IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NOS: LCC206/2010

LCC 20/2012

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

9 July 2020 .....
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

concerning

CERTAIN FARMS IN THE MARULENG REGION AS LISTED IN ANNEXURE "NR1"

CASE NUMBER: LCC 20/2012

MNISI, KHOZA, SBUYANA and MUNISI

COMMUNITIES/TRIBE MEMBERS/FAMILIES Competing Claimants

concerning

CERTAIN PORTIONS OF THE FARMS
FLEUR DE LYS and MORIA

REASONS FOR DECISIONS AND DIRECTIONS
OF 28 FEBRUARY AND 3 JULY 2020

SPILG, J

INTRODUCTION

1. This case arises from a referral by the Regional Land Claims Commissioner ("*RLCC"*) in October 2010 of the claim of the first to fourth claimants. The referral, which is filed under case no LCC 206/2010, has been generally referred to as the Moletele Land Claim. These claimants are also referred to as the *main claimants*.

   Part of their claim related to a not inconsiderable area of land owned by the State which was settled and has already been restored to them. The relevance of this will become apparent alter.

2. The claim then became bogged down with a large number of disputes between the main claimants and a large number of individual and corporate land owners. They range from challenging the competency of the claim to non-restorability in respect of their specific property. They have also relied on a referral report of Prof. Delius which has been challenged in generalised terms by the main claimants.

3. In the latter part of 2015 a number of other claimants delivered their statement of claim. Their claim had been referred to this court some years earlier under case no

LCC 20/2012 and is generally identified as the Mnisi Land Claims. These 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.*

4. The effective consolidation of these two sets of land claims added a further series of major disputes to an already burgeoning list of issues requiring court adjudication. All the parties have remained resolute in their positions.

   .As a result the case became bogged down with not only substantive issues but also a large number of procedural and technical issues.

5. At a pre-trial conference held on 16 September 2019 the Commission on the Restitution of Land Rights ("the Commission") through its counsel Adv Dodson proposed that the parties hold a litigation planning meeting in an attempt to break the impasse.

6. On 21 November the parties met and resolved, subject to the approval of Meer AJP that among other things;

   a. Each party would file by 7 February 2020 its proposed litigation plan for the further conduct of the proceedings, including any proposed issues for separate adjudication;

   b. The litigation plan would be considered at the pre-trial conference agreed for 28 February 2020 and, if there was no agreement the presiding judge would determine which plan was to be adopted.

7. The conference was held before me on 28 February and the following issues were dealt with:

    a. Whether the main claimants were to provide the RLCC with certain documents. The RLCC contended that these documents needed to be considered by the Chief Land Claims Commissioner in order to determine whether to continue providing the main claimants with legal funding, it being submitted that the main claimants were deriving significant revenues from the State land which had already been transferred to them under a settlement of part of their restitution claim.

    b. The Main claimants' unspecified reservations with or challenges to the referral report of Professor Delius.

    c. Whether there should be a separation of issues which affected only certain landowners in relation to;

        i. the competency of certain of the claims;

        ii. 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.

    d. the litigation plan and whether certain of the issues could be hived off for determination by referees while the others could proceed under the main trial

    e. the provision for witness statements as contemplated in the litigation plan

    f. whether the Minister should file a plea and be separately represented.

8. The purpose of holding a pre-trial conference and court's power to issue orders and directions pursuant to it are found in s 31 of the Act which provides:

> *"(1) The Court may, at its own instance or at the request of any party before it, at any stage prior to the hearing of a matter convene a pre-trial conference of the parties with a view to clarifying the issues in dispute, identifying those issues on which evidence will be necessary and, in general, expediting a decision on the claim in question.*
>
> *(2) The Court may, after the holding of such a pre-trial conference, issue such orders and directions as to the procedure to be followed before and during the trial as it deems appropriate."*

9. At the conference I made an order regarding the delivery of the relevant financial information by the main claimants. They gave notice requesting reasons for my decision. The reasons are now provided.

10. The parties all agreed on the time lines to be adhered to in moving forward and agreed that the consideration of whether a referee or a number of referees be appointed to deal with separated issues could be deferred without doing violence to the litigation time lines agreed up to that proposed stage.

11. In the result the only significant issues on which a decision was required concerned;

    a. whether the Minister should file a plea and be separately represented.

    b. 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;

c. the contents and format of the witness statements which are to be produced;

d. the main claimants' reservations regarding or challenges to the Delius Report

12. I understood that the parties' agreement concerning the time lines was binding and would be adhered to. Unfortunately my own health issues and the lockdown made it difficult to finalise the outstanding matters or provide the reasons for ordering the main claimants to deliver the financial information requested by the RLCC.

13. Before embarking on that exercise it is necessary to deal with the import of the minutes of the conference of 16 September 2019 and the subsequent one held between the parties two months later on 21 November.

STATUS OF THE MINUTES OF 16 SEPTEMBER and 21 NOVEMBER 2019

14. The contents of the pre-trial minutes of 16 September 2019 and the litigation planning minutes of 21 November 2019 summarises what occurred. Each minute was circulated and to ensure that they were a true reflection of what occurred, the adoption of both minutes were placed as items 2 and 3 on the agenda of the conference on 28 February 2020. The minutes were duly adopted at the commencement of that conference.

15. Both minutes therefore constitute the written memorial of what transpired including the undertakings that were given and agreements reached, albeit in summarised

form,. It follows that any recording of an undertaking or agreement is evidence before this court and, as with any undertaking or agreement given, binds the party to it.

16. In the present case undertakings and agreements were made by counsel. Because Adv Notshe has sought to distance his clients from a number of recorded agreements contained in the previous pre-trials it is necessary to indicate that a court will not lightly allow a party to disavow an undertaking made or agreement concluded by his or her legal representative; much less permit the legal representative to absolve his client or himself from the consequences of a clear undertaking given or agreement concluded.

DRAMATIS PERSONAE

17. Due to the number of litigants and counsel representing them it is useful to provide a brief outline of the main protagonists and the land in issue, divided into the three broad categories.

18. **The Claimants**

The Main Claimants- The four claimants under case no LCC 206/2010 comprise the Moletele Community, Heir Prince-Maekane Tribal Community, Kgosi Lackson Abuthi Chiloane on behalf of the Moletele Tribe and the Moletele-Blydepoort Community.

They are represented by *Adv Notshe SC* and *Adv Z Madlanga* on instructions from Ngoepe Attorneys

The Moletele Land Claim- The claim brought under case no LCC 206/2010 by the *Main Claimants*

The Moletele CPA- The Communal Property Association established by members of the Moletele Claimants

Competing Claimants- There are effectively 20 claimants who represent the Mnisi, Khoza, Sbuyana and Munisi communities, tribe members or families. Their claim has been brought under case no LCC 20/2012.

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They are represented by Steven Maluleke Attorneys

The Mnisi Land Claim- The claim brought under case no LCC 20/2012 by the *Competing Claimants*

19. **The Landowners**

A&V Group- The registered owners of Portion 1 of the farm Antwerpen 60 KU and Portion 1 of the farm Vienna 207 KT.

It is unclear to me at this stage whether this entire grouping, or only part of it was previously identified as the *Modilto landowners,* comprising of certain owners within the Modilto Estate.

They are represented by *Adv Stone* on instructions from Attorneys FourieFismer Inc

The Hoedspruit landowners- They are the main body of affected land owners, consisting of 231 registered owners of 440 properties which are subject to the present litigation.

They are represented by *Adv du Plessis SC* and *Adv Daniels* on instructions from Attorney CHM Steyn

KTO Group- This is a group of registered landowners whose properties are situated in the Kapama and Thornybush areas

Although *Adv van der Merwe* represents both groups the attorneys for the Kapama owners are Adams & Adams while ENSafrica are the attorneys for the Thornybush owners

Madrid Landowners- They are the 359th and 406th defendants, being the registered owners of both the Remaining extent of the farm Madrid 39KU and Portion 1 of that farm

They are represented by *Adv Majozi* on instructions from Werksmans Attorneys

Telkom- Telkom SA SOC Ltd which is the registered owner of Portion 64, a portion of Portion 5 of the Farm Grovedale 239 KT.

It is represented by MacRoberts Attorneys

The Grovedale property- The property registered in the name of *Telkom*

20. **The Officials**

The CLCC- The Chief Land Claims Commissioner.

The Commission- The Commission on the Restitution of Land Rights.

The RLCC- The Regional Land Claims Commissioner, Limpopo and Mpumalanga

The RLCC, is represented by *Adv Dodson SC* and *Adv M Maenetje* on instructions from the State Attorney. They also represent the Minister and the interests of the Commission and the CLCC.

FIRST ISSUE: FUNDING FOR THE MAIN CLAIMANTS

21. The issue of funding for the main claimants was raised at the pre-trial conference held on 16 September 2019. It was raised by Adv du Plessis on behalf of the Hoedspruit landowner defendants. In response to their query the RLCC advised that the CLCC had requested the main claimants to provide their financial statements for the last three years and to indicate how the State owned properties which had been transferred to them were being utilised.

22. The minute of the conference on 16 September indicated that the main claimants had initially said that the assets were not liquid but:

"*Later they undertook to provide the information by 12 September 2019, but this was not done. Regarding their legal stance the claimants raised an issue that the CLCC is functus officio".* [1]

23. Since Adv Dodson advised the Hoedspruit landowners that he did not envisage any difficulty in putting the CLCC on terms to make a decision regarding the continued funding of legal costs for the main claimants he proposed that the main claimants provide the documents required by 23 September. He had also indicated that the CLCC would require another month to consider the documents and make her decision.

24. In para 8 of the minute Adv Notshe on behalf of the main claimants asserted that they would object to the application for the withdrawal of funding as there was no legal basis to do so.

    In reply Adv Du Plessis for the Hoedspruit landowners contended that the Act made provision for legal assistance on specific grounds and that the contention that the main claimants derived no income from the State owned land already transferred to them was untrue. He wished to place on record that his clients had personal knowledge of the main claimants' ability to pay for their own legal fees. He contended that this entitled the landowners, who were obliged to foot their own legal bills, to raise the concern of inequality of arms.

    Adv Dodson indicated at that conference that the CLCC had not yet formulated her position on whether the principle of *functus officio* applied and first required the requested information. He then persisted with requiring that the information be

[1] See para 6 of the pre-trial minute of 16 September.

provided within seven days, that the CLCC would make her decision within 30 days after which the main claimants would have a further month to respond.

25. It would have been evident to all that if the CLCC considered herself *functus officio* or did not otherwise withdraw the funding then the Hoedspruit landowners intended challenging her decision on the basis that the main claimants did not meet the criteria of eligibility to State funding. If this occurred then there was an inevitability that the Hoedspruit landowners would press for production of financial records. In short, one way or the other the financials might therefore have to be produced; save that if it was at the instance of the Hoedspruit landowners the litigation on that aspect alone could delay the finalisation of the restitution process for another lengthy period.

26. After the exchanges I mentioned earlier, the minute of 16 September 2019 then records at para 12 that:

> "*Advocate Notshe agreed that the main claimant will provide the information within the time stipulated to enable the CLCC to establish a prima facie view whether or not the claimants still qualify. Thereafter, the main claimants will make representations."*

I would have thought that nothing could be clearer whether in isolation or read in the context of what preceded it.

27. The main claimants failed to provide the necessary documents and an early stage of the 28 February conference Adv Dodson sought an order directing them to do so. He also referred to the provisions of the Public Finance Management Act 1 of 1999 which imposed certain responsibilities on the CLCC to ensure that continued expenditure was justified.

In contending that the financials do not have to be provided Adv Notshe again relies on the submission previously made that the CLCC became *functus officio* after she had decided to provide legal representation at State expense.

28. I did not invite argument on this issue since the point could be decided on the basis of whether or not the main claimants were bound by the terms of the agreement concluded at the 16 September conference in terms of which they undertook to provide the information and, if so, whether the court during the course of a pre-trial conference could order compliance.

Agreement and undertaking to provide financials

29. Adv Notshe as a senior counsel and his attorney who was present at the September pre-trial would appreciate the consequences of an undertaking or an agreement made by a legal representative on behalf of their client.

30. There is no claim that the undertaking was given under any misapprehension[2]. Nor could it in the context of the minuted exchanges. The only point raised by Adv Notshe is that the undertaking is not binding because it was not made an order of court or contained in a direction.

In my view the contention advanced misses the point: An agreement does not have to be made an order of court in order to be binding. However a court can always enforce its provisions at the request of a party provided the purpose of doing so has not become academic, which is certainly not the case here.

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[2] *Fisheries Development Corporation of SA ltd v Jorgensen and another (and elated matter)* 1979 (3) SA 1331 (W) at 1334E-F *per* Nicholas J (at the time). Compare in relation to admissions *Dhlamini v Government of the Republic of South Africa*1985 (3A3) QOD 554 (W) at para 9 per Kriegler J (at the time)

31. I do not comprehend an agreement, undertaking or concession which is seriously and deliberately understood to be made by a party at a formal pre-trial conference to differ from those effected during the course of a trial, let alone in exchange of correspondence between the legal representatives of litigants.

    Accordingly the mere fact that a judge is not asked to formally record an agreement, concession or undertaking does not render it any less effective. At best its non-recordal in any form by the presiding judge may constitute evidence that it could not have been understood to have bound the party or parties concerned.

    In a pre-trial conference covering as many issues with as many legal representatives as the present ones it is understandable that not every aspect agreed upon may find its way into a consent order, ruling or direction. Of sole concern, as with any agreement or undertaking, is whether as a matter of law its utterance is binding, unless in the case of legal representatives, there was a misunderstanding as understood in the *Jorgensen case*.

32. As to a court's entitlement to enforce an agreement or undertaking made at a judicial pre-trial conference; even without regard to the Act or the rules it should be axiomatic that a court can always do so in the form of an order or ruling at the instance of one of the parties. On a daily basis litigants agree in open court on curtailing proceedings, give undertakings or make concessions (by which I include admissions) without the judge or magistrate being obliged to put his or her formal imprimatur to it. Not doing so does not minimise the reliance that the other party or the court can place on its binding nature. On the contrary it allows a court simply to order compliance where the agreement, undertaking or concession was made in its

presence or if it appears from the transcript, or an agreed minute, of a pre-trial conference as in the present case.

33. Aside from being entitled to enforce by way of an order or ruling agreements, undertakings or concessions which are placed on record, under this court's rules a judge presiding at a conference may make orders or give directions in relation to information required on any issue before the court (rule 30(9) (g) (ii)). Under sub-rule (9) (k) a judge may also make orders and give directions in relation to deviations from any of the rules "*which the expeditious, effective and economical disposal of the case may require".*

34. It therefore is irrelevant to the order I was requested to make at the 28 February pre-trial whether the judge who presided at the 16 September pre-trial did or did not issue an order reflecting the undertaking given by the main claimants to provide the information because it is not my intention to utilise rule 30(7) (b) which would have required the pre-existence of such an order or direction.

The court is entitled to issue such an order under rule 30(7) (a) as read with the provisions of either rule 30(9) (g) (ii) or (k) in relation to the production of documents[3]. I am satisfied that the last sub-rule is applicable in that the production of the required documents is required for the expeditious, effective and economical disposal of the case.

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[3] Rule 30(7) provides that:

The presiding judge may at a conference—

(a) make any interlocutory order or give any direction which the Court may make or give under any provision of these rules; and

(b) investigate any non-compliance with these rules or with any order or direction previously given in the matter and give such orders or directions in relation thereto as may be just, including an order for costs or a postponement of any hearing.

35. I say this for a number of reasons.

Firstly if I do not accede to the request for the information to be provided then then resolution of both the main claims and the competing claims is likely to be considerably delayed, as foreshadowed by the position which the Hoedspruit landowners have adopted. Moreover as long as the main decisions on the claims are not proceeded with expeditiously large tracts of land will continue to remain effectively sterilised; and this cannot be in the interests of any of the parties. Accordingly the sooner the financial information is provided the sooner all issues regarding the funding of legal costs can be finalised, including any challenge to a decision which the CLCC may take.

Secondly all the parties, including the main claimants expressed a commitment to expedite the process. This motivated the buy-in to formulate a litigation framework which the court could pronounce on.

To this end it is also evident that the main claimants through their legal representatives at the conference of 16 September understood the advisability of providing the requested documentation in the interests of avoiding further delay with the progress of the case and reserved their rights to challenge any adverse determination by the CLCC. In essence, if the CLCC does not withdraw funding then there can be no prejudice to them. If the CLCC withdraws funding then they are at liberty to seek a speedy remedy from this court provided they can meet the requirements for interdictory relief. [4]

36. It should be added for sake of completeness that the nature of the documents requested are those which the main claimant community have a general obligation to produce through their representatives in order to account for the conduct of the affairs of the Community Property Association (*"the CPA"*) constituted by its

[4] The determination of any issue relating to a decision made by the CLCC under s 29((4) would fall within this court's exclusive jurisdiction by virtue of ss 22(1) (d) and (2) (b) and (c).

members as required in terms of s 11 of the Community Property Association Act 28 of 1996 ("*the CPA Act")*.

37. In its terms and if regard is had to the Reg 8 (c)(i) of the regulations promulgated under the CPA Act in R1908 of 28 November 1996 the community body being the main claimant community members through their appointed representatives are obliged to furnish the Director-General;

> "*annually and within two months of the date on which its body's Annual General Meeting is held … the body's annual balance sheet or financial statements which have been independently verified as approved by the Director-General;"*

38. The requirement to provide the financials is not simply for oversight on behalf of the Department of Rural Development and Land Affairs. In terms of s 17 of the CPA Act, the D-G is obliged to submit to the Minister a report each year concerning CPAs and the extent to which the objects of the CPA Act are being achieved. In turn the Minister is obliged to table the report in Parliament.

39. The report obviously includes matters relating to attaining the objects of the CPA Act; namely the proper management of the land awarded for the benefit of its members in a fair manner. The failure to provide such documentation required under Reg 8(c) (i) is not a minor infraction; it has serious ramifications extending to the frustrating Parliament in the proper performance of its functions. A failure to furnish these documents annually may amount to an abuse of authority if the failure to do so prejudices or threatens the benefits or rights of a member[5]. The documents requested are statutorily required on behalf of the main claimant members through

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[5] See s 14(1)(c) of the CPA Act

their representatives on the Community Property Association which they had formed for their mutual benefit and to protect their individual and overall interests.

40. Since that leg of the pre-trial conference had been completed I accordingly made an order under s 31(1) and the rules already mentioned to expedite a matter which after 10 years since the referral to court is still not trial ready. The order required the Moletele Community to produce the audited financial statements ("*AFSs"*) of the Moletele CPA for the last four financial years up to the 2019 financial year end, should there be no AFSs up to that date then for the last four such audited AFSs and should there be none then the provisional financial statements for the past ten years ending for the 2019 financial year as well as bank statements for the previous two years up to 31 January 2020.

SECOND ISSUE- MAIN CLAIMANTS' RESPONSE TO THE DELIUS REPORT

41. The referral report of Prof Delius ("*Delius Report")* is one on which the landowners rely. In particular the Hoedspruit landowners. [6]

42. The main claimants did not effectively deal with the Delius Report. Their Response of 14 February 2013 to the s 14(2) Referral report is couched in broad terms and, while accepting that much will be matters of evidence, the extent of their challenge remain extremely vague and does not identify the issues which will be in contention to enable the other parties to properly prepare.

[6] See paras 10, 17, 40, 42, 43, 46 and 50 of their plea to the Main Claimants statement of claim.

43. At the 28 February pre-trial the Hoedspruit landowners contended that the main claimants were obliged to state precisely what parts of the Delius Report they contested.

44. In my view the position of the main claimants should firstly be crystallised through both the witness statements and their own experts' reports. To this end the witness statements in setting out the material facts relied on to establish each element of the claim in respect of which he or she will be called must also identify the specific claimed property to which the material fact relates and whether such evidence deals with challenging or otherwise contesting the Delius Report, and if so which specific paragraph thereof

45. Adv Notshe submitted that the main claimants could not engage experts until the issue of funding was resolved. The Commission's position was that the resolution of the funding issue should not delay the litigation.

46. At this stage I am reluctant to make a call on that issue, not only because it may be premature but I do not believe that I have afforded the parties an opportunity to fully ventilate the issues or the ramifications of making such an order. I say premature because the issue of funding may become moot once the financials were provided.

    However, to the extent that such experts will be basing their opinions in part or in the main on facts provided by witnesses in their challenge to the contents of the Delius Report, such facts are to be contained in the witness statements which must clearly identify that part of the Delius report which it is intended to deal with.

THIRD ISSUE – SEPARATION OF ISSUES

47. The following landowners sought a separation of issues concerning the competency of the claims relating to them and the issue of the restorability of their land;

    a. The A&V Group who contend that their farms were not properly claimed and in any event were erroneously claimed. They also contend that their farms are geographically quite isolated from the main body of claimed farms and that being game farms, one of which is a share block (Jejane Game Farm Shareblock (Pty) Ltd)., issues of restorability arise,

    b. The KTO Group who contend that their four parcels of land are geographically far removed from those of the main body of Hoedspruit landowners and that it is the only area which involves the competing claimants. They contend that it is therefore likely that the claims to the Group's land will be quite different to that in respect of the Hoedspruit owners. In any event they contend that they should be afforded a geographic separation of the hearings in relation to their farms.

       The farms in question are subdivisions of Guernsey 81-KU, Hoedspruit 82-KU, Moria 83-KU and 84-KU, Fleur de Lys 194-KU, 195-KU and 196-KU, Awetu-KU (consolidated portions of Casketts 65-KU and Guernsey 81-KU) and Riversdale 246-KU, many of which are being claimed by both sets of claimants.

    c. The Madrid Group who also contend that their farms were not properly claimed and in any event were erroneously claimed. They also submit that their farms are quite separate from the others in that their farms generally

share only one common boundary with the other areas of land claimed. This was sought to be demonstrated by a map produced which showed their land coloured in blue. Only one of their farms shares two common boundaries with the main group of farms claimed. Moreover they also contend that the issue of restorability should be separately determined

d. Telkom which contends that it is not feasible to restore their land. It pleads that there is an electronic communications exchange and other communication equipment, such as a microwave tower, which constitute "*a vital and indispensable facility for the provision of access to fixed and mobile electronic communication services by the users thereof in the surrounding areas"*

48. There are therefore three grounds for seeking separation, not all being applicable to each party. The first is 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 is that the farms are incapable of being restored and lastly that some farms are a sufficient distance from the others to justify a separate hearing.

49. The claimants and the Hoedspruit owners oppose a separation. The latter also contends that any separation must be done formally as they wish to be heard on the issue and, inferentially, the case management meeting did not provide an adequate forum for properly ventilating their position.

50. The RLCC proposes the engagement of a number of referees in terms of s 28C as a workable solution. It submits that this is preferable to a separation or utilising the more informal *cum* inquisitorial provisions of s 32(3) (b). Adv Dodson indicated that

the requirement of consent by the parties, a necessary prerequisite to trigger the appointment of a referee, might be obviated as was done in *Black Sash Trust v Minister of Social Dev (Freedom Under Law Intervening)* 2017 (3) SA 335 (CC)[7]. If I understood the proposition this might be competently achieved by applying the provisions of ss 172 or 173 of the Constitution. As mentioned earlier the Commission did not persist with this proposal at this stage but has not abandoned raising it at a later stage.

51. Telkom's position is unique. I will therefore deal with it first.

Telkom's position

52. Telkom appears to stand on a different footing to all the other land owners based, firstly, on whether it acquired title of the Grovedale property through expropriation and secondly on the feasibility of restoration having regard to its 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 licence it holds are pursuant to the provisions of the Telecommunications Act 103 of 1996, the Electronic Communications Act 36 of 2005 or both.

53. I did not understand the Hoedspruit landowners to require that Telkom brings a formal application for separation. If they did then I believe they had sufficient opportunity to raise their objections at the pre-trial conference, so too the main claimants. There is nothing I comprehend that would justify the need for a formal application for separation. The issues regarding Telkom's request for a separation, as set out in their pleading to the main claimant's statement of claim (*"Telkom Plea")*,

[7] Also cited in (2017 (5) BCLR 543 and [2017] ZACC 8

are self-evident. It would simply be a waste of costs to the clients for the court to go through what would be a pure formality, more particularly of s 34 applies. Moreover the issue does not concern the competing claimants since they it does not fall within their claim.

I will therefore order 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 shall be separately decided from all the other issues involved in the above case numbers and, in the absence of agreement between Telkom and the main claimants, the court shall hear prior argument as to whether the provisions of s 34 apply.

54. I will also order in terms of rule 30(9) that

    a. Telkom is 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 are 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 are 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 are to state the grounds for such denial;

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

55. The difficulty which subsequently occurred to me is that although reference was made to s 34 by one of the parties, the consequences if it is applicable may be significant and I certainly did not afford the parties an opportunity to deal with the issue fully[8]. The exchanges on this aspect do not appear to have been covered in the pre-trial minute but to the best of my recollection as assisted by my notes I do not believe that either Telkom or the main claimants (since the competing claimants do not claim restoration of the Grovedale property) have indicated whether they are in agreement as to whether the former is or is not a *"government body"* for the purposes of s 34.

    If they are not in agreement then it will first be necessary to hear argument on this point. In any event it will also be necessary to establish the parties' respective position as to whether the Commission has 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 applies as well as the status that should be accorded to the report and its utilisation at any hearing.

56. This may appear to involve the taking of unnecessary steps. However, without consensus between the main claimants and Telkom, the difficulty which arises is that if the latter is a government body for the purposes of s 34 then the procedure

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[8] The implications of s 34 being of application are clear from *Khosis Community, Lohatla & Another v Minister of Defence & Others* 2004(5) SA 494 (SCA) at para 7. See also *Nkomazi Municipality v Ngomane of Lugedlane Community and Others* [2007] ZALCC 28; [2010] 3 All SA 563 (LCC) *per* Meer ADJP at para 9

provided for in that section will have to be complied with to the extent that it has not been already.

In brief: If s 34 applies then the court will have to fashion an order which accounts for the steps envisaged in that section and, in making a determination, will be obliged to consider the matters set out in s34(6); if s 34 does not apply then the court will have to fashion the procedure to be applied by reference to s 31(2) and s 33(cA) read with rule 30(9)(a)(ii) and rule 57 (1)(c) as well as identify among the issues for consideration those mentioned in s 34(6) or hear argument as to why they should not apply at all or the weight to be attached to them .

Position of other landowners seeking separation

57. The other landowners who seek a separation do so on the issue of non- restorability, whether their farms were described in the claims submitted or were erroneously included in Government Gazette notice under s 11(1), and finally on the ground that their farms are a sufficient distance from the others to justify hearings at separate locations.

58. In regard to separating the question of whether a valid claim was lodged in respect of the land in question and whether the property was erroneously included in the Gazette, the main contention is that the affected landowners would be incurring a considerable amount of unnecessary costs, which they can ill afford, in circumstances where these issues can be speedily dealt with and, if resolved in their favour, will be finally determinative of the matter against them. If there is not a separation then they will also be exposed to a lengthy trial involving a multiplicity of issues which do not concern them at all. In this regard it is necessary to point out that

the Moletele claimants seek restoration of 1300 individual farms covering a total land area of 500 000 hectares. They also mention that the legal representatives will be too thinly stretched to deal with all the issues in one linear trial conducted at a single venue.

59. The main claimants contend that these landowners were obliged to have taken the RLCC's decision to *Gazette* the claims which affected their land on review and that until they do it is not open to challenge the decision. It is unnecessary to consider at this stage the actual import of the entitlement accorded to a landowner under s 11A to make representations to have the notice withdrawn in respect of the land in question and the consequences of not doing so where the section does not appear to impose an obligation but rather confers an initial entitlement (the word "*may"* is used, not "*shall"*). The reason once again is that an agreement where the landowners agreed not to pursue a challenge to the *Gazetting* of their land at that stage.

60. Once again it was evident to all the parties that a challenge to the *Gazetting* could have retarded the progress of the land claims. . In para 1.5.10 to 1.5.13 of a letter addressed by ENSafrica to Ngoepe attorneys on 4 April 2013, reference is made to an agreement to include many of the farms into the referral process without the RLCC being required to test the validity of the claims; it being considered preferable to include all the properties requested by the claimants in the agreed area,

> "*rather than to leave out properties which may have the consequence that the claim may be delayed.*
>
> *On this basis, farms were added to the lists on a liberal basis simply because they fell within the geographic area.*

The letter then continues:

> *"One of the main objectives and reason why the Defendant Owners were prepared to agree to include farms on a liberal basis was to ensure that the matter was referred to the Land Claims Court as soon as possible"*[9]

61. It is therefore evident that all the parties adopted a sensible approach at an early stage and in return for not challenging the *Gazetting* at that stage, it was agreed that the landowners would effectively reserve their rights to do so once the matter reached this court. .

Neither claimants contended that such an agreement was not reached. Moreover acknowledging such an agreement in the particular circumstances is in keeping with the object of not penalising a party who seeks a reasonable and sensible compromise solution in a case of this magnitude. After all the Act and the Rules envisage a flexible process to achieve the objectives of the legislation in a fair, economical and expeditious manner.[10]

62. The A&V and the KTO groups contend that they are in a stronger position to argue that their land was incorrectly included in the *Gazette* Notice because it is geographically quite distant from the main body of claimed farms. Moreover, they are game farms, which in the one instance is operated under a registered shareblock

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[9] The letter starts at p 62 of the Consolidate Litigation Plans Bundle provided to the court for the purposes of the 28 February pre-trial

[10] See s 28C (investigation by a referee), s 32(3) (discretionary powers for referring a claim back to the Commission or conducting proceedings other than on a purely adversarial basis), s 35(2)(fA) which appears apposite for present purposes and s 35A (mediation). See rule 28(4) (deviation from rules and condonation) and rules 30(7) and (9) (conferences).

scheme thereby, according to the submission, rendering them unfeasible for restoration.

63. The Madrid group in addition contend that they are faced with claims by both the main and competing claimants which will involve a different set of considerations to those applicable to the other properties. In any event they contend that they should not be obliged to attend hearings at a venue some distance from their locality.

64. In regard to the competency of the claims, much can be said for the desirability of an upfront determination. If successful it will be unnecessary for any of the parties to incur significant costs in preparing on all the other issues. However there are two difficulties which present themselves.

65. The first is that a decision on the issue will be subject to appeal which may then delay the hearing of the other claims until the right of appeal to both the Supreme Court of Appeal and possibly the Constitutional Court are exhausted. The other is that the issue might be tied up with identifying the land described in the various claim forms with its cadastral description at the Deeds Registry.

    In some cases the land has been specifically described with the *caveat* that there might be name changes to the farms. In another instance the land claimed is identified as "*the area between Klaserie river and Olifants river and Blyd river encashment area and all; the areas bordering the Drakensberg mountain escarpment"* .It is then followed by a list of farms.

66. In my view the exercise is not necessarily a simple one. Aside from whether there is sufficient clarity as to the land identified, questions may arise as to whether evidence can be led to explain the area which was intended to be described, whether there

was a pointing out before the land was identified in the *Gazette*, whether officials from the Commission assisted in this process (as provided for in terms of s6(b)), whether considerations analogous to rectification of an agreement for the sale of land apply and whether the attempts by Government to extend the period for claiming under the Act can be taken into consideration when interpreting Parliament's intention.[11]

Perhaps equally concerning is whether ordering a separation would result in parallel proceedings were an appeal court to overturn a decision taken on whether the claim was validly lodged or *Gazetted.*

67. I appreciate that some of the landowners in question believe that the type of issues I have just mentioned would not be involved; rather that the inclusion of their land in the *Gazette* Notice was an error which can be readily demonstrated. However this is as much a result of the manner in which the statement of case has been prepared and the expectation of these landowners that, by agreeing not to challenge the gazetting at the time, the statement of claim would in turn have sifted out land which was not in fact being claimed by identifying properties to which their claim specifically related and those it did not "*given the present property descriptions and names of the owners".*[12]

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[11] See the Restitution of Land Rights Amendment Act No. 15 of 2014 which was declared invalid for want of public participation by the Constitutional Court in *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others* 2016 (10) BCLR 1277 (CC)

[12] This is the contention of landowners as reflected in the ENSafrica letter to Ngoepe Attorney of 4 April 2013.

68. Moreover the statement of claim left the issue of restorability hanging in the air in respect of private land other than that identified in Annexure NR1B and erven in already established townships.[13] 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"*

There follows a list of criteria which the main claimants contend should be used to determine the feasibility of restoration. While many follow the general considerations applicable to restorability the main claimants specifically identify as one of the criteria to be applied: "*The need to transform land ownership, especially in respect of large land holdings used for leisure, part time farming and the like"*.[14]

69. While it can be accepted that it would not have been easy to formulate a claim of this magnitude involving four groups of main claimants over such a large land area with its different demographics and current land use, it appears that the landowners believed that this should have been dealt with as part of the agreement reached not to challenge the *gazetting* upfront. The matter is approaching trial stage and much greater clarity is required if the trial hearing itself is to be fairly and expeditiously conducted.

70. It should be added that the competing claimants do not identify which of the land falling within their claim is non-restorable, nor do they make any substantive

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[13] See paras 19-21 of main claimant's claim.

[14] Para 22.7 of the claim

allegations in regard to the issue. They content themselves by simply seeking: "*Equitable redress in respect of all the land claimed which is not restorable".*

71. The main claimants signed their statement of claim in February 2013 and the competing claimants theirs in September 2015. Having regard to the time that has elapsed and the contention by the claimants at the pre-trial conference that their witness statements can be provided by June they should have identified by now which cadastral units, if any, owned by which defendants;

    a. are not subject to any claim;

    b. are accepted as non-restorable;

    c. are subject to a court determination as to their restorability.

72. In order to meaningfully narrow the issues and preclude any litigant adopting a purely tactical approach I believe the proposal made by the KTO legal representatives in an email sent to the court on 5 May and which was then circulated to all the other parties has much to commend itself. Indeed save for an additional suggestion by the legal representatives of the Madrid Group no party has objected to the proposal.

73. The proposal is that the witness statements which are to be provided in terms of the litigation plan must contain certain specified particulars in relation to each of the properties registered in the name of the individual landowners. To the extent that some of the particularity sought cannot be provided in an individual witness statement provision can be made for the particulars to be separately provided.

74. Before dealing with the proposal I should add that I have not closed the door to a party seeking a separation and will address that should the need arise once the claimants' witness statements and the required particulars have been provided.

75. The final motivation advanced for a separation is to permit a ''*geographical"* separation of issues. While this will provide easier access to justice for individual landowners and certain claimants, the prospect of the same witnesses testifying repeatedly in respect of the same historic facts in regard to both the land and the relationship between claimants *inter se* and in the broader family, communal or historic tribal groupings appear unavoidable.

76. At the pre-trial conference it was evident that the Commission's proposal of hiving off issues among referees was not popular. However what came through was an appreciation by all the parties that a case of this nature may drag on in respect of issues which are of little or no concern to many, if not most, of the other parties and that this will come at a heavy cost both in legal fees, wasted time in prolonged but potentially unnecessary court attendances with resultant loss of income, salaries or wages..

77. For obvious reasons the parties are far better apprised than I can be of all the permutations that the litigation may entail. I therefore request, at this stage, for consideration to be given as to whether it will not serve them better if there are self-contained aspects of the litigation which can be dealt with in convenient stages, thereby releasing those parties who have no interest in that aspect from attendance, and then to determine how the various stages should be prioritised.

    An illustration of what I have in mind would be dealing separately with;

a. the broad history of the occupation, by whom, of what area and how and when the dispossession occurred as well as other issues which are generally common to all litigants,

b. whether there was adequate compensation payable at the time of dispossession, dealing with each occasion of dispossession separately so that, if at all possible, only those involved need participate;

c. the feasibility of restoration and equitable redress in respect of any individual landowner or convenient group of landowners dealt with separately; and so on.

FOURTH ISSUE- NATURE AND CONTENT OF THE WITNESS STATEMENTS

78. The parties agreed that the witness statements need not be formally deposed to. They also agreed that detailed factual witness statements are to be provided[15]. This agreement therefore envisages the content of the statements to be somewhat broader than a simple summary of evidence and therefore requires some closer definition for sake of clarity as to the court's minimum requirement as it is entitled to do under rule 30(9)(k) to achieve the objective of that provision as read with s 31.[16]

79. In my view in order to achieve the objective for which they are intended they must at the minimum contain a clear and concise statement, in chronological order where applicable, of the following;

a. The material facts, and where applicable in their chronological order, that will be relied on by each of the claimants to;

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[15] See paras 11 and 17 of the Minutes

[16] Compare rule 30(9)(d)(iv)

i. Establish each element of the claim in respect of which the witness will be called. Moreover;

    1. Each element shall be separately and clearly dealt with and identified under a distinct and appropriate heading. Where applicable reference may be made to another portion of the statement provided its contents are identified by reference to a specific paragraph number;

    2. Each element shall identify the specific claimed property to which the material fact relates, such property or fact being identified by reference to;

        a. the cadastral information registered at the relevant Deed Registry office;

        b. the portions of the claimed farm to which the witness' statement relates, according to the cadastral portions as they existed at the time of dispossession and also their present descriptions;

        c. the specific paragraph in the report of Professor Delius which is referred to.

    3. And furthermore In respect of each such property specified separately;

        a. the type of occupation and area of such occupation which the witness claims were held at the time of

dispossession and if not by the witness personally , then by whom and the relationship between such person and the witness;

b. The dates of such occupation by the relevant person or persons

c. The date and manner of removal of the witness or the relevant person and such person's relationship to the witness

4. And in relation to the properties published in the *Gazette* but which either were not mentioned in the claim form to which the witness's statement relates or were not verified in the referral report;

a. The material facts on which a claim in respect of such property is persisted with;

b. The material facts to support a claim to the property in question

b. The material facts, and where applicable in their chronological order, that will be relied on by each of the landowners to;

i. Establish each element of the defence to the claim in respect of which the witness will be called. Such element shall be separately and clearly dealt with and identified;

1. by reference to the relevant claimant witness' statement identified by name of witness, heading in the claimant witness' statement and paragraph number

2. under an appropriate heading if the element is not dealt with in any witness statement;

THE MINISTER AS A PARTY

80. Adv Notshe contended that the Minister should be separately represented and should file a separate plea. The basis was that the process would be expedited if the Minister was made a party because she may contend that restoration is not possible and this would then enable the claimants to consider pursuing equitable remedies.

81. Adv Dodson submitted that rule 38(9) is the operative provision. In its terms the rules relating to the preparation for and the conduct of an action will apply save that no plea or reply may be filed unless the Court orders otherwise.

82. He also pointed to para 31 of the pre-trial conference on 16 September which recorded that Adv Notshe had agreed not to persist with his request that the Minister plead[17]. Adv van der Merwe on behalf of the KTO Group also drew attention to agreements reached between the parties which had resulted in recommendations made that certain of their properties were not restorable. This had been set out in their written submissions objecting to the Minister being obliged to deliver a plea. At para 26 of those submissions reference was made to Adv Dodson having previously pointed out that the issue would have been decided on 28 June 2019 but that at the

[17] See p24 of the present pre-trial bundle

request of the main claimants the relevant opinion was provided which was endorsed by the Commission and the Minister.[18]

83. In my view it is clear from the passage referred to by Adv Dodson of the 16 September pre-trial minute as read with para 31 of the same minute that the main claimants did not persist with their request. It therefore is unnecessary to consider the desirability of compelling a Minister to enter into other issues which appear to be the discreet function of the Commissioner under s 6 and which only provides for the direct involvement of an executive decision in cases where a claimant does not qualify for restitution of rights in land under the Act.[19]

FURTHER PROGRESS

84. The parties agreed that the next conference would be held on 4 December 2020. However the Covid-19 pandemic which resulted in a hard lock down being implemented on 26 March 2020 under regulations promulgated in terms of the Disaster Management Act 57 of 2002 has no doubt impacted on the ability of the litigants to adhere to the litigation plan that had been agreed upon.

85. Revised time lines can be determined by agreement between the parties, failing which the impact of the lockdown on the ability of each of the parties to meet its respective litigation milestones will need to be assessed at another pre-trial conference which should be scheduled for some time after before mid-August by which stage the impact of the present lockdown level can be better gauged. This has also been provided for in the order.

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[18] Ib p56

[19] See s 6(2)(b)

ORDERS, RULINGS AND DIRECTIONS

86. It is for these reasons that the order requiring production of the financials was made at the pre-trial conference on 28 February and the following order was made on 7 July 2020, which has been rectified to correct the identity of Telkom's property:

IN RESPECT OF THE MINISTER BEING REQUIRED TO PLEAD:

THE COURT RULES THAT

1. The Minister is not required to plead to the Main Claimants statement of claim.

IN RESPECT OF THE CLAIM FOR RESTORATION OF TELKOM'S GROVEDALE PROPERTY:

THE COURT ORDERS THAT:

2. In terms of rule 30 (9) (a) (ii) as read with rule 57 the factual and legal issues of whether the Portion 64, a portion of Portion 5 of the Farm Grovedale 239 KT. (the "Grovedale property") or any rights in it should not be restored to any claimant shall be separately decided from all the other issues involved in the above case numbers and, in the absence of agreement between Telkom SA SOC Ltd ("Telkom") and the main

claimants, the court shall hear prior argument as to whether the provisions of s 34 of the Restitution of Land Rights Act 22 of 1994 apply.

3. *In terms of rule 30(9):*

   a. *Telkom shall state in writing delivered to all the parties by **27 July 2020** as to 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 shall state in writing within 15 court days of receipt of Telkom's response to para 2(a) hereof;*

      i. *whether or not the Grovedale property is restorable*

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

      iii. *whether they admit or deny how Telkom claims to have acquired title to the property, and if they deny then they are to state the grounds for such denial;*

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

THE FOLLOWING RULING AND DIRECTIONS ARE ISSUED IN RESPECT OF THE AFORESAID RESTORATION CLAIM RE TELKOM

4. *Both the Main Claimants and Telkom shall state in writing by **27 July 2020** whether or not Telkom is a "government body" for the purposes of s 34 of the Act.*

5. *If they are not in agreement then it will first be necessary to hear argument on a date to be arranged;*

    a. *On whether s 34 applies;*

    b. *On whether the Commission has 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 of the Act applies as well as the status that should be accorded to the report and its utilisation at any hearing.*

    c. *If s 34 applies, which of its other provisions still requires compliance, if any;*

    d. *If s 34 does not apply then what procedures should be adopted having regard to the provisions of s 31(2) and s 33(cA) read with rule 30(9)(a)(ii) and rule 57 (1)(c);*

THE FOLLOWING RULING AND DIRECTIONS ARE ISSUED IN RESPECT OF THE CLAIMS CONCERNING ALL THE LANDOWNERS INCLUDING TELKOM

6. *At this stage, and aside from Telkom, there shall not be a separation of any of the issues arising under the above case numbers.*

7. *The Main Claimants are required to state in writing by **31 August 2020** which cadastral units that have been Gazetted fall within "the area between Klaserie river and Olifants river and Blyd river encashment area and all; the areas bordering the Drakensberg mountain escarpment"*

8. *Each of the claimants is required to state in writing by **31 August 2020** which of the cadastral units that have been Gazetted*

    a. *are not subject to any claim;*

    b. *are no longer being claimed*

    c. *are accepted as non-restorable;*

9. *Each of the witness statements of each of the claimants must contain a clear and concise statement, in chronological order where applicable, of the following;*

    a. *The material facts, and where applicable in their chronological order, that will be relied on by each of the claimants to;*

i. *Establish each element of the claim in respect of which the witness will be called. Moreover;*

    1. *Each element shall be separately and clearly dealt with and identified under a distinct and appropriate heading. Where applicable reference may be made to another portion of the statement provided its contents are identified by reference to a specific paragraph number;*

    2. *In respect of each element the witness statement shall identify the specific claimed property to which the material fact relates, such property or fact being identified by reference to;*

        a. *the cadastral information registered at the relevant Deed Registry office;*

        b. *the portions of the claimed farm to which the witness' statement relates, according to the cadastral portions as they existed at the time of dispossession and also their present descriptions;*

        c. *the specific paragraph in the report of Professor Delius;*

3. *In respect of each such property, specified separately;*

    a. *the type of occupation and area of such occupation which the witness claims was held at the time of dispossession and if not by the witness personally , then by whom and the relationship between such person and the witness;*

    b. *The dates of such occupation by the relevant person or persons*

    c. *The date and manner of removal of the witness or the relevant person and such person's relationship to the witness*

4. *In relation to the properties published in the Gazette but which either were not mentioned in the claim form to which the witness's statement relates or were not verified in the referral report;*

    a. *The material facts on which a claim in respect of such property is persisted with;*

    b. *The material facts to support a claim to the property in question*

b. The material facts, and where applicable in their chronological order, that will be relied on by each of the landowners to;

i. Establish each element of the defence to the claim in respect of which the witness will be called. Such element shall be separately and clearly dealt with and identified;

1. by reference to the relevant claimant witness' statement identified by name of witness, heading in the claimant witness' statement and paragraph number

2. under an appropriate heading if the relevant element of the case is not dealt with in any witness statement;

10. The words "should the court so order" are to be included in paras 9.1 and 9.2 of the agreed litigation time table as provided by the Commission and to which the parties agreed subject to these orders, rulings and directions

11. A pre-trial video-conference conference will be held on a date to be agreed between the parties which shall be either in the last week of this court vacation or the third week of the third term in order to establish the timelines in the agreed litigation plan which require variation due to the Covid -19 regulations and whether any of the times provided for in these

orders, rulings and directions cannot reasonably be complied with for the same reason.

(Signed)

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SPILG, J

DATE OF PRE-TRIAL:	28 February 2020
DATE OF FINAL PROPOSALS:	15 May 2020
DATE OF ORDERS, RULINGS ETC:	28 February 2020
	3 July 2020
DATE OF REASONS:	9 July 2020
FOR THE MAIN PARTIES:	See paras 18-20 above