IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NOS: LCC206/2010

LCC 20/2012

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

9 October 2020 **(SIGNED)**
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SIGNATURE

CASE NO: LCC206/2010

In the matter between:

THE MOLETELE COMMUNITY First Claimant

HEIR PRINCE-MAEKANE TRIBAL COMMUNITY Second Claimant

KGOSI LACKSON ABUTHI CHILOANE

on behalf of **MOLETELE TRIBE** Third Claimant

MOLETELE-BLYDEPOORT COMMUNITY Fourth Claimant

v

TELKOM SA SOC Ltd 641st Respondent

concerning

PORTION 64, a PORTION of the

FARM GROVEDALE 239 KT
held under Deed of Transfer No. T3484/1992
(Item 415 on Annex NR1A of Referral Report)

JUDGMENT
RE:
THE *LIS* BETWEEN THE MAIN CLAIMNATS AND TELKOM

SPILG, J

INTRODUCTION

1. This case arises from a referral by the Regional Land Claims Commissioner in October 2010 of the claim of the first to fourth claimants. These claimants are also referred to as the *main claimants*.

2. In the latter part of 2015 a number of other claimants delivered their statement of claim. Their claims cover a portion of the land in respect of which the main claimants seek restitution under the Restitution of Land Rights Act 22 of 1994 (*"the Act"*). The group bringing the Mnisi Land Claims are referred to as the *competing claimants.*

3. The cases were subsequently consolidated. Innumerable disputes have been raised ranging from challenging the competency of the claims to non-restorability in respect of specific properties. In all the main claimants seek restoration of 1300 individual farms covering a total land area of 500 000 hectares.

4. Due to the multiplicity of substantive, technical and procedural issues not only between the claimants and the landowners but also between the claimants inter *se*

the parties resolved that each would prepare a litigation plan for the further conduct of the proceedings. The court would then be required to resolve any disputes regarding the appropriate course to follow. This was on 21 November 2019

5. At that meeting it was agreed that each party's litigation plan would identify any proposed issue for separate adjudication.

6. The several litigation plans were then dealt with at a pretrial conference held before me on 28 February 2020.

   Among the issues specifically dealt with were whether there should be a separation of issues which affected certain of the landowners in relation to;

   a. the competency of certain of the claims;
   b. the restorability of a number of properties belonging to a small number of the affected landowners who are separately represented from those of the main group of some 231 landowners.

7. The parties were agreed on almost all of the elements of the litigation plan. However one of the issues in respect of which there was disagreement concerned whether there should be a separation of the issues raised by certain landowners regarding the competency of the claims and the restorability of their property.

COURT'S DETERMINATIONS REGARDING SEPARATION OF ISSUES

8. I thereafter was required to make a determination and in written reasons identified the landowners who sought a separation of various issues including the issue of the restorability of their lands. They were the A&V Group, the KTO Group, the Madrid Group and Telkom.

9. Three broad grounds were raised for seeking a separation, not all being applicable to each party. The first was that the farms of certain landowners were not described in

the claims and in any event were erroneously included in the Government Gazette notice under s 11(1), the second was that the farms were incapable of being restored and lastly that some farms were a sufficient distance from the others to justify a separate hearing.

Save for the KTO Group, all these parties sought a separate determination of the issue of restorability.

The claimants and the Hoedspruit owners opposed any separation.

10. I did not permit a separation at that stage except in the case of Telkom. Its position was unique because it may have acquired the Grovedale property through expropriation. I also indicated that in respect of the feasibility of restoration Telkom relied on the allegation that it performs a public function on the land in issue and that the purpose and function of the exchange and equipment on the property and the licences it holds are pursuant to the provisions of the Telecommunications Act, the Electronic Communications Act or both.

I therefore ordered, in terms of rule 30 (9) (a) (ii) as read with rule 57, that the factual and legal issues of whether the Grovedale property or any rights in it should not be restored to any claimant will be separately decided from all the other issues involved in the two cases and, in the absence of agreement between Telkom and the main claimants, the court would hear prior argument as to whether the provisions of s 34 applied.

11. I also ordered in terms of rule 30(9) that

    a. Telkom was obliged to state whether it acquired registered title to the Grovedale property by way of expropriation or ordinary purchase and sale, and if by expropriation to identify the applicable legislation;

    b. Irrespective of the response, the main claimants were obliged to;

        i. state whether or not the Grovedale property is restorable;

        ii. state whether they admit that the Grovedale property is approximately 625 sq. metres in size as alleged by Telkom, failing which they were to state its approximate size;

        iii. state whether they admit or deny how Telkom claims to have acquired title to the property, and if they deny then they were to provide the grounds;

        iv. state separately in respect of each of the contents of paras 2, 4 and 19 of Telkom's plea whether the allegations contained therein were admitted or denied.

12. Although reference had been made to s 34 of the Act by one of the parties, on preparing the decision I became concerned that, if the section was applicable then it may be significant and I had not afforded the parties an opportunity to deal fully with the consequences. In particular I did not believe that either Telkom or the main claimants had indicated whether they were in agreement as to whether the former is or is not a *"government body"* for the purposes of s 34.

The reason for my concern was that if the parties were not in agreement then it would first be necessary to hear argument on the point. It would also be necessary to establish the parties' respective position as to whether the Commission had investigated and reported on the desirability of making an order not to restore the Grovedale property to any claimant if s 34(2) as read with s 12 applied as well as the status that should be accorded to the report and its utilisation at any hearing.

I considered that without consensus between the main claimants and Telkom, the difficulty would arise that if the latter is a government body for the purposes of s 34 then different considerations apply and the procedure provided for in that section would have to be complied with to the extent that it had not been already. My concern was directed at that- nothing more.

13. In response to my order Telkom disavowed any reliance on s 34.

14. The main claimants in their response, which was contained in a letter dated 26 August, stated (in para 6) that side from the issue of restorability they are of the view that

> "*… the remaining issue in this regard is the determination of the manner and terms of acquisition from Telkom. This is a matter between the Minister and Telkom. The Judge should direct that Telkom should start their negotiation regarding the acquisition".*

15. At the pretrial conference of 1 September Adv Stone on behalf of Telkom raised his client's concern that the main claimant was suggesting that the only issue remaining was the negotiation of acquisition with the Minister. He asserted that the merits were

still outstanding and therefore the separated issue would not finally dispose of the matter. He contended that the dispute of feasibility to restore the property was separated from the dispute on the merits.

16. Advocate Notshe however submitted that because Telkom was not relying on s 34 they had effectively dealt with the merits when "*they conceded*" to the separated issue.

17. I indicated that when I was called on to consider making an order of separation I had not understood that Telkom was conceding the merits nor did I understand that by so ordering Telkom was being precluded from doing so.

18. I however required that the issue be determined forthwith and not linger until after the separated issue was decided. In the interests of justice both parties required a determination now.[1]

19. The main claimants contend that by not relying on s 34 Telkom has somehow forfeited its right to plead on the merits because procedural rules would result in that consequence.

20. I certainly know of none and none has been provided that is on point.

At best the authorities confirm that the test for separation is whether an issue can be conveniently separated for determination in favour of one of the parties which will dispose of the case or a significant part of it. But if it does not then the court proceeds to deal with the balance of the disputes which remain. In other words a separation is not determinative of all the issues that are raised by one of the parties,

[1] The initial point raised appeared to be on a different footing to the one actually dealt with in the main claimants heads of argument. I will therefore cover all possible permutations.

but will be against the other either completely, because it strikes at the foundation of that party's entire cases, or a material portion of it[2].

All basic text books deal with this adequately, provide the authorities which are in point and need not be repeated.

21. My decision for granting a separation in respect of Telkom and for not granting it in relation to the others, as contained in the reasons furnished on 9 July, dealt with the concerns raised in the cases relied on by Adv Notshe.

It should be added that I had already made an order that it is "*convenient"*, as that term is applied in *Tongaat*, for the legal and factual issues concerning the question of restorability to be separated from the other defences raised by Telkom. That is the end of the matter insofar as the main claimant's heads of argument are concerned and the question of whether it was appropriate to separate the issue cannot be revisited in the indirect manner now sought. I have made my ruling on it and it stands.

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[2] For instance Adv Notshe relies on *Denel (Pty) Ltd v Vorster.* 2004 (4) SA 481 (SCA). At para 3 of the judgment the court explained the caution to be applied when considering an application for a separation. In the other case relied on of *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) the court said at p 364 that

> *"It follows from what I have said that the function of the Court in an application of this nature is to gauge to the best of its ability the nature and extent of the advantages which would flow from the grant of the order sought and of the disadvantages. If, overall, and with due regard to the divergent interests and considerations of convenience (in the wide sense I have indicated) affecting the parties, it appears that such advantages would outweigh the disadvantages, it would normally grant the application.*
>
> *… I am satisfied that the Court ought not to grant an application for a separate hearing on certain questions and for the stay of the pending trial until such questions have been resolved, unless there appears to it to be a reasonable degree of likelihood that the alleged advantages would in fact result."*

Moreover the main claimants have not contended that the issue I have separated is not effectively self-contained or is not otherwise convenient to separate. That is a *sine qua non* to get off the starting blocks. They never contended it when the matter was argued on 28 February nor have they since.

So one must go to the pleadings to establish if the' point to be separated was identified as the only one which Telkom raised as a defence or elected to stand or fall by.

THE PLEADINGS

22. It is trite that the issues are defined in the pleadings, and of course by clear admissions made by the parties. No authority is required for these propositions.

23. In his heads of argument Adv Notshe does not point to any part of the plea or rely on any express admission made to show either that Telkom had not pleaded lack of restorability in the alternative to its defence on the merits or was now expressly abandoning the balance of the allegations it had put in issue in its plea.

24. Telkom's plea is clear.

In paragraph 11 it complains about the insufficiency of particularity contained in the complainants' statement of case to enable Telkom to plead meaningfully to it. Telkom set out the basis for its objections in para 12.

I pause to mention that this is effectively conceded by the main claimants. They had had left the whole issue of restorability of private land hanging in the air. In para 22 of the main claimants' claim they state:

> "*The claimants accept that there is further land within the published area that cannot be feasibly restored. It is also accepted that some land can only be restored subject to present land uses. It is not practical at this stage to identify specific land which falls within this category and this matter is also left for further evidence"*

25. In para 16 of its plea Telkom then dealt with the merits of the claim. It expressly pleaded that:

> *"All elements of the claimants' claims are disputed. Without limitation to any defences available to Telkom its defences can be summarised as follows;*
>
> *16.1 It is disputed that claims were duly lodged in respect of the Grovedale exchange property by the claimants or any duly authorised representative of the claimants, as required in section 10 of the Restitution of Land Rights Act 22 of 1994 {"the Act').*
>
> *16.2 It is denied that any claim in respect of the land is valid.*
>
> *16.3 All aspects of the merits of the claims are disputed and it is disputed that the claims in respect of any rights in land of Telkom comply with the requirements set out in section 2(1) of the Act.*
>
> *16.4 Telkom contends that the claims for restitution of any rights they have in respect of the aforesaid land should be dismissed.*
>
> *16.5 Further and/or in the alternative, only if it is found that the main claimants are entitled to succeed in principle to claim relief in respect of*

the Grovedale exchange property (which remains denied), then Telkom contends that the Grovedale exchange property should be found to be non-restorable inter alia as the restoration thereof is not feasible, and that in such event the main claimants should then either be awarded monetary compensation by the State, or provided with alternative State owned land or be awarded some other form of redress or compensation by the State, as the court may direct.

26. Under a quite distinct heading titled "*Point in limine"* it then raised the non-feasibility defence. It does so in the following manner, and I quote:

"***IN LIMINE:***

17. Before dealing with the content of the statement of claim ad seriatim, a point in limine is raised and Telkom contends that such point should be dealt with first and finalised separately, before the rest of the hearing.

18. Telkom contends that the restoration of the Grovedale exchange property is not feasible and should not be ordered in any circumstances. Telkom contends that this is an aspect that should be dealt with first and separately from the other disputes in the hearing.

19. Telkom inter alia refers to the following considerations in support of their contention that the Grovedale exchange property should not be restored:

19.1 …"

There then follows the grounds for contending that it is not feasible to restore the property.

27. Not only is it made abundantly clear that the point in limine of non-restorability is in addition to its plea on the merits but this is again repeated in the following unequivocal terms:

If it is found that any of the claimants can succeed with the claim in respect of the Grovedale exchange property, it is submitted that the court should find

20. that restoration of such land is not feasible and should not be ordered claimants should then be compensated by the State by way of some other form of redress.

21. The court will be requested to adjudicate the question of the feasibility of such land, before the adjudication of the merits, separately.'

28. It is evident that Adv Notshe cannot find what he seeks to contend for, namely that it has forfeited it right to contest the merits.

29. Nor can he find it in anything Adv Stone contended for during the argument relating to the separation issue, much less in Telkom stating that it was not relying on s 34 of the Act. The fact that it does not seek assistance from s 34 does not mean that it's pleading is any less clear than any of the other litigants who sought a separation of issues- and the claimants do not contend that these other landowners would have forfeited their right to proceed on their other defences if a separation had been ordered.

30. The principles of separation are well known. A party seeking a separation of issues does so precisely because it believes that among its defences there is one that can be determinative of the entire case made out by the claimant (not necessarily its own) if found in its favour, or an element of it which will have significant consequences in reducing the issues or evidence required.

31. It is unnecessary to do a précis of the basis under which a separation is sought or its consequences. They have been with us for well over a century and are well understood. Moreover the main claimants do not contend that Telkom falls within the purview of s 34 or is obliged to pursue that route.

32. I should add that Adv Notshe never raised the issue at any prior stage. It is difficult to appreciate how the claimants can make a virtue of something it had actually accepted; namely that Telkom had never claimed that it was pursuing a position under s 34 with its far more egregious consequences to the claimants by reason of the advantages it would give a party that can so rely.

33. I am satisfied that the point sought to be taken is devoid of any merit and there is nothing contained in the heads of argument that addresses the trite proposition set out at the commencement of this section. The plea is clear and at no stage when dealing with the issue of separation of issues did Adv Stone ever concede the merits nor did Adv Notshe in responding to him contend that he had. I certainly did not and I was surprised by the argument raised.

34. I therefore direct and rule that all the issues raised in Telkom's plea, and in particular those set out in paras 11, 12 and 18 remain part of the issues between the parties and still constitute the *lis* between the parties requiring determination should the court find against Telkom on the restorability issue in the separated hearing.

COSTS

35. Telkom has sought a special order for costs on the attorney and client scale in respect of this issue, including the costs of the pretrials cum hearings of 17 August and 1 September 2020

36. Firstly dealing with the costs arising out of the issue raised by the main claimants. Costs have been unnecessarily incurred on a point that on all basic principles lacks merit. This should have been apparent to their legal representatives, particularly when it is evident that the heads of argument looked in vain for a basis to support the position adopted in the letter of 26 August and which then convoluted issues of when a separation can be ordered and an abandonment of all other defences raised. A moment's reflection should have made it apparent that the point was bad and to pursue it for its own sake was simply building up unnecessary costs.

37. In this case a stage has been reached where all litigants need to appreciate that the sanction of a punitive costs order has become necessary in order to ensure that the real issues between the parties are addressed in an expeditious fashion.

38. The purpose of such a sanction is not to stifle litigation nor to preclude legal representatives from enjoying the latitude which should be afforded to them to challenge legal precepts or to put their client's case forward. It is directed at instances where it is clear from the arguments raised that the point is devoid of any merit, simply results in delay or the incurring of unnecessary costs by the other party and which therefore is prejudicial to the proper functioning of the court or the interests of justice. It is a sanction that will not be lightly used. However this is a clear case where it should.

39. The main claimants should have appreciated that on first principles the issue raised was not sustainable because it not only put the cart before the horse but because the hose had already bolted when I ordered the separation. Furthermore they had not at any stage contended that the separated issue in the case of Telkom was not self-

contained or that it was not convenient, as that term is understood in this context, to deal with separately.

40. Telkom also seeks the costs of the attendances on 17 August and 1 September 2020.

41. I believe different considerations apply. The hearing of 17 August was aborted on the day without an acceptable explanation being proffered as to why the main claimants' attorney could not have indicating its client's position sooner. There was however some confusion regarding when the main claimants became aware of the Commissioner's decision to withdraw funding- being the reason for seeking a postponement in order to take instructions on whether the main claimant's would provide self-funding. If there are costs to be awarded they can only be considered by reference to the issues which might arise in the stay proceedings still to be brought. Accordingly those costs will be reserved and will be determined (if Telkom still intends pursuing them) at the stay hearings.

42. It is also inappropriate at this stage to visit a cost order, special or otherwise, in respect of the I September attendance since other business was conducted and progress was made with regarding the bringing of the review and stay proceedings. The matters in fact dealt with at the attendance on 1 September were essentially concerned with the review/stay proceedings and the costs will therefore also be reserved for determination at the stay hearing.

43. In closing: Parties are encouraged to communicate in good time with their opposite number and not leave it to the day of the actual hearing to seek a postponement. If the ground is justified and the other party does not accede then the boot may well be

on the other foot depending on whether ordinary costs should have been tendered or not.

ORDER

44. It is ordered and declared that :

1. The present *lis* between the main claimants and Telkom includes all the issues put in dispute in Telkom's Pleading

2. The order on 7 July 2020 separating the issue of restorability does not preclude Telkom from raising all its other pleaded defences should the court find against it in respect of the separated issue.

3. Should the court find against Telkom at the separated hearing with regard to feasibility all the other defences raised by it in its Pleading will be dealt with thereafter

4. The main claimant is to pay all the costs arising from this issue including the heads of argument and the hearing of 8 September 2020, which costs shall be on the attorney and client scale.

5. The order in para 4 does not include the attendances/hearings of 17 August and 1 September 2002, which costs are reserved for the hearing of the stay application.

(Signed)

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SPILG, J

DATE OF HEARINGS:	8 September 2020
DATE OF JUDGMENT:	9 October 2020
FOR THE MAIN CLAIMANTS:	Adv VS Notshe SC
	Adv Z Madlanga
	Ngoepe Attorneys
FOR TELKOM:	Adv J Stone
	MacRoberts Attorneys