IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC 74/2018

DELETE WHICHEVER IS NOT APPLICABLE

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

17/6/2022
DATE

SIGNATURE

In the matter between:

TEBOGO SIMON THOBEJANE	First Applicant
MASEBOTI SIMON PHOLWANE	Second Applicant
CEDRICK PHOLOSHI MOGOBA	Third Applicant
MOLOHLANYE WILLIAM PHALA	Fourth Applicant
KGOLANE DAPHNEY THOBEJANE	Fifth Applicant

and

THE REGIONAL LANDS CLAIM COMMISSIONER FOR LIMPOPO	First Respondent
THE ROKA MASHABELA TRIBAL AUTHORITY	Second Respondent
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Third Respondent
NKGONYELETJE WILLIAM MASHABELA	Fourth Respondent

JUDGMENT

Flatela A.J

Introduction

[1] The applicants seek a mandatory order directing the First Respondent ("**the Regional Commissioner**") to withdraw notice of claim number 359/2007 published in the Government Gazette on 13 March 2007 in terms of section 11A (1) of the Restitution of Land Rights Act 22 of 1994 in respect of properties described as Dsjate 24KT, Fernkloof 539KS, Quatzhill 542 KS unless good cause is shown by any one or more of the second respondent and or third and fourth respondents .Alternatively, an order reviewing and setting aside in terms of section 6 of the Promotion of Administrative Justice Act no 3 of 2000 the first respondent's refusal to withdraw the said notice in terms of section 11 A of the Act at the expiry of the period mentioned in the notice of claim unless good cause is shown contrary to the contrary is shown by any of the respondents.

[2] The applicants allege that the properties mentioned above were published as part of the land claimed by the second respondent belong to applicant's community, Tjate community. The applicant community has been occupying it since time immemorial.

[3] The applicant alleges that the claim by the second respondent is precluded by section 2 of the Restitution Act on the basis that the second respondents were dispossessed of the land prior to 19 June 1913. Moreover, the validation report prepared by the first respondent in 2007 recommended that the land claim by the second respondent does not qualify in terms of Restitution Act on the basis that it is frivolous and vexatious.

[4] The first and third respondents filed a notice to participate but failed to file the answering affidavit until he was barred from further participation in these proceedings. The second and fourth respondent filed an answering affidavit raising only the point in limine. There was no appearance on their behalf when the matter was first heard in September 2021.

The Parties

[5] The first applicant is Tebogo Simon Thobejane an adult male of full legal capacity of care of the Tjate Community Offices, House no.1, Tjate Village, Driekop, 1129, the aspirant Chief of the Community. The first applicant succeeded his deceased mother Moreka Francinah Thobejane who was the firs applicant in these proceedings . An order for his substitution was granted by this court on 21 April 2021.

[6] The second applicant is Maseboti Simon Pholwane an adult male of full legal capacity of care of the Tjate Community Offices, House no.1, Tjate Village, Driekop, 1129, the aspirant headman of the Mokgwatjane and Matikwaneng Section.

[7] The Third Applicant is Cedrick Pholoshi Mogoba an adult male of full capacity of the Tjate Community Offices, House no.1, Tjate Village, Driekop, 1129, the aspirant headman of Tidintitjane Section.

[8] The fourth Applicant is Molohlanye William Phala an adult male of full legal capacity of care of the Tjate Community Offices, House no.1, Tjate Village, Driekop. 1129, the aspirant headman of the Mamphifi Section.

[9] The fifth applicant is Kgolane Daphney Thobejane an adult female of full legal capacity of care of the Tjate Community Offices, House no.1, Tjate Village, Driekop, 1129, the aspirant headwoman of the Makete Section.

[10] The First to Fifth Applicants allege that they are the only members of the Traditional Leadership, as this is defined in section 8 of the of the National Traditional Leadership and Governance Framework Act 41 of 2003 (NFA), of the Tjate Community.

[11] The First Respondent is the Regional Land Claims Commissioner for Limpopo, established in terms of the Restitution of Land Rights Act 22 of 1994 of 96 Kagiso House, Corner Rissik and Schoeman Streets, Polokwane, Limpopo. The first respondent has not filed any pleadings relating to this application.

[12] The Second Respondent is the Roka Mashabela Tribal Authority established as such in terms of Proclamation 1335 of Act 68 of 1951 and Proclamation 686 in Government Gazette 2055 dated 26 April 1968 of 201 Baroka-Mashabela Traditional Council, Burgersfort, Limpopo.

[13] The Third Respondent is the Minister of Rural Development and Land Reform Act of 184 Jeff Masemola Street, Pretoria, in his capacity as the representative if the Government of the Republic of South Africa, which is reflected as the owner of the properties referred to hereunder in the title deeds thereof. No relief is claim against the Third Respondent unless he/she opposes the relief sought by the applicants, in which event a costs order, jointly and severally with the other respondents, will be sought against him/her as well.

[14] The Fourth Respondent is Nkgonyeletje William Mashabela, the Chief of the Roka Mashabela Community of 201 Baroka-Mashabela Traditional Council, Burgersfort, Limpopo.

[15] The fourth respondent filed an answering affidavit in opposition of this application.

The Applicants Case

[16] The applicant alleges that Tjate Community occupies the farms Dsjate 249 KT, Fernkloof 539 KS, Quartzhill 542 KS and Dekom 252 KT in the Sekhukhune district, Limpopo Province. They regard this land as their ancestral land.

[17] The three of the properties mentioned are amongst the properties claimed by the Second Respondent in terms of the Restitution of Land Rights Act no.22 of 1994 (the Restitution Act). A notice to that effect was published in the Government Gazette

dated 30 March 2007. The community became aware of the notice in December 2014 when a letter from the first respondent addressed to Prescali Environmental Consultants came to the attention of the applicant's community. This letter confirmed that there was a land claim lodged on the properties and that the notice was gazetted on 30 March 2007 to that effect.

[18] The community did not have legal advice when they discovered that their ancestral land was claimed by the second respondent. It was resolved that the community must lodge a counterclaim, which they did. An acknowledgement of receipt of the counterclaim by the first respondent was attached as annexure to this application. Except for the acknowledgement of receipt, the applicants allege that the community never received any communication from the first respondent regarding their counterclaim.

[19] During 2016 after consultation with their attorneys and upon receipt of a legal opinion that the second respondent's claim was not a valid claim, the community leaders requested a copy of a file regarding the claim of the second respondent from the first respondent. The community received no response from the first respondent. The community brought an application in the High Court, Limpopo Division to compel the first respondent to give the community the file. The file was finally delivered to the applicants containing over 300 pages.

[20] On 20 December 2017 after considering the contents of the file, the applicants made presentations in terms of section 11A of the Act to have the notice withdrawn by the first respondent. The applicants stated in their representations that the claim ought to have been rejected because it is frivolous and vexatious. In support of this contention the applicant referred to a number of paragraphs extracted from first respondent validation report.

[21] The report recommended that the claim of the second respondent does not qualify in terms of the Act.

[22] The applicants allege that the Community is being severely prejudiced by the First Respondent's refusal to withdraw the notice previously published. It has urgent

and substantial commercial reasons to press for the withdrawal thereof. The commercial interest is that there is a large platinum group metals deposit on and under the said farms.

[23] There is already a company which will exploit the platinum group metals as it was granted a mining right 1 March 2017. The Community alleges that it has a share therein through two companies. The community feels that the Roka Mashabela Community is an outsider and it cannot be allowed interfere with this valuable right.

[24] The failure of the First Respondent to withdraw the notice can be interpreted only as refusal to do so, although no good grounds for the refusal exist.

The Second Respondent's case

[25] The second and fourth respondent filed an affidavit and it only raised two points in limine regarding the time the objection is raised and the applicant's locus standi. In their affidavit they did not deal with the merits of the case.

[26] The second respondent raised an issue of a delayed objection to their claim. The notice provided a 90-day period for objections.

[27] In their affidavit the applicants aver that they became aware of the claim in December 2014 way after the lapse of a 90-day period.

[28] Section 11 (6) enjoins the first respondent to advise the owner of the land and or any interested party of the publication of the notice and to refer that or such other party to the provisions of subsection (7).

[29] There is no evidence that the first respondent immediately after publication of the land claim in the government gazette notified the owner or the person in charge.

[30] When the applicants were in a position to engage the first respondent through their attorneys, their request to make available all the documents relating to the second respondent's claim to the disputed land was ignored. The applicants brought

application in the High Court, Limpopo Division to compel the first respondent to make all the documents available to them. The file was ultimately made available after a year on the eve of the hearing. A punitive cost order was granted against the first respondent for its failure to provide the requested file.

[31] The applicant made representations for the withdrawal of the notice in terms of section 11A of the Act, the representations were ignored hence this application.

[32] The first respondent is not inflexible in their procedures especially when the parties involved are the communities with no access to legal advice. This point must fail.

[33] The second in limine point raised concerns by the second respondent is that the applicant lacks *locus standi to bring* this application on behalf of the Tjate community due to the fact that they are not recognised traditional leaders in terms of the National Traditional Leadership and Governance Framework Act 41 of 2003 (NFA)

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[34] The applicants described themselves as the only members of the Traditional Leadership of Tjate Community, as defined in section 8 of NFA but their formal recognition as such was not approved by the premier and the MEC and the matter is in court.

[35] The applicant state further that the application is brought in terms of sec 38 (c) of the Constitution in that the applicants represents the community.

[36] The deponent to the affidavit stated that he is acting in his personal capacity and on behalf of the applicants whose rights and interest are directly affected by the subject matter.

[37] Although the reliance on the NFA and issues around traditional disputes were irrelevant in this application. I am satisfied that the applicants have shown that they have locus standi to bring this application. The points in limine must fail.

The Legal Framework

[38] The procedure after the lodgement of the claim is provided in sections 11 and 11 A of the Act. The provisions are as follows:

> **11 Procedure after lodgement of claim**
>
> **(1) If the regional land claims commissioner having jurisdiction is satisfied that-**
>
> **(a) the claim has been lodged in the prescribed manner;**
>
> **(b) the claim is not precluded by the provisions of section 2; and**
>
> **(c) the claim is not frivolous or vexatious,**
>
> **he or she shall cause notice of the claim to be published in the Gazette and shall take steps to make it known in the district in which the land in question is situated. [Sub-s. (1) amended by s. 5 (a) of Act 78 of 1996 and substituted by s. 4 (a) of Act 18 of 1999.]'**
>
> **...**
>
> **(4) If the regional land claims commissioner decides that the criteria set out in paragraphs (a), (b) and (c) of subsection (1) have not been met, he or she shall advise the claimant accordingly, and of the reasons for such decision. [Sub-s. (4) substituted by s. 4 (b) of Act 18 of 1999.]**
>
> **11A Withdrawal or amendment of notice of claim**
>
> **(1) Any person affected by the publication of the notice of a claim in terms of section 11 (1) may make representations to the regional land claims commissioner having jurisdiction for the withdrawal or amendment of that notice.**
>
> **(2) Where during the investigation of a claim by the Commission the regional land claims commissioner having jurisdiction has reason to believe that any of the criteria set out in paragraphs (a), (b) and (c) of section 11 (1) have not been met, he or she shall publish in the Gazette and send by registered post to-**
>
> **(a) the claimant;**
>
> **(b) the owner; and**
>
> **(c) where applicable, a person who has made representations in terms of subsection (1) and any other party, who to his or her knowledge, may have an interest in the claim,**
>
> **a notice stating that at the expiry of the period mentioned in the notice, the notice of the claim published in terms of that section will be withdrawn unless cause to the contrary has been shown to his or her satisfaction.**
>
> **[Sub-s. (2A) amended by s. 5 of Act 18 of 1999.]**

(3) At the expiry of the period contemplated in subsection (2), the regional land claims commissioner shall, unless cause to the contrary has been shown to his or her satisfaction, withdraw the notice of claim and-

(a) advise the persons mentioned in that subsection by notice sent by registered post;

(b) cause notice of his or her decision to be published in the Gazette; and

(c) take other steps to make his or her decision known in the district in which the land in question is situated.

'(4) The regional land claims commissioner having jurisdiction may, during the investigation of a claim by the Commission and after following the procedure set out in subsection (2), unless cause to the contrary has been shown to his or her satisfaction, amend the notice published in terms of section 11 (1), whereafter the provisions of paragraphs (a), (b) and (c) of subsection (3) shall apply mutatis mutandis: Provided that the regional land claims commissioner may, without following the procedure set out in subsection (2), amend the notice to correct any obvious error in it, and cause notice of his or her decision to be published in the Gazette. [S. 11A inserted by s. 6 of Act 78 of 1996.]' [16] Counsel for the state respondents argued that the omission of the applicant'

[39] The procedure for lodgement, consideration and final determination of a claim for the restitution was neatly summarized by the Supreme Court of Appeal in *Gamevest (Pty) Ltd v Regional Land Claims Commissioner*[1] .Olivier JA for the court said they may be divided into four phases. They are the following :

1. The first phase is the lodgement of the claim- at this stage the Commissioner must "subject to the provisions of sec 2 , receive and acknowledge receipt of all claims lodged with or transferred to it in terms of this Act (s6(1) (a) and to resolve the disputes regarding representation of the claimant in terms of ss 10(4),(5) and (6)

2. The second phase is the "acceptance" of the claim by publication thereof in the Government Gazette- In this phase the Regional Land Claims Commissioner must consider certain matters, and may only proceed with the aforesaid publication if he or she is satisfied that (a) the claim has been lodged in the prescribed manner; (b) the claim is not precluded by the provisions of s 2; and (c) the claim is not frivolous or vexatious (s 11(1)(a), (b) and (c)). After giving consideration to these

[1] 2003 (1) SA 373 (SCA)

requirements, the Regional Land Claims Commissioner then has to take an administrative decision and perform an administrative action, *viz* to refuse acceptance of the claim or to accept the claim. In the first case, he or she must inform the applicant of the refusal and furnish reasons therefor (s 11(4)). If the claim is accepted, he or she must give notice of the acceptance of the claim by publication in the Gazette and by taking steps to make the acceptance of the claim known in the district in which the land in question is situated (s 11(1)).

3. The third phase is the investigation of the claim- which may be called the investigation phase, is governed by the provisions of ss 11(6), (7), (8), 11A, 12, and 13. In a nutshell, it obliges the Regional Land Claims Commissioner to advise the owner of the land in question of the application, to prevent dealings with the land, to deal with amendments to and withdrawal of claims, and to investigate the claims thoroughly. In case of dispute, the Chief Land Claims Commissioner may direct the parties concerned to attempt to settle their dispute through a process of mediation and negotiation (s 13).; and

4. The fourth phase is the referral of the claim

Evaluation

[39] The applicants seek an order directing the first respondent to withdraw the notice in terms of section 11A (1) on the basis that the second respondent's claim is frivolous or vexatious. In their representations and in the founding affidavit, the applicants rely heavily on the first respondent's own validation report which has been attached as annexure to the founding affidavit.

[40] The applicant avers that the first respondent acted against its own recommendations disqualifying the claim by publishing the notice in contravention of the provisions of sec 11(1).

[41] The difficulty that the applicants face is that they only extracted an incomplete validation report and they rely heavily on it. The applicants aver that they received a file which is more than 300 pages relating to the second respondent's claim the applicant only extracted the validation report from the file. The validation report is not

complete. It has no date and it has no author. The validation report may have been approved or disproved by the relevant official.

[42] The determination of whether the claim is accepted or not is dealt with in second phase, "the acceptance phase". In this phase, the Regional Land Claims Commissioner must consider certain matters, and may only proceed with the aforesaid publication if he or she is satisfied that (a) the claim has been lodged in the prescribed manner; (b) the claim is not precluded by the provisions of s 2; and (c) the claim is not frivolous or vexatious (s 11(1)(a), (b) and (c)).

[43] Spilg J in The Nyavana Traditional Authority v MEC for Limpopo Department of Agriculture & Others [2] said :

> Moreover, at this preparatory stage of the process in *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC) at 924B-C Dodson J confirmed that the strength of the claim is not important at the acceptance stage, provided that there is an arguable case.
>
> In the same case Bam P said at 936G-I:
>
> *"However, I am firmly of the view that ... total exclusion [of a claim] was intended to occur only in patently bogus claims or claims without substance or claims which on a purely mechanical or objectively determinable reasoning, fell outside the parameters of the legislation.*

[44] Commenting on the meaning of the word satisfied in section 11 (1) Moloto J referring to Dodson J said in Hlaneki & Others v Commission on Restitution of Land Rights and Others[3]

> "This Court has rejected the view that the word "satisfied" in section 11(1) means "prove." Dodson J, as he then was, held as follows:
> "That, in my view, is not the correct meaning to be attached to the term 'satisfied' in relation to section 11(1)(b). It is sufficient if the applicants show in relation to both the factual and legal issues that they have an arguable case, even if the

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2 [2001] 1 ALL SA 237

3 2005 (LCC 43/02) ZALCC 6 ; 2006 (1) ALL SA 633 LCC

arguments are relatively weak"[4] He went on to say that "to require applicants to prove their cases before the Regional Land Claims Commissioner would be to exceed the Constitutional and statutory mandates conferred on the Commission."[5]

The approach of Dodson J was referred to by the Supreme Court of Appeal in the matter of *Mahlangu N.O. v Minister of Land Affairs & Others*.[6] Referring to Dodson J's statement that a claimant need only to exhibit an "arguable case," Nugent JA said the following:

"In my view, even that threshold might be too high, but it is not necessary in this appeal to decide that question. It is sufficient to say that on the material that is before us, it is doubtful that the commission was entitled to decline to consider the present claim and instead to make alternative recommendations. If that is correct, the community would of course have been entitled to have the commission's finding and recommendations set aside on review"

[45] In this case it is also not clear that whether the first respondent has made a determination of whether or not the second respondent's claim is frivolous and vexations.

[46] Secondly, the applicants aver that have a clear right to the withdrawal of the Notice. I disagree. It seems to me that the applicants are competing claimants to the second respondent's claim.

[47] The applicant avers that they only came to know about the second respondent's claim in December 2014 and they resolved to lodge a counterclaim. Coincidentally, in 2014 the Restitution of Land Rights Amendment Act[7] (Amendment Act) whose aim was to re-open the lodgement of land claims was enacted. New claims were lodged during this period. The applicant claims that except for the acknowledged of receipt of the

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4 Farjas (Pty) Ltd v Regional Land Claims Commissioner, kwaZulu – Natal 1998(2) SA 900 (LCC) at 923F

5 Farjas at 923I

6 2005(1) SA 451 (SCA) at para 13, p 455 D – G.

7 15 of 2014.

so-called counterclaim, they never received any communication from the first respondent.

[48] A proper look at the acknowledgement of receipt reveal that in December 2014 the applicant's leader Mr TP Thobejane lodged a land claim in respect of the land in question in terms Amendment Act·

[49] A reference number was given and an additional information was required. The acknowledge of receipt reads:

> "Please note however that the following additional information is still required
>
> 1. Copy of any written notice received at the time of dispossession such as notice of expropriation or trek pass
> 2. Copy of any documents that proves the existence of any other registered right i.e, Permission to occupy (PTO)Quitrent right
>
> Please note that the lodgement of the claim will only be confirmed once the additional information is supplied and complete property description is identified (erf/nae is identified "

[50] Although the Amendment Act was invalidated, the claims lodged as results of this Act were not invalidated. The Court interdicted the Commission on Restitution of Land Rights from processing the claims lodged from 1 July 2016 pending the re-enactment by Parliament of an Act re-opening the period of lodgement of the land claims and until the old claims whose cut-off date was 31 December 2021 had been finalised.

[51] In **Emakhaseni and Another v Minister of Rural Development and Land Reform and Others**[8] in a special sitting of four judges this court considered the implication of LAMOSA 1 judgement. The court held that:

> *15.1 No new claim lodged between 1 July 2014 and 28 July 2016 can be adjudicated upon or considered in any manner whatsoever by this Court in any proceedings for the restitution of rights in land in respect of old claims lodged before 31 December 1998.*
>
> *15.2 New claimants who contest old claims lodged before 31 December 1998 may be admitted as interested parties solely to the extent that their participation may contribute to the establishment or rejection of the aforementioned old*

[8] LCC 01/2009

claims or in respect of any other issue, the presiding judge may allow to be addressed in the interest of justice.

[52] It seems to me that the applicants are competing claimants who are contesting the old claim of the second respondent. It is not clear from the pleadings if the applicants submitted the required additional information to the first respondents. What is also missing from the applicant's pleaded case is whether they have now withdrawn or abandoned their claim in respect of the land in question.

[53] Even if I am wrong, it my view that the applicants are competing claimants, The validation report which they rely on records the historical report on the land claimed by the second respondent as follows:

49.1 DSJATE 249 KT

Originally surveyed in 1887 and has since then always been owned by the State. It was transferred to the SANT and still held by the now defunct SANT by virtue of Title Deed T15880 of 1989. The second respondent once lived in this land but driven off it by Sekhukhune in the 1800's. The second respondent claimed the land as it has the sentimental value to them as their ancestral Chiefs being buried there.

49.2 **FERNKLOOF 539 KT**

The land was originally surveyed in 1887, since then held by the State. In 1989 it was transferred to the Government of Lebowa by virtue of Title Deed T44484 /1989. It is recorded that the land is used by the Roka Mashabela as mountainous grazing. The owner of the property is still reflected as the Government of Lebowa

49.3 **QUARTZHILL 542 KT**

It was originally surveyed in 1887 and was held by the State until 1989 when it was transferred to the Government of Lebowa by virtue of Title Deed T47101/1989. It was allocated to and used by the Roka Mashabela as mountainous grazing. According to the RLCC Database there are no other claimants to this farm.

[54] The incomplete validation report clearly states that except Dsjate 249KT, the land claimed by the second respondent was allocated to them and that they are currently occupying it. Regarding the Fernkloof 539KS and Quartzhill the report stated that the second respondent is using the land for grazing.

[55] The applicant's case is that three of the claimed land belongs to Dsjate Community. In terms of the validation report Dsjate 256 KT that is partly excluded from the second respondent's occupation, the report stated that the second respondent forebears were driven off by Sekhukhune in the 1800. They were allocated the land in Hockney and in Twickenham although there were second respondent's descendants that were left in Dsjate land. The report states that although the claim maybe considered as frivolous and vexatious in terms of the Act, the second respondent genuinely believe that the land belongs to them.

[56] In its claim the applicants cannot rely on the validation report to claim clear right in respect of the properties. It is clear from the validation report that the applicants and the second respondent are asserting their constitutional rights. They are competing claimants.

[57] In view of the position, I take in this matter, I am of the view that the appropriate order to be granted is Rule Nisi calling upon the RLCC and the second Respondent to show cause why an order should not be made to have the notice withdrawn against the applicant's properties.

[58] I am alive to the fact that the first and second respondent was given ample time to investigate the matter after 11 A (1) representations and to file its answering affidavit but they failed to do so until they were barred. The conduct of the first respondent is reprehensible. This court disapproves the manner in which the applicants have been treated. In matters of this nature where there are competing constitutional rights of the claimants for the restitution of land rights, the courts are required to balance the competing interest.

[59] On 12 February 2022 I issued the following order:

1. Rule Nisi is issued, returnable on **15 March 2022** calling upon the first and the second Respondents to show cause why an order should not be made to have the notice withdrawn against the applicant's properties within 15 days of the date of this order.
2. The first respondent must confirm by, **4 March 2022** whether the validation report that recommended that the second respondent's claim does not qualify in terms of the Restitution Act was approved or not. If it was approved, the first respondent must confirm whether the publication of the claim was not an obvious error
3. The first respondent to pay the applicants' costs on attorney and client scale

[60] On 2 March 2022, the first respondent filed a report in compliance with the court order. The first responded submitted that the court should not grant the order to have the Gazette notice withdrawn because the second respondent's claim was lodged in a prescribed manner and it was accepted after the first respondent was satisfied that it complied with the provisions of sec 11(1) of the Act. The first respondent attached an acceptance report which was approved on 21 December 2017 by Mr Maphuta, the Regional Land Claims Commissioner. However, the first respondent failed to comply with paragraph 2 of the order.

[61] In response to the report filed by the first respondent, the applicants filed a replying affidavit. The applicant highlighted the contradictions in the 2007 and 2017 validation reports of the first respondents. The applicants submitted that due to these contradictions and the failure of the first respondent to deal with the status of the 2007 validation report, the court should not be satisfied that the requirements of section 2 read with section 11 of the Restitution Act have been satisfied.

[62] The applicants argued further the claim of the second respondents cannot succeed under the restitution Act as it dies not satisfy the criterion set out in section 2 of the Act. In support of its argument the applicant dealt with the history of the dispossession, analysed the claim form and additional information filed.

[63] The applicants conducted a census of the people who are currently occupying the land claimed. The applicant concluded that this court should reject the version

advanced by the first respondent that the second respondent's claim complied with the provisions of section 2 read with section 11 of the of the Act add notice in terms of Rule 32 (5) affording the first respondent an opportunity to comply fully with paragraph 2 of the court order.

[64] The applicant filed a supporting affidavit by Ntoampe Isaac Mampuru who is a member of the Royal Council of Bapedi Kingdom known as Sekhukhuni kingdom the Chief of Bapedi who advanced an argument that the second respondent's forebears collaborated with the apartheid regime during 1950's and as a results they were awarded chieftainship secondly they were given authority and control over the farms Twickenham; Hackney and Quatzhill . The deponent further advanced an argument the second respondent were awarded some properties.

[65] The applicant furthermore filed an interlocutory application in terms of Rule 32(5)(b) to strike out a defence, alternatively to strike out the report filed by the first respondent. The interlocutory application was set down on 28 April 2022. The applicant relied heavily on the recommendations of the 2007 validation report in support of the application to strike out. The applicant furthermore dealt with the merits of claim by assessing the evidential material available at the time of acceptance, the claim form, affidavits and answered by the second respondent to the questionnaire attached to the land claim. The applicants submitted that the second respondent's claim was frivolous and vexatious. The application to strike out was refused and first respondent was ordered to comply with paragraph 2 of the court order.

[66] Ms Mautsana Shirley Selena, a project officer in the office of the first respondent filed an affidavit in compliance with the court order of the 28 April 2022. She stated that the unsigned validation report upon which the applicant relied on was never approved by the first applicant. She further confirmed that the second respondent's claim was accepted by her predecessor after having satisfied that the claim met the requirements of Sec 2 read with section 11 of the of the Act. The claim was published in the Government Gazette in 2007 after it was accepted therefore the publication was not an obvious error. The claim was investigated in 2017 and it was found that the claim met all the requirements and it was approved by the first respondent on 21

December 2017. The regional land claims commissioner filed a confirmatory affidavit in this regard.

[67] Ms Mautsana submitted that RLCC-Limpopo received a lot of claims from the claimants who were not physically dispossess of their land and these claims fell under section 3 of the Act. The RLCC held a view at the time that these particular claims should be transferred to the Department of Land Affairs in order for the security of tenure of the land occupants to be upgraded. The RLCC conducted a land enquiry in respect of section 3 claims. A report was made which recommended that the files would be transferred to the department and the claimants right to dealt with under Communal Land Act was subsequently invalidated by the Constitutional Court. The 2007 validation report was not prepared for consideration of the claim in acceptance stage but was prepared for the department of Land Affairs in order to deal with the claims in terms of the Communal land Act.

[68] The first respondent further submitted that this court in Hlaneki and Others v Commission on Land Restitution and others [9] ruled that the first respondent was incorrect in its view that the land claim wherein the claimants are still in occupation of the land claimed do not fall under section 2 of the Restitution Act. Having failed in appealing the judgement the first respondent revisited all the claims, accepted and gazetted them. Counsel for the first respondent argued that although the validation report was available at the acceptance stage and before the land claim notice was published in the government gazette, the report was not considered.

[69] In reply, the applicant poked holes in the affidavit filed by RLCC in that it failed to comply with the court order. The applicants disputed that the 2007 validation report was in fact an enquiry report prepared for the purposes of transferring the second respondent's claim, it claimed that the validation report was prepared for the purpose of validating the claim. The applicants decried the fact that the first respondent's assertion that the validation report was enquiry report was not supported by any documents. The applicant submitted that the decision to publish the claimed land was irrational and unreasonable due to the fact that the recommendations of the 2007 validation report were ignored therefore reviewable.

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[9] [2006] 1 ALSA 633

[70] The applicant's main argument for seeking the orders as stated in its notice of motion is two folds and it is as follows:

70.1.1 The basis for the main application is the fact that the Roka Mashabela's claim to the three farms does not satisfy the criteria set out in section 2 of the Restitution Act.

70.1.2 The second respondent's claim is frivolous and vexatious as contemplated in section 2, read with 11(1) of the Restitution Act and has no prospects of success.

[71] During the argument Counsel for the applicant advanced an argument that an appropriate order to be granted by this court is a declaratory order that the decision to gazette the land claimed by the second respondent was unlawful and invalid.

[72] The applicant pinned its argument on rationality review. It argued that the first respondent acted irrationally when taking a decision to publish the land claim in that it ignored the 2007 validation report and considered irrelevant considerations that were not authorised by the law. The applicant submitted that the first respondent simple accepted the claims after Hlaneki judgement and ignore the fact that the second respondent's claim was precluded by sec 2 (1) (d) in respect of Dsjate land. Relying on Gamevest matter the applicant submitted that the decision taken by the first respondent was an administrative decision which is reviewable in terms of section 33 of the Constitution. The first respondent acted outside the rule of law and he acted in a manner inconsistent with the Constitution.

[73] I am of the firm view that the declaratory order that the applicant advanced during argument cannot be granted due to the fact that the first respondent has since complied with the court orders and have advanced the argument that the second respondent's claim was fully investigated and was found to have complied with the provisions of section 2 read with 11 (1) of the Act. An acceptance report of 2017 was attached to the papers.

[74] It was inevitable that when dealing with this matter, the applicant will have to deal with the merits of the second and fourth respondent's claim in order to show that

the claim is excluded by section 2 of the Act. This court is not competent to deal with the rights of the applicant's regard being had to Emakhaseni and Lamosa 1 and 2 judgements.

[75] The land claim by the second and fourth respondent in respect of the properties in question has not been finalised. It can only be if the claim is settled between the claimants and the third respondent, in terms of section 42d and or through section 14 of the Restitution Act by way of referral to this court.

[76] It is clear from the pleadings that the applicant is contesting the second and fourth respondent's claim. In Emakhaseni matter this court held that "New claimants who contest old claims lodged before 31 December 1998 may be admitted as interested parties solely to the extent that their participation may contribute to the establishment or rejection of the aforementioned old claims or in respect of any other issue, the presiding judge may allow to be addressed in the interest of justice.

[77] The Counsel for the applicant submitted that in the event that I found that this court is not competent to deal fully with the matter, I should in the interest of justice order the first and third respondent to refer the land claim to the court for adjudication. This proposition was opposed by both counsel for the first and third respondent and the second and fourth respondent on the basis that the applicant is not a claimant in terms of the Restitution Act. I differ with state and claimant's counsel. The applicants before this court are not non entities as suggest by the counsel second and fourth respondent's counsel. They are representing the interest of the communities that are currently occupying some of the properties that are claimed by the fourth respondent. According to Emakhaseni Judgement the only platform that is available to them to participate is when they are admitted as interested parties for the purpose of establishment or rejection of the old claim or in respect of any other issue. The applicant have demonstrated that they have interest in the adjudication of this claim. I am of the view that in this case it is in the interest of justice that an order be granted for the referral of the claim to this court within 60 days from the date of this order.

Costs

[78] On 14 February 2022 I ordered costs against the first respondent. The RLCC is to pay these costs until 14 September 2021.

[79] It is the case the applicant has partially succeeded in the relief claimed in the alternative. It is an accepted legal principle that costs are at the discretion of the court. The basic rules were stated as follows by the Constitutional Court in *Ferreira v Levin NO and Others*[10]

> 'The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.'

[80] In my view there are no special circumstances warranting departure from ordinary rule of this court. I will order that each party pay its own costs.

Order

[81] The following order is made:

1. The application is dismissed.

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[10] *Ferreira v Levin NO and others* 1996 (2) SA 621 (CC) at 624B—C (par [3]).

2. The first respondent is directed to:

   a. certify and refer the land claim submitted by the second and fourth respondents to the Land Claims Court in terms of section 14 of the Restitution of Land Rights Act 22 of 1994 within 60 days from the date of this order.

   b. include the applicants in the notice of referral as persons "whose rights or interests may be affected by the claim", so as to enable the applicants to participate in the referred proceedings; and

   c. deliver a copy of the notice of referral to the applicants' attorney of record simultaneously with its delivery to the second and fourth respondents.

3. Each party to pay its own cost

L Flatela
Acting Judge of the Land Claims Court

APPEARANCES

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	J L Griffiths
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For the First Respondent	
And Third Respondent:	Mr Mathebula
Instructed by:	State Attorney

For the second	
And fourth Respondent	Mr Machacha
Instructed by	Machacha Attorneys

Date Heard:	14 September 2021, 28 April 2022, 1 June 2022
Date Delivered:	17 June 2022