CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 75/10
[2011] ZACC 15

BAPHALANE BA RAMOKOKA COMMUNITY	Applicant
and	
MPHELA FAMILY AND OTHERS	First Respondent
HAAKDOORNBULT BOERDERY CC AND OTHERS	Second to Seventh Respondents
MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM	Eighth Respondent

In re:

MPHELA FAMILY AND OTHERS	Applicants
and	
HAAKDOORNBULT BOERDERY CC AND OTHERS	First to Sixth Respondents
MINISTER FOR AGRICULTURE AND LAND AFFAIRS	Seventh Respondent

Heard on : 22 February 2011

Decided on : 21 April 2011

JUDGMENT

CAMERON J:

Introduction

[1] The applicant applies to rescind this Court's judgment and order in *Mphela and Others v Haakdoornbult Boerdery CC and Others*[1] (*Haakdoornbult* judgment). The applicant is the Baphalane Ba Ramokoka Community (Community), represented by its current leader, Kgosi Modise Tonse Ramokoka. In the *Haakdoornbult* judgment, affirming a land apportionment order the Supreme Court of Appeal granted,[2] this Court substantially upheld the claim of the Mphela family to the Haakdoornbult farm. The Family acquired Haakdoornbult in August 1918 and farmed it until they were forcibly removed on 2 August 1962. The farm to which the Family was relocated was Pylkop, which was registered in the name of a family member on behalf of the Family. And here is the rub. The Community has lodged a claim under the Restitution of Land Rights Act[3] (Act) to lands that include Pylkop. That claim is pending before the Land Claims Court. The question this application raises is whether this Court's judgment in *Haakdoornbult* impinges on the Community's claim to Pylkop.

[2] The respondents are: first, the Mphela family, whose claim to Haakdoornbult substantially prevailed in the judgment sought to be rescinded; the former owners of

[1] [2008] ZACC 5; 2008 (4) SA 488 (CC); 2008 (7) BCLR 675 (CC).

[2] *Haakdoornbult Boerdery CC and Others v Mphela and Others* 2007 (5) SA 596 (SCA); 2008 (7) BCLR 704 (SCA).

[3] 22 of 1994.

Haakdoornbult, who were the main respondents in the *Haakdoornbult* litigation (second to seventh respondents); and the Minister for Rural Development and Land Reform, who oversees the administration of the Act (eighth respondent).[4] Only the Family opposes the application.

[3] In its original application, filed on 16 August 2010, the Community sought to rescind the whole of the judgment and order in *Haakdoornbult* so that the matters in issue could be referred back to the Land Claims Court to be heard concurrently with its claim to Pylkop. However, in an amended notice dated 2 December 2010, it introduced a more modest alternative. This was that only certain "pronouncements" in paragraphs 54 and 56 of the judgment be "rescinded or expunged", and that only the "issue in respect of" Pylkop be remitted to the Land Claims Court.

[4] The Community claims rescission on the basis that the *Haakdoornbult* judgment violated its right of access to courts,[5] since it was not a party to the proceedings, of which it claims to have had no timeous knowledge. The essence of its complaint is that the judgment was "a decision pertaining to the farm Pylkop", in respect of which its claim is currently pending in the Land Claims Court.

[4] The applicant cited the Minister as the eighth respondent. However, the Minister made joint submissions with the office of the Regional Land Claims Commissioner for the North West and Gauteng Provinces.

[5] Section 34 of the Bill of Rights, which is headed "Access to courts", provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[5] Some background is needed to illuminate the dispute and the parties' contentions.

The Haakdoornbult litigation

[6] Haakdoornbult lies on the banks of the Crocodile River near Thabazimbi in Limpopo. In 1918, Mr Klaas Phadi Mphela and Mr Mautsi Makok[6] acquired the farm. It was later partitioned into two parts: portion one and the remaining extent. The remaining extent of Haakdoornbult 542 KQ became an Mphela family settlement. But the shadow of apartheid dogma fell over the Family. Under the Native Land Act of 1913[7] and the Native Trust and Land Act of 1936,[8] the government considered their farm an unacceptable "black spot". Subject to considerable duress, the Family sold Haakdoornbult in 1951. In 1953 the Family used the proceeds of the sale to buy a farm from the South African Native Trust. That farm, 17 kilometres away, was Pylkop 26JQ. But the Family refused to complete the process of transferring Haakdoornbult and in 1962, the new owners of Haakdoornbult and the South African Police conducted a night raid against them. The Family's homes were bulldozed, and their kgotla tree, kraals and school were razed. The Family was forcibly removed with its livestock to Pylkop.

[6] This appears to be a corruption of the family name Ramokoka.

[7] Black Land Act 27 of 1913.

[8] Development Trust and Land Act 18 of 1936.

[7] In 1996, the Family instituted a land claim for Haakdoornbult. The principal respondents were the Haakdoornbult Boerdery CC, the Bez Bezuidenhout Family Trust and the F&S Fürstenberg Family Trust, all represented by an attorney, Mr Grobbelaar, and counsel, Mr Havenga. The landowners' main defence was that the Family had received just and equitable compensation in the form of Pylkop at the time of dispossession.[9] The Family argued by contrast that receiving Pylkop did not compensate them for the loss of Haakdoornbult.

[8] On 9 March 2005, the Land Claims Court (Moloto J) upheld the Family's claim and ordered that all four subdivisions of the farm be restored to the Family.[10] However, the Land Claims Court required that additional argument be heard on whether an order should be made that the Family return Pylkop to the state to avoid "double" compensation. The Family argued against this, since the Minister had indicated from the start that she would not seek the return of Pylkop. On 1 June 2005, the Land Claims Court held that it would not be just and equitable for the Family to have to return Pylkop.[11] It observed that the state had anyhow waived its claim to the return of Pylkop.

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[9] Section 2(2) of the Act provides:

> "No person shall be entitled to restitution of a right in land if—
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> (a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or
> (b) any other consideration which is just and equitable,
>
> calculated at the time of any dispossession of such right, was received in respect of such dispossession."

[10] *Mphela and Others v Engelbrecht and Others* [2005] 2 All SA 135 (LCC).

[11] *Mphela and Others v Engelbrecht and Others*, Case No LCC 66/01, 1 June 2005, unreported.

[9] The Haakdoornbult owners appealed to the Supreme Court of Appeal. The main issue was whether the Family should receive the whole of Haakdoornbult, or whether that would amount to overcompensation. The court found that despite receiving a fair market price for Haakdoornbult in 1951, the Family was not fully and fairly compensated. This was because in the forced removal they had lost so much more than just the market value of their farm.

[10] But the Supreme Court of Appeal held that the Family would be overcompensated if they kept Pylkop and in addition received the whole of Haakdoornbult.[12] It therefore ordered the return of 86% of the farm to the Family, but remitted to the Land Claims Court the question whether the Family should contribute toward the state's acquisition of Haakdoornbult on their behalf "by putting part of Pylkop in the pot."[13] In effect, the court made the restoration of 86% of Haakdoornbult subject to possible contribution by the Family.

[11] However, in considering the Land Claims Court's view on whether Pylkop should be returned to the state, the Supreme Court of Appeal noted that the return of the land was never "an issue between the parties". It observed that "the [Family's] case was that they were to retain Pylkop; the [landowners] did not contend otherwise; and the State

[12] Above n 2 at paras 54 and 60.

[13] Id at para 74.

never sought the return."[14] The court in any event had "serious difficulties in understanding" how the state could lay claim to Pylkop.[15]

[12] The Family appealed to this Court against the ruling of the Supreme Court of Appeal that only 86% of Haakdoornbult should be returned to it. But this Court affirmed the apportionment. However it set aside the remittal to the Land Claims Court of the question regarding Pylkop as compensatory land. This, the Court held, would "unnecessarily prolong finalisation" of the matter.[16] This Court noted that the Supreme Court of Appeal had not found that the return of 86% of Haakdoornbult would amount to overcompensation, but only that the return of the whole of Haakdoornbult would.

[13] A further issue was whether the compensatory land inquiry was competent at all under the provisions of the statute in view of the fact that the state did not seek it. This Court pointed out that the issue did not arise.[17] It noted that the state could not claim a return of compensatory land in respect of Pylkop because the Family "did not 'receive' Pylkop as compensatory land" – they bought it "with the purchase price received for

[14] Id at para 56.

[15] Id.

[16] Above n 1 at para 54.

[17] Id at para 56.

Haakdoornbult." For this reason, this Court noted that Pylkop "belongs to the family[18] and no 'claim' can be made that it, or part of it, be returned to the State under the Act".[19]

[14] The *Haakdoornbult* judgment was delivered in May 2008. And there matters stood for just over two years. But conflict – and, as we shall now see, confusion – was brewing.

The Pylkop litigation

[15] In 1998 the Community lodged a land restitution claim with the office of the Regional Land Claims Commissioner for the North West and Gauteng Provinces (Commission). The land it claimed included Pylkop. On 26 August 2005, its claim was published in the Government Gazette. A group of landowners, the Atlanta Northam Land Claim Action Committee (landowners), opposed the claim. Like the Haakdoornbult landowners, they were represented by attorney Mr Grobbelaar and Advocate Havenga. The landowners applied to the Land Claims Court for a *mandamus* to compel the Commission to refer the claim to the Land Claims Court. That application succeeded. On 30 November 2007 Meer J ordered that the Community's claim be adjudicated in the Land Claims Court. The matter was set down for hearing in March 2010. But on 25 February 2010 the Family applied for leave to intervene, and for the hearing to be

[18] At this point, the judgment in *Haakdoornbult*, at fn 96, reads: "It is registered in the name of the Estate of the late Daniel Rakgokong Mphela and the family's rights are registered against the Title Deed."

[19] Id. Section 35(2)(f) of the Act gives the Land Claims Court power, in addition to ordering the restoration of land or compensation, to "make an order in respect of compensatory land granted at the time of the dispossession of the land in question".

postponed. The Family stated they had only just become aware of the Pylkop proceedings. They claimed entitlement to be joined because of their substantial interest in the Community's claim to Pylkop. This contention was upheld by Meer J on 2 March 2010, who ordered that the Family be joined.

[16] In the application to intervene, as well as in its response to the referral, the Family invoked the outcome of the *Haakdoornbult* litigation. Particularly pointed was a letter dated 24 March 2010 from the Family's legal representative, in which the Community was urged to withdraw its claim to Pylkop. After setting out the history of the *Haakdoornbult* litigation, the letter asserted that the Community should first apply for a rescission of the *Haakdoornbult* judgment:

> "Our client intends taking the point in its response to be filed shortly that the entire referral process in respect of your client's claim was invalid because it ought, in circumstances where it involved and [was] already the subject of an order of the Land Claims Court, first to have applied to the Land Claims Court in terms of section 11(5)[20] of the Restitution of Land Rights Act for a rescission of the order in our clients' favour. If our clients succeed, this will delay resolution of your client's claim for a very substantial period, while the necessary prior application is brought before the Land Claims Court." (Footnote added.)

[17] On 1 June 2010, the Community responded to the Family's affidavit by insisting that it had enjoyed rights over Pylkop from before 1913; the Family's rights by contrast

[20] Section 11(5)(a) of the Act provides that if after a court has ordered restitution or compensation or other remedy, or the interested parties have entered into an agreement as to how the claim should be finalised, it is shown that another claim was lodged in respect of the land to which the order or agreement relates, "any interested party may apply to the Court for the rescission or variation of such order or the setting aside or variation of such agreement".

were subject to the authority of the Baphalane Tribal Authority. Since 1962 the Family enjoyed only a right of occupation, not ownership. The Community noted that none of the courts that decided *Haakdoornbult* were made aware of their claim to Pylkop. They contended that therefore the courts' findings were academic and that the Family should abandon the *Haakdoornbult* judgment.

[18] The Community also claimed that, because Mr Grobbelaar and Mr Havenga had acted for the landowners in both cases, they knew of the Community's claim to Pylkop and the conflict it created in the *Haakdoornbult* litigation. The Community's response therefore asserted that they had an "ethical duty" to bring it to the courts' attention – and that by not doing so they wilfully misled the courts deciding the *Haakdoornbult* judgment.

[19] The landowners in response applied on 22 June 2010 for an order striking out the statements about Mr Grobbelaar and Mr Havenga on the ground that they were scandalous, vexatious and irrelevant. Mr Grobbelaar was the deponent. He stated that the Community's reply was based on the "false premise" that the courts in the *Haakdoornbult* proceedings awarded Pylkop to the Family. In fact, none of the courts awarded Pylkop to the Family and thus the lawyers were under no obligation to inform the courts about the Community's claim to Pylkop.

[20] On 24 November 2010, the Land Claims Court (Gildenhuys J) granted the striking-out and ordered that, in addition to the Community, counsel for the Community and his attorney pay the costs from their own pockets (*de bonis propriis*). The Land Claims Court held that the Community's claim to Pylkop "remains untrammelled" by the order in the *Haakdoornbult* judgment. The Court held that counsel's sustained allegations of unethical conduct against the landowners' legal team were amongst the "worst insults that can be hurled at legal practitioners in relation to their official duties".

The rescission application

[21] On 16 August 2010, the Community filed the present application for rescission of the *Haakdoornbult* judgment. The Community asserted it had a substantial interest in that matter, that it had not known about the matter, and that its interest in Pylkop was not drawn to the attention of the courts in the *Haakdoornbult* litigation thus violating its right of access to courts.[21] The Community's founding affidavit, as well as the written argument Mr Makhambeni submitted on its behalf, repeated the charges of scandalous, improper and dishonest conduct against Mr Grobbelaar and Mr Havenga. As already indicated, the amended notice of motion sought less than the rescission of the *Haakdoornbult* judgment.[22] In argument the original claim to relief was not pressed.

[21] Section 34 of the Bill of Rights is set out in n 5 above.

[22] See [3] above.

[22] On 20 September 2010, this Court issued directions in which the parties were asked to answer the following questions:

> "(a) When exactly did the deponent [Kgosi] Modise Tonse Ramokoka become aware of—
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> (i) the [Mphela family's] restitutionary claim to Haakdoornbult, lodged in 1996;
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> (ii) the [*Haakdoornbult*] litigation in the Land Claims Court (case LCC 66/01), the Supreme Court of Appeal and this Court dealing with that claim?
>
> (b) When did any member of the community [Kgosi] Ramokoka represents become so aware?
>
> (c) How exactly did [Kgosi] Ramokoka or any member of the community he represents become aware of that litigation?
>
> (d) Are there any circumstances that may indicate that the deponent or any member of the community he represents could reasonably have acquired knowledge of the claim and those proceedings earlier?"

[23] In response, the Community stated that the Kgosi, the tribal council and all the members of the Community first became aware of the Family's claim to Haakdoornbult and the resultant litigation in February 2010, shortly after their legal team had learnt of the claim. They stated that there were no circumstances in which they could reasonably have come to know of the claim. The Community also stated that it was the Family that had advised them to obtain rescission of the *Haakdoornbult* judgment in the letter of 24 March 2010. The Community therefore failed to understand why the Family opposes rescission, and asked for a punitive order as to costs.

[24] The Commission in its deposition stated that the Community's explanation accorded with its understanding of the facts and history. It became aware of the Family's claim to Pylkop only in February 2010 and Mr Grobbelaar and Mr Havenga never informed their office of the Family's competing restitution claim.

[25] The Family filed a series of affidavits (including affidavits by Mr Grobbelaar and Mr Havenga) in response to the Court's directions. The Family submitted that it is unlikely that the Community learnt about the *Haakdoornbult* proceedings only in February 2010. They stated that the physical proximity between the two communities and their personal relationships make this highly improbable. Additionally, the Community has had access at a point in time before 26 June 2006 to a series of documents prepared by the landowners in their representations and the attendant proceedings which should have alerted them to the Family's potential land claim to Pylkop and the court proceedings about Haakdoornbult.

Should the Haakdoornbult judgment, or any part of it, be rescinded?

[26] This Court has the power where necessary to rescind its own judgments. Rule 42(1)(a) of the Uniform Rules of the High Court, which is applicable to proceedings in this Court,[23] provides that the Court may, in addition to any other powers it may have, of

[23] Rule 29 of the rules of this Court provides that, amongst others, rule 42 of the Uniform Rules of the High Court shall, with the necessary modifications, apply to proceedings in this Court.

its own accord or on application, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected by it.[24]

[27] In invoking and applying rule 42, this Court has previously left open the question what power it may have as a court of final appeal to vary its past orders under the common law, or under its inherent power to protect and regulate its own process, or under its power to develop the common law, taking into account the interests of justice.[25] It has also left open the question whether section 172 of the Constitution[26] confers additional powers on it to correct its own orders.[27]

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[24] Rule 42 of the Uniform Rules provides:

> "(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
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> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> (c) an order or judgment granted as the result of a mistake common to the parties.
>
> (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
>
> (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

[25] Section 173 of the Constitution provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[26] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—

[28] Do the *Haakdoornbult* judgment and order impinge on the Community's claim to Pylkop? The answer is clearly No. In the bracing air of argument, counsel for the applicant was driven to acknowledge this. The *Haakdoornbult* judgment concerned Haakdoornbult alone. The Court there gave no order in respect of Pylkop, and it granted no restitutionary determination in respect of Pylkop. The *Haakdoornbult* judgment left the Community's claim to Pylkop unaffected.

[29] Nor did the Community establish a case for the alternative relief, namely to rescind or expunge from the *Haakdoornbult* judgment various "pronouncements" the Court had made. Whether a court's reasons may be expunged, as opposed to rescinding the order it has granted, is doubtful.[28] But in any event no case was made out for the reduced relief sought. The Community's amended notice of motion seeks the expungement of the Court's statement in paragraph 54 that the Supreme Court of Appeal's order to remit the question of Pylkop to the Land Claims Court "will unnecessarily prolong finalisation of this matter." The Pylkop issue that the Supreme Court of Appeal order remitted

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(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[27] *Minister for Justice and Constitutional Development v Chonco and Others* [2010] ZACC 9; 2010 (7) BCLR 629 (CC) at para 13, citing *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at paras 22-4 and para 27 and *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC). See also *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

[28] See *Western Johannesburg Rent Board and Another v. Ursula Mansions (Pty.) Ltd.* 1948 (3) SA 353 (A) (holding that an appeal lies only against a court's order, and not against the reasons given for the order).

concerned the Family's entitlement to Pylkop, and not the Community's. The Community's entitlement to claim Pylkop remains untouched, for the Land Claims Court to determine.

[30] The "pronouncement" in paragraph 56 of the *Haakdoornbult* judgment that the Community seeks to be expunged is the statement that the Family—

> "did not 'receive' Pylkop as compensatory land. They purchased it with the purchase price received for Haakdoornbult. Pylkop, therefore, belongs to the family[29] and no 'claim' can be made that it, or part of it, be returned to the State under the Act".

This statement concerned only the Family's interest in Pylkop, as it related to the Family's entitlement to restitution of Haakdoornbult. It has no bearing on the Community's claim to Pylkop.

[31] Counsel for the Community explained that the prayer for these "pronouncements" to be expunged stemmed from the impression the letter of 24 March 2010 created that the Family would raise a plea of *res judicata* to the Community's Pylkop claim. The plea of *res judicata* can be raised only where the same litigant seeks the same relief on the same cause of action.[30] As counsel for the Community eventually conceded during oral

[29] See n 18 above.

[30] *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at para 2.

argument, correctly so, the plea could never have been raised against the Community's claim to Pylkop. Nor indeed could a plea of issue estoppel have been raised.[31]

[32] In short, the *Haakdoornbult* judgment and order dealt exclusively with Haakdoornbult and not Pylkop. It contained no judicial ruling binding on the parties in the Pylkop litigation, because the parties, the cause of action, the relief sought, and the issue in dispute were different.

[33] In these circumstances, the claim for rescission of the *Haakdoornbult* judgment or the expungement of any pronouncements in it must fail, and the application must be dismissed. This makes it unnecessary to consider the Family's contention, which was not pressed in oral argument, that the Community knew about the *Haakdoornbult* judgment much earlier than it owns, and that this precludes any claim for rescission now.

Costs

[34] The Family sought a punitive order as to costs against the Community. They sought an order dismissing the application with costs on the attorney and client scale, including the costs of two counsel. They also sought an order that the Commission share responsibility for their costs.

[31] See *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) at para 10.

[35] The first question is whether costs on a punitive scale should be awarded. In my view they should not. The Community's claim for rescission was misbegotten. But there was nothing frivolous, vexatious or improper about it.

[36] The claim for a punitive order as to costs is misplaced. As already indicated, the Family's attorney suggested that rescission was necessary. This suggestion, part of pre-trial sparring, was wrong. Correctly, the Family's legal team did not persist in it. When the Family's response to the Community's Pylkop claim was lodged 15 days later, on 8 April 2010, it contained no word about the need to rescind the *Haakdoornbult* judgment. But the seed of disquiet and confusion had been planted. They yielded a misbegotten harvest, in these proceedings.

[37] Given the Family's lawyer's part in the confusion, there can be no punitive order as to costs against the Community. The Family is entitled only to costs on the ordinary scale.

[38] From whom may these costs be recovered? Unusually, the Commission and the Minister (who were jointly represented) should in my view be jointly and severally liable for the Family's costs. This is because, far from assisting the parties and the Court with an impartial exposition of the matter's history, as was its duty, the Commission in partisan manner entered the arena on the Community's side. Not only did it make common cause with the Community's case but it even gave succour to the misguided

imputations of unprofessional non-disclosure against the landowners' lawyers. The Commission must share responsibility for the Family's costs.

[39] There is one further aspect. It is the conduct of counsel for the Community. He levelled accusations of fraudulent misconduct against the legal teams representing the Haakdoornbult owners, as well as those representing the Mphela family. Mr Grobbelaar and Mr Havenga are not before the Court. So I leave the imputations against them to one side. But the Family's legal team is before the Court. In his written argument, counsel for the Community accused the Family's lawyers of dishonestly trying to mislead the courts in the *Haakdoornbult* litigation by suppressing mention of the Community's claim to Pylkop. Since the Community's claim to Pylkop was irrelevant to the Family's claim to Haakdoornbult, that was a grossly misconceived imputation.

[40] What is more, the allegations of fraud were not needed to sustain a case for rescission. Innocent non-disclosure and absence would have been quite good enough.

[41] Counsel's allegations of misconduct were thus misdirected, far-going and unfortunate. Yet he persisted in them even after the Land Claims Court in its judgment of 24 November 2010 condemned them as scurrilous and vexatious, and ordered that he pay attorney and client costs from his own pocket. His written argument was lodged in this Court after that ruling. Yet in it he repeated his claims against the Family's lawyers.

[42] After exchange with the Court during oral argument, counsel for the Community acknowledged that these imputations were baseless and unwarranted. However, damage had been done. It emerged during oral argument that because of counsel's allegations of fraud, the Family's legal team considered itself obliged two or three weeks before the hearing to bring in a further counsel to lead the two counsel who were already conducting the case. It was the integrity of these counsel that had been impugned. The decision to brief a further counsel was reasonable. In these most unusual circumstances,[32] a costs order against counsel is warranted. Counsel for the Community took full responsibility for his conduct, making it clear that his attorney attracted no blame.

[43] It is fitting that counsel should pay from his own pocket the additional costs arising from the briefing of further counsel for the Family. To counsel's credit, he apologised in court for his conduct. In doing so, he indicated that he would assent to this order.

Order

[44] The following order is made:

a. The application is dismissed.

b. The Baphalane Ba Ramokoka Community, represented by Kgosi Modise Tonse Ramokoka, and the Minister for Rural Development and Land

[32] Compare *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at paras 46-54.

Reform are ordered to pay, jointly and severally, the Mphela family's costs, including the costs of two counsel.

c. The costs arising from the engagement of additional counsel on behalf of the Mphela family are to be paid by counsel for the applicant from his own pocket (*de bonis propriis*).

Ngcobo CJ, Moseneke DCJ, Froneman J, Jafta J, Khampepe J, Mogoeng J, Mthiyane AJ, Van der Westhuizen J and Yacoob J concur in the judgment of Cameron J.

For the Applicant:	Advocate PW Makhambeni instructed by Matloga Attorneys.
For the First Respondent:	Advocate G Budlender SC, Advocate A Dodson and Advocate A Bodasing instructed by the Legal Resources Centre, Johannesburg.
For the Eighth Respondent:	Advocate G Shakoane and Advocate VD Mtsweni instructed by the State Attorney, Johannesburg.