. The costs of the postponed proceedings remain reserved.

SJ Cowen

Judge

LAND CLAIMS COURT

Date of hearing: 1 September 2023

Date of judgment: 9 October 2023

Appearances

For the Applicant:

Mr M Mzila Mzila HM Inc.

For the First Respondent:

Adv S Giba Instructed by State Attorney, Durban