



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA**

**HELD AT RANDBURG**

**Case numbers:** LCC 115/2008  
LCC 026/2007

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

**19 May 2021**

DATE

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SIGNATURE

In the matter between:

**CINDI FAMILY**

**PLAINTIFF**

Concerning Rondavel 403, Standerton district municipality, Mpumalanga

and

**MINISTER OF RURAL DEVELOPMENT AND LAND  
REFORM**

**FIRST DEFENDANT**

**CASPARUS JANSE VAN RENSBURG**

**SECOND DEFENDANT**

**MARTHA MARIA GEYSER**

**THIRD DEFENDANT**

**THE REGIONAL LAND CLAIMS COMMISSIONER:  
MPUMALANGA**

**PARTICIPATING PARTY**

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**RULING ON MINUTE OF INSPECTION IN LOCO**

**19 MAY 2021**

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**SPILG, AJP**

## INTRODUCTION

1. An inspection in loco was conducted on a number of farms in the Standerton area on 10 and 11 February 2021. It is possibly the best planned and implemented inspection I have participated in whether as counsel or as a judge. Prior to the inspection the parties had independently of each other attended the location with their clients and experts to determine the features which needed to be pointed out. They then collaborated in devising the most convenient route which the inspection party should follow.
2. On the morning of the inspection a large scale topographic map which also identified the respective farm boundary lines was provided to each participant. A dictaphone was used to record observations and comments while photographs were taken which were cross-referenced to the location point.

The court was constituted by Attorney T Maodi as the assessor and myself. This was in accordance with the provisions of s 28(3) of the Restitution of Land Rights Act 22 of 1994. Aside from the claimant plaintiff and landowner defendants together with their legal representatives and experts, Mr Mathebula attended on behalf of the State Attorney. He also represents the Minister of Agriculture, Land Reform and Rural Development which is the first defendant.

3. During the inspection each structure or feature which was pointed out was given a location number and its GPS coordinates were separately noted. Each party would identify and describe the physical features that he wished to have observed indicating on occasion its basic significance. The other party or the court could add further observations that appeared relevant. All this would be dictated to the satisfaction of all the parties and the court before the inspection proceeded to the next point on the route.
4. It was agreed that *Mr Havenga* for the landowner defendants would prepare a draft of the minute of the inspection from the contemporaneous audio recording and that this would then be considered by *Mr Whittington* who represented the plaintiff claimant. In case of disagreement the court would make a ruling on the final version of the minute.

For present purposes only the landowners (being the second and third defendants) will be referred to as the defendants.

5. A dispute has arisen between the parties regarding the contents of the minutes.

## THE ISSUES

6. As I understand it, the issue between the parties concerns what should be contained in the minute. The plaintiff contends that the draft should not include conclusions and opinion evidence while the defendants submits that the contents of the minute should do so and explains that the draft prepared by Mr Havenga distinguishes between the physical observations and "*what was said by the various parties at the inspection in order to give content to what was observed*". In this regard Mr Havenga argues that what was said does not constitute evidence unless confirmed by a witness under oath during the trial but that without these observations the minute lacks content and would become meaningless to someone who was not present but who may be required at some stage to consider it.

## THE DELETIONS AND AMENDMENTS CONTENDED FOR BY THE PLAINTIFF

7. The changes effected by Mr Whittington to Mr Havenga's proposed minute may be divided into three categories;
  - a. The first concerns those paragraph headings which describe the identified point by reference to a person or period despite such description not necessarily being common cause between the parties.

By way of illustration, point 7 of Mr Havenga's draft is headed "*Graves associated with the 1903 farmstead of Pieter Francois*". Another example to which objection is taken is the heading to point 12 which reads "*Cindi house*". By contrast no objection is taken to the next heading (point 13) which is "*Cindi kraal and outbuildings*". In all, objection is taken to some 12 of the 34 headings.

- b. The next are purely grammatical changes which I do not believe the parties intended to form part of the issues the court is called on to resolve
- c. The last concerns all passages in the minute which deal with what one or other party or their legal representative placed on record when voluntarily explaining the significance of the structure or feature which was being pointed out.

The offending passages are quite wide ranging as the following extracts demonstrate:

In para 12 of his draft, Mr Havenga had inserted the following:

*"The area where the inspection party was standing was, according to Mr Küsel, the location of one of the original farm homesteads in the area as indicated on the 1903 and 1905 map of this area."*

Para 12.4 of the draft reads:

*"According to Mr. Küsel there was a road connecting the two farmsteads. The evidence to be led by the second and third defendants will be that members of the Joubert families who occupied the two dwellings, used to visit each other when the two houses were still occupied."*

Para 16 states:

*"Mr. Küsel expressed the opinion that it was probably a sheep kraal with the low-lying area towards the river on the east. This will be dealt with in his supplementary report."*

Para 23 of the draft contains the following:

*"It was observed that further to the east of this spot, similar rocky outcroppings appeared in the grass. It was recorded that the two sets of experts are in*

*agreement that the rocks that were visible in this area are natural outcroppings and not the remains of any building.*

Para 30 reads:

*"When the party left this point, Mr. Whittington placed on record that Mr. Cindi had just informed him that his uncle Bob Cindi lived at this site. This evidence is not common cause."*

A final illustration is the contents of para 64 of Mr Havenga's draft which reads:

*"Mr. Whittington said that Mr. Cindi's version was that Skhovana established a Methodist Church at the first site which was pointed out and that it was subsequently moved to Portion 10. Mr. Havenga remarked that Mr. Cindi had indicated that Skhovana Cindi built the church on Portion 10, but that the evidence will be that a Mr. Dugmore built the church and that from 1955 the building was also used as Joubertskop School, which they shared with the Church. Mr. Whittington confirmed that the building was also later used as a school. Mr. Havenga further stated that the school was moved to the second defendant's portion of the Remaining Extent of Rondavel which is surrounding the small portion. He indicated that the new school was built approximately 500 metres west of the Church and that it was later replaced by the new (current) Rondavel School on the second defendant's land further down the tarred road.*

8. It will be observed that the contentious passages in this final category differ to some degree. They vary from what a party's expert intends to lead in evidence to what may amount to statements of fact asserted by either the plaintiff or the defendants during the course of the inspection and include statements made by counsel without identifying the source.

## THE HEADINGS

9. It is evident that the plaintiff does not object to all the headings which associate a person or period to the subject matter being pointed out. The plaintiff appears to do so in instances where he believes there was not consensus.
10. The issue can therefore be readily resolved by directing that unless the defendants can point to a clear admission made on behalf of the plaintiff, the heading must remain neutral in the manner adopted by the plaintiff in its proposed amendments.

## SYNTAX

11. The plaintiff has deleted the punctuation preceding the GPS coordinates and altered the grammar in one or two passages. Provided the meaning is not ambiguous preferences of style are not the court's concern. I do not believe that the parties intended the court to deal with these amendments although they are included (perhaps by default) in the request for a determination.

## COMMITTING TO A VERSION

### Purpose of inspections

12. Inspections *in loco* are held not simply to obtain real evidence regarding the physically observed characteristics of a structure or feature which cannot be brought into the court room.<sup>1</sup>
13. Inspections *in loco* in land claims will invariably take place prior to the hearing so that the court obtains a clearer perspective of the subject matter in dispute, involving as it usually does the need to determine the historic occupation of the land in question, its extent, the period and chronology of consecutive occupations (and if there is any overlapping, the relationship between the several occupiers).

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<sup>1</sup> See generally PJ Schwikkard and SE van der Merwe *Principles of Evidence* (4<sup>th</sup> ed) para 19.6. Compare CWH Schmidt and H Rademeyer *Law of Evidence* para 10.3.3

Against this canvass (inclusive of the general topography), which can only be imprecisely conveyed by words and photographs, the court is able to grasp more readily and contextualise more effectively the significance of oral testimony when it is eventually led, can appreciate more fully issues concerning the proximity or otherwise of relevant structures (such as homesteads, kraals and gravesites), or features such as crop and grazing areas, whether non-indigenous flora or material was introduced and if so its extent and when.

Accordingly the inspection also serves the purpose of enabling the court to better understand the evidence once it is led.<sup>2</sup>

14. There appear to be two further benefits to be derived from conducting an inspection. The immediate one is that it enables the court to there and then eliminate points that were in dispute regarding physical features (either because the parties agree on what is observed or because, after noting the respective parties' positions, the court records its own observations with such reasons as may be necessary for its finding). In appropriate cases, and land claims as well as land invasion/unlawful removal of occupiers matters are generally such cases, the other benefit is that an inspection facilitates the narrowing of issues because it allows the parties to re-assess the merits of the positions they have taken by reference to what is clearly observable at the scene.

It is axiomatic that these benefits more readily bear fruit if the inspection is held before any evidence is led.

15. It follows that where an inspection takes place before evidence is led, some contextualising of the relevance of the structure or feature being pointed out is necessary. In practice the respective legal teams will place on record the significance of each observation they have requested. Usually it will concern an historic family or communal link or a unique attribute or detail which may allow for the structure's dating or explain how it came to be there and through whose endeavours.

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<sup>2</sup> *Id Principles of Evidence*

In each case the purpose of pointing out the structure or feature is to advance a particular position or negate that taken by the other party. But it would always have to be relevant to an issue requiring determination.

16. The nature of a statement made by a party at an inspection cannot be pigeonholed within a single classification: While it is correct that the recording of a statement made by a party at an inspection does not constitute testimony before the court, it would be incorrect to say that an explanation provided at an inspection has no consequences.
17. Although the statement is not made under oath, it is a curial statement because it is made in the presence of the judge during the course of a proceeding: Although the statement is not tested at that stage it is nonetheless deliberately made in the presence of the presiding judge and may comprise not only an observation which is required to be noted and agreed or disagreed upon, but may also include a representation with regard to the evidence the party intends to lead (either as to fact or opinion).
18. Since the statement made at an inspection is not under oath it carries no weight in favour of the person who uttered it until it is testified to during the trial hearing itself. Nonetheless, being a representation intentionally made during the course of court proceedings, a witness once called can be cross-examined on it. Much like a pleading, a statement deliberately made in the presence of a judge during the course of an inspection constitutes an allegation made on record by (or on behalf of) the person concerned. Even if the statement is not repeated during the evidence-in-chief the other party may therefore use it in cross-examination in the ordinary way, such as to test veracity and reliability or in the case of opinion evidence the underlying premises,
19. Moreover, even if the statement is not made under oath at the trial, an agreement by one party formally made at an inspection to a statement made by the other regarding either an observation or a background fact would fit into the category of a judicial admission similar to an admission contained in an affidavit or plea- and carry the same consequences. See *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd* 1994 (2) SA 588 (A) at 605H-J where Nicholas AJA (at the time) in a separate concurring judgment said:



*"In regard to counsel's first submission, I do not agree that the admission was not a formal admission. It was made in the counterstatement as a formal admission of an allegation made in the statement of particulars, and it constituted what Wigmore on Evidence vol IX paras 2588-90 calls a "judicial admission". Such an admission is binding upon the party making it, ie it prohibits any further dispute of the admitted fact by the party making it and any evidence to disprove or contradict it (para 2590). Compare Gordon v Tarnow 1947 (3) SA 525 (A) at 531-2 where Davis AJA said:*

*'Wigmore (loc cit), speaking of judicial admissions in general, refers to the Court's discretion to relieve a party from the consequences of an admission made in error. It does not seem to me that such a discretion could be exercised, in a case where the admission has been made in a pleading, in any other way than by granting an amendment of that pleading . . . Here, there has at no stage been any such application to amend. But it is only right to add that in any case I see no valid grounds for thinking that there has been any error.'*"<sup>3</sup>

20. As in other instances, the same statement made by a person may serve different purposes – and have different consequences depending on the purpose for which its introduction is sought. The common denominator though, is that a statement made before the judge at an inspection *in loco* constitutes either a judicial admission or constitutes part of the material which can be introduced (without formal proof since it is already part of the court record) during the course of the oral hearing for one or more purposes of varying significance. But in either event, the statement was made by one of the parties before a presiding judge and heard by all present its contents and logically cannot be totally ignored for all purposes.
21. Accordingly, while a statement made at an inspection cannot constitute evidence on behalf of the party asserting its correctness, it may constitute a judicial admission or form part of the material which can be used adversely against that party.
22. Since a statement made by one party in the presence of the other (outside inconclusive negotiations) can be introduced for one or more purposes during the course of the trial, an

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<sup>3</sup> This passage was applied in *Louw and Other v Nel* 2011 (2) SA 172 (SCA) per Ponnar JA at para 17

untenable situation would arise if a relevant statement made by a party at an inspection was not recorded and a dispute arose as to what was actually said.<sup>4</sup>

### Process adopted

23. The inspection of the several farms took place over two days and covered various types of terrain. As mentioned earlier the parties and their legal representatives and experts had each reconnoitered the area. Aside from this allowing them to determine a common route they were also able to distribute a convenient route plan in point form together with the topographic map. The route plan identified, by reference to a designated location point in each instance (for ease of cross-referencing), the place or basic feature to be observed.
24. It was agreed by counsel and endorsed by the court that due to the amount of detail which would have to be noted and for purposes of maintaining accuracy the counsel responsible for pointing out a particular structure or feature would use a dictaphone to record the observations that the client or expert had wished to note. Any observations that the other party or the court wished to make would then be added.
25. Once everyone, including the assessor and myself, was satisfied that the observation which the parties wished to make was accurately described and the contention they wished to advance in relation to it was accurately recorded, the inspection would proceed to the next point on the route. At the commencement of the second day it was however necessary to retrace the inspecting party's steps because one of the parties wished to add a more detailed set of observations regarding a particular site. I should also add that on several occasions the legal representatives would confer in private with the expert and client before dictating a particular note or asking for one to be recorded.<sup>5</sup>
26. I am satisfied that each party elected to inform the court and have recorded, after due deliberation, the relevance of the structure or feature that was pointed out, as did the other party in responding at the time. In turn the court would be satisfied that the observations

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<sup>4</sup> More especially where the hearing may only take place sometime later or becomes part-heard

<sup>5</sup> I consider that the contemporaneous recording and reaching of agreement in situations of a prolonged inspection *in loco* satisfies the objective of certainty and accuracy required in cases such as *Kruger v Ludick* 1947 (3) SA 23 (A) at 31, to enable the court to enter the minute produced by this process as an accurate account of what the court observed and of the contentions advanced albeit that they do not constitute evidence until confirmed under oath during the course of the trial.

were correctly recorded and on occasion would request that a particular feature it had observed would be included once its description was agreed upon.

## Resolution

27. It is evident from the discussion of the process followed and the purpose of inspections of this nature, which concern more than the visual observation of the properties of a single object, both the current properties of the structure or feature as well as the basis for its relevance to the case should be dealt with by the party wishing to make the observation.

The relevance may already be contained in an expert's report, in which case there is no reason why it cannot be disclosed to enable the court to follow its reasoning and conclusions more effectively; and if it is not so contained then the other party would be entitled to enquire before the trial starts as to the purpose of the specific identification for its own trial preparation.

28. I believe that the issue raised by Mr Whittington can be resolved by ensuring that;

- a. To the extent not already done, the minute clearly identifies those statements which constitute the contentions of one of the parties only, from those which are common cause facts.
- b. Where a statement amounts to a contention advanced by one party then the source should be identified. Earlier I set out the contents of para 64 of Mr Havenga's draft minute to which Mr Whittington took exception. In it both counsel are recorded to have made statements regarding historic events. These need to be reworded so that the identity of the person (whether it be the client or an expert) who actually made the statement is identified. By way of example, the correction would be effected by Mr Whittington not himself confirming, but by confirming on instruction from say his client. In turn Mr Havenga would not himself contend for an historic state of affairs but would state that his client or a specific expert in the landowners' team will give that evidence;

- c. If the plaintiff contends that any statement contained in the draft minute prepared by Mr Havenga does not correctly record the contents of the audio recording taken during the inspection, then he must identify in writing which they are. Should there be disagreement then these issues can be referred to the court for finalisation. In such an eventuality the assessor will be part of the court since the issue will then concern one of fact (which the present ruling does not).

## RULING

29. I accordingly rule that:

1. *With regard to headings contained in the draft minute of the inspection in loco prepared by Adv. Havenga ("the Havenga draft"); unless the defendants can point to a clear admission by the plaintiff, all headings to which objection is taken must be amended in terms of the neutral headings adopted in Adv. Whittington's draft revision ("the Whittington revision");*
2. *Unless the plaintiff informs the defendants in writing within 10 days of this ruling of errors in the transcription contained in the Havenga draft of the statements made by any party at the inspection, the statements as noted in the Havenga draft will be deemed to be an accurate reflection of what was said by that party.*
3. *After a period of 10 further days, if there still remains a dispute as to the correctness of the statement contained in the Havenga draft, the disputed statements will be referred to the court for determination and each party will be obliged to identify the actual passage on which it relies in the transcription which has been made of the entire audio recording, or the audio recording itself which is the primary source document. The court will then either hear argument or call for written submissions before finalising the minute.*
4. *To the extent not already reflected in the Havenga draft the parties are to co-operate in;*

- a. *clearly identifying as such, those statements which constitute the contentions or explanations which one of the parties will adduce in evidence (and identify the person who will adduce that evidence or the source of such information), from those statements which are common cause facts;*
  - b. *identifying the person who provided the explanation or made the purported statement of fact which at present are only attributable to one or other counsel*
5. *The parties are to agree on all purely grammatical changes that are to be effected to the final draft*
6. *The parties shall involve Mr Mathebula of the State Attorney, who also represents the Minister of Agriculture, Land Reform and Rural Development (the first defendant), in the above process prior to presenting the final draft to court for confirmation together with the photographs and their accompanying agreed identification or description.*

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B SPILG

Acting Judge President

Land Claims Court

**Delivered:** This judgement was handed down electronically by circulation to the Parties or their legal representatives via email. It will also be released for publication on SAFLII. The date for hand-down is deemed to be at 14:00 on 19 May 2021

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DATE OF SUBMISSIONS: 7 May 2021

DATE OF RULING: 19 May 2021

FOR PLAINTIFF

Adv. D Whittington

AY Bhayat Attorneys Inc.

FOR 2<sup>nd</sup> and 3<sup>rd</sup> DEFENDANTS:

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