


**IN THE LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT RANDBURG**

CASE NO: LCC144/2019

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES <u>NO</u>
(3)	REVISED.
 30/3/2022	

In the matter between:

**MANENZHE COMMUNITY**

APPLICANT

and

**REGIONAL LAND CLAIMS COMMISSIONER**

1<sup>ST</sup> RESPONDENT

**THE MINISTER OF AGRICULTURE,  
RURAL DEVELOPMENT AND LAND REFORM**

2<sup>ND</sup> RESPONDENT

**ALL OTHER LANDOWNERS**

3<sup>RD</sup> RESPONDENT

**MAREMANI NATURE RESERVE (PTY) LTD**

4<sup>TH</sup> RESPONDENT

**NZHELELE BOEREVERENIGING**

5<sup>TH</sup> RESPONDENT

**TSHIPISE SAFARIS (PTY) LTD**

6<sup>TH</sup> RESPONDENT

**KLAPROPS 128 (PTY) LTD**

7<sup>TH</sup> RESPONDENT

**ASMEFOUR BOERDERY (PTY) LTD**

8<sup>TH</sup> RESPONDENT

**MAPAKONI COMMUNAL PROPERTY ASSOCIATION**

9<sup>TH</sup> RESPONDENT

**MANDIWANA COMMUNAL PROPERTY ASSOCIATION**

10<sup>TH</sup> RESPONDENT

**NWANEDI COMMUNAL PROPERTY ASSOCIATION**

11<sup>TH</sup> RESPONDENT

**NEDONDWE COMMUNAL PROPERTY ASSOCIATION** 12<sup>TH</sup> RESPONDENT

**MULUNGUFHALA COMMUNAL PROPERTY ASSOCIATION** 13<sup>TH</sup> RESPONDENT

**RAMAPHABANA COMMUNAL PROPERTY ASSOCIATION** 14<sup>TH</sup> RESPONDENT

CASE NO: LCC48/2021

In the matter between:

**RAMPHABANA TRIBE** 1<sup>ST</sup> APPLICANT

**NEDONDWE COMMUNITY** 2<sup>ND</sup> APPLICANT

**NELUTSHINDWI COMMUNITY** 3<sup>RD</sup> APPLICANT

**MANDIWANA COMMUNITY** 4<sup>TH</sup> APPLICANT

**MAPAKONI COMMUNITY** 5<sup>TH</sup> APPLICANT

**MULUNGUFHALA COMMUNITY** 6<sup>TH</sup> APPLICANT

**NWANEDI COMMUNITY** 7<sup>TH</sup> APPLICANT

**NEFOLOVHODWE COMMUNITY** 8<sup>TH</sup> APPLICANT

**FOLOVHODWE COMMUNITY** 9<sup>TH</sup> APPLICANT

and

**REGIONAL LAND CLAIMS COMMISSIONER, LIMPOPO** 1<sup>ST</sup> RESPONDENT

**COMMISSION ON RESTITUTION OF LAND RIGHTS** 2<sup>ND</sup> RESPONDENT

**THE MINISTER OF AGRICULTURE,  
RURAL DEVELOPMENT AND LAND REFORM** 3<sup>RD</sup> RESPONDENT

<b>ALL OTHER LANDOWNERS</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>MAREMANI NATURE RESERVE (PTY) LTD</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>NZHELELE BOEREVERENIGING</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>TSHIPISE SAFARIS (PTY) LTD</b>	<b>7<sup>TH</sup> RESPONDENT</b>
<b>KLAPROPS 128 (PTY) LTD</b>	<b>8<sup>TH</sup> RESPONDENT</b>
<b>ESMEFOUR BOERDERY (PTY) LTD</b>	<b>9<sup>TH</sup> RESPONDENT</b>
<b>VAN DER WESTHUIZEN</b>	<b>10<sup>TH</sup> RESPONDENT</b>
<b>MANENZHE COMMUNITY</b>	<b>11<sup>TH</sup> RESPONDENT</b>
<b>MULUMBWANE COMMUNITY</b>	<b>12<sup>TH</sup> RESPONDENT</b>
<b>MADIDE COMMUNITY</b>	<b>13<sup>TH</sup> RESPONDENT</b>
<b>MPHEPHU TRIBAL COUNCIL</b>	<b>14<sup>TH</sup> RESPONDENT</b>
<b>NETSHDZIVHANE AND HIS COMMUNITY</b>	<b>15<sup>TH</sup> RESPONDENT</b>
<b>LUSHAKA LWA THIRUNDU</b>	<b>16<sup>TH</sup> RESPONDENT</b>
<b>RAMBUDA TERRITORIAL COUNCIL</b>	<b>17<sup>TH</sup> RESPONDENT</b>
<b>NEMAMILWE COMMUNITY</b>	<b>18<sup>TH</sup> RESPONDENT</b>
<b>NETSUNI TRIBE</b>	<b>19<sup>TH</sup> RESPONDENT</b>
<b>MAHUMONI COMMUNITY</b>	<b>20<sup>TH</sup> RESPONDENT</b>
<b>NETHENGWE, T</b>	<b>21<sup>ST</sup> RESPONDENT</b>

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## JUDGMENT

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### Introduction

1. This is an application in terms of Rule 32(5) of the Rules of this Court to declare steps effected by the Regional Land Claims Commissioner, Limpopo Province (the Regional Commissioner) irregular and set them aside. The case arises from the Restitution of Land Rights Act 22 of 1994 (the Restitution Act).
2. The impugned steps are:
  - 2.1. a withdrawal of a referral of the Manenzhe Community land claim<sup>1</sup> to this Court effected in terms of section 14 of the Restitution Act; and
  - 2.2. an amendment effected to a notice of a land claim in the Government Gazette effected in terms of section 11 of the Restitution Act published on 4 October 2021 (GN 496 of 2021).<sup>2</sup>
3. The impugned conduct is said to be both irregular and in contempt of an order of this Court of 30 October 2020 (the 30 October 2020 order) varied on 31 May 2021 (the varied order of May 2021) and relief is sought in that regard too.

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<sup>1</sup> Under case number LCC48/2021

<sup>2</sup> GN 996 of 4 October 2021 published in GG 45257 amending GG 127 of 12 February 2021 published in GG 44188.

4. There are seven Applicants who describe themselves respectively as the Ramphabana Tribe, the Nedondwe Community, the Nelutshindwi Community, the Mandiwana Community, the Mapakoni Community, the Mulungufhala Community and the Nwanedi Community (the Applicants).
5. There are twenty-three Respondents. The only Respondents opposing this application are the First to Third Respondents, being, respectively, the Regional Commissioner, the Commission on Restitution of Land Rights (the Commission) and the Minister of Agriculture, Rural Development and Land Reform (the Minister). I refer to them collectively as the State Respondents. Various landowners being the Fifth to Ninth Respondents (the Participating Landowners) are legally represented in these proceedings but abiding them.

## **Background**

6. The genesis of this application is a different application, instituted by the Manenzhe Community under case number LCC144/2019 (the Manenzhe Community application). The Manenzhe Community is the Eleventh Respondent in these proceedings, and is abiding them.
7. The Manenzhe Community application was instituted in October 2019 to compel the Regional Commissioner to issue a certificate and refer its land claim to the Land Claims Court in terms of section 14(1)(b) of the Restitution Act. Section 14(1)(b) places a duty on the Regional Commissioner to refer a land claim to this Court in circumstances where he or she certifies that it is not

feasible to resolve any dispute arising by mediation or negotiation. The Manenzhe Community lodged its land claim in December 1995. The Regional Commissioner gave notice of the claim in the Government Gazette in terms of section 11 of the Restitution Act by Notice 962 of 1995 (Notice 962 of 1995).<sup>3</sup>

8. The Manenzhe Community application, LCC144/2019, came before me on 30 October 2020 on the unopposed motion court. I issued the 30 October 2020 order on that day by agreement. For convenience I set it out in full below.

***“HAVING** read the documents filed of record, having heard counsel for the applicants and Mr Nkatingi and Mr Mulaudzi, an official of the First Respondent:*

**IT IS ORDERED THAT: BY AGREEMENT BETWEEN THE PARTIES**

1. *In this order the following definitions apply:*
  - 1.1 *‘the Manenzhe land claim’ means the land claim lodged by the Manenzhe Community on or about 12 December 1995 in terms of the Restitution of Land Rights Act 1994 in respect of the 129 farms defined below.*
  - 1.2 *‘the 129 farms’ mean the farms listed in Government Notice 962 of 1995 in Government Gazette No 16647 of 8 September 1996 attached as “A”, which can collectively be described as the area stretching from Limpopo River in the North, forming a boundary with HaGumbu in the South, extending Southwards bordering Thengwe and Tshakadza on the South East, bordering Ma-Musekwa on the South West, bordering Tshivhula on the West, extending Northward along Muengedzi (sand) River forming a boundary with Ha-Makushu before reaching Messina, Soutpansberg, Mutae and Messina Magisterial Districts, Limpopo Province.*
2. *A rule nisi is issued calling on the respondents or any other interested party to show cause on 26 May 2020 why the First Respondent should not be directed to certify and refer the Manenzhe land claim in respect of the 129 farms to the Land Claims Court in terms of section 14 of the Restitution of Land Rights Act read with Rule 38 of the Rules of the Land Claims Court.*
3. *On or before Friday 12 April 2021, the First Respondent shall deliver:*
  - 3.1 *a report on compliance with paragraphs 8 to 10 below and the state of referral of the Manenzhe land claim;*
  - 3.2 *an affidavit explaining why the costs of 26 October 2020 should not be granted in favour of the applicant.*

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<sup>3</sup> Published in GG 16647 on 8 September 1995.

4. *On or before Friday 23 April 2021, any person wishing to show cause why the order contemplated by paragraph 2 should not be made shall deliver an affidavit setting out the basis therefore and confirming their attendance in court on 26 May 2021 whether in person or represented by a legal representative;*
5. *In event that the Applicant deems it necessary to file a replying affidavit to the aforementioned report and / or affidavit(s), such replying affidavit should be filed on or before Friday 7 May 2021.*
6. *The applicant shall file a practice note on or before 12 May 2021 setting out progress and participation in the matter and if the matter is opposed or unopposed so that it may be properly allocated on 26 May 2021.*
7. *Any heads of argument in this matter shall be delivered no later than 19 May 2021.*
8. *The First Respondent shall amend the Government Notice 962 of 1995 in Government Gazette No 16647 of 8 September 1996 as empowered by section 11A of the Restitution of Land Rights Act, to be in line with the recommendations contained in the Detailed and Comprehensive Research on the Vhembe Land Claim investigation report of March 2017 which was conducted after the initial gazetting process which limits the claim to areas where the claim is competent by no later than 31 January 2021 and in doing so will invite all affected parties to engage in settlement discussions in respect of the Manenzhe land claim.*
9. *The First Respondent shall take such further steps as are necessary to notify all affected parties of the settlement discussions, to collate a list of such persons together with their contact details and to provide such persons with a copy of this order.*
10. *The First Respondent shall convene any meetings it deems necessary to pursue settlement of the Manenzhe land claim with all affected persons by the end of March 2021.*
11. *Costs are reserved."*

9. The 30 October 2020 order contained a rule nisi which, if confirmed, would require the First Respondent to refer the Manenzhe land claim in respect of 129 farms to this Court. Provision was made in the order to facilitate notice of the proceedings to affected persons, to facilitate any final process of settlement of the claim that may be deemed necessary and to enable an amendment to the Government Gazette. The matter came before me again on the return day of 26 May 2021.

10. By that stage, and on 12 February 2021, the Regional Commissioner had purported to comply with paragraph 8 of the October 2020 order by publication in the Government Gazette of Notice 127 of 2021 of 129 farms under claim (Notice 127 of 2021). Also on 12 February 2021, the First Respondent filed a notice of referral of the Manenzhe land claim in terms of section 14 of the Restitution Act (the February 2021 referral) under case number LCC48/2021, being the case number in the present proceedings. What had also transpired at that stage is that the Participating Landowners had delivered a notice of appearance and answering affidavit in the Manenzhe Community application which also serves as a founding affidavit in a counter application filed to set aside Notice 127 of 2021 and the February 2021 referral.<sup>4</sup>

11. On 31 May 2021, I delivered a judgment in which I extended the rule nisi until 29 October 2021, for reasons I explained.<sup>5</sup> I also varied the rule nisi (paragraph 2) to insert the words “or such other farms as the Court may direct” after the words “129 farms”.

12. After the hearing, I issued further directions regulating the conduct of the Manenzhe Community application including service of the application on interested persons including affected landowners and competing claimants and the process for joinder and citation of affected landowners and competing claimants, some of whom had at that stage sought to participate. The directions I issued contemplated that a hearing over two days would be

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<sup>4</sup> In the Manenzhe Community application, these respondents are cited as fourth to eighth respondents.

<sup>5</sup> The rule nisi had been extended until 31 May 2021.

convened in the week before the return date in order to hear the Manenzhe Community application and the Participating Landowners' counter-claim. I refer to these directions as the 31 May 2021 directions.<sup>6</sup>

13. As explained in paragraphs 7 to 9 of my judgment of 31 May 2021, one of the issues raised in the Participating Landowners' affidavit is the status of Notice 962 of 1995 in light of two subsequent Government Gazettes and the decision of the Supreme Court of Appeal in *Manok Family Trust v Blue Horizon Investments and others*.<sup>7</sup> Other issues raised are that the Manenzhe claim was in fact validated only in respect of a significantly reduced number of farms, and a contention that the dispossessed are communities living under the jurisdiction of the Manenzhe Community.<sup>8</sup>

14. On 5 August 2021, however, the Regional Commissioner withdrew the February 2021 referral in its entirety in terms of Rule 27 of the Rules of the Land Claims Court. This conduct is one of the steps impugned in these proceedings.

15. On 3 August 2021, affidavits styled explanatory affidavits were delivered in the Manenzhe Community application on behalf of various Community Property Associations including the Mapakoni Community CPA, the Mandiwana Community CPA, the Nwanedi Community CPA, the Nedondwe Community CPA, the Mulungufhala Community CPA and the Rampabana Community CPA. On 20 August 2021, each of these parties, now joined as Respondents

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<sup>6</sup> In the papers they are referred to as the 26 May 2021 directions but they were issued on 31 May 2021. The matter was heard on 26 May 2021.

<sup>7</sup> 2014(5) SA 503 (SCA); [2014] 3 All SA 443 (SCA).

<sup>8</sup> See judgment, para 11.

delivered answering affidavits. In short, the concern of these Respondents is to ensure that their own land claims in respect of properties referred under the Manenzhe Community land claim are also referred for final resolution by this Court.

16. Also on 20 August 2021, the State Attorney wrote to the parties, referring to the withdrawal of the February referral and advising that a final version of an amending notice will shortly be published in the Government Gazette, limiting the referred claim to 26 properties referred to in Appendix 3.4 of the Venda University report and excluding farms already restored to claimant communities.

17. Thereafter, the State Attorney sought a pre-trial conference in respect of the Manenzhe Community application. A conference was convened on 21 October 2021.

18. It was at about this time that the Applicants in these proceedings instituted the current proceedings under case number LCC48/2021. Following that conference, I issued various directives, amongst other things, regulating the Rule 32(5) proceedings, suspending compliance with various features of the previous directives pending the determination of the application now before me and extending the rule nisi until 27 January 2021.

19. On 4 October 2021, the Regional Commissioner published the amended Government Gazette (the amended 4 October 2021 gazette), which was delivered to Court on 28 October 2021.

20. On 8 December 2021, the State Respondents delivered an answering affidavit in these proceedings, deposed to by the Regional Commissioner, Mr Lebjane Maphutha: They are opposing the application. The Applicants thereafter delivered their replying affidavit (deposed to on 17 December 2021). The Participating Landowners, while abiding, align themselves with the approach of the State Respondents.

21. The application was heard on an arranged date, 27 January 2022. Mr Shakoane SC (with him Mr Ngwana) appeared for the Applicants. Mr Dodson SC (with him Mr Ramaano) appeared for the State Respondents. Mr Havenga C appeared for the Participating Landowners. I thereafter again extended the rule nisi, initially until 18 March 2022 and then until 5 May 2022.

### **Funding for legal representation**

22. An issue that has animated the proceedings in both the Manenzhe Community application and these proceedings is access to legal representation. This has been the subject of various directions issued during case management, and has informed the setting of dates for its further conduct. Both the Manenzhe Community and the Applicants requested funding for their respective litigation in terms of section 29(4) of the Restitution Act.<sup>9</sup>

23. Before proceeding with the hearing, Mr Dodson confirmed that both applications for funding had been approved: The Manenzhe Community is

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<sup>9</sup> Section 29(4) provides: "Where a party can not afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the State legal aid system or, if necessary, at the expense of the Commission."

abiding these proceedings in circumstances where they have state-funded legal representation. What remains outstanding for decision is the Manenzhe Community's costs to date in the Manenzhe Community application, which remain reserved and which I do not deal with in these proceedings or in this judgment.

### **The notice of irregular steps, the application and the issues for determination**

24. The Applicants' complaints were first set out in a notice of irregular step dated 23 September 2021. Only the withdrawal of the February 2021 referral was impugned and the complaints can be summarised as follows:

24.1. The February 2021 referral was made in compliance with the 30 October 2020 order.

24.2. Under the Oudekraal principle,<sup>10</sup> the "decision and act to refer and file" the February 2021 referral has legal consequences and stands unless set aside by a Court.

24.3. The 26 May 2021 directions and varied order of May 2021 regulate the further conduct of the proceedings and the withdrawal of the February 2021 referral does not comply with these.

24.4 The varied order of May 2021 determines that the number of farms to be referred is to be determined by the Court not the Commissioner.

24.5 The withdrawal of the February 2021 referral without the consent of all

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<sup>10</sup> A reference to Oudekraal Estate (Pty) Ltd v City of Cape Town 2004(6) SA 222 (SCA) at para [26].

the parties is not permitted under the provisions of Rule 27(1)(b) of the Rules of this Court.

25 On 4 October 2021, the Commissioner responded to the notice and declined to reverse the alleged irregular step contending there was no irregularity in withdrawing the February 2021 referral.

26 In the application, the notice of motion seeks orders in various terms impugning both the withdrawal of the February 2021 referral *and* 'the consequent' GN 496 of 2021 published on 4 October 2021. Both are sought to be declared irregular and set aside and be in contempt of the varied order of May 2021. Alternative and ancillary relief is also sought.

27 In addition to the issues raised above, the application foreshadows a complaint that the Commission was not entitled to effect the February 2021 withdrawal as it is the Manenzhe Community that effectively initiated the referral and not the Commission. Reference is made to Rules 25 and 38 of this Court. The Applicants also contend that the Commission's failure to withdraw the February 2021 withdrawal and the publication of the 4 October 2021 gazette reveal an 'unrepentant and defiant' attitude.

28 The key issues for determination which address both the primary and alternative relief sought are:

28.4 Whether the withdrawal of the February 2021 notice is irregular;

28.5 Whether the consequent GN 496 of 2021 is irregular;

28.6 Whether the impugned conduct constitutes contempt of court.

29 In dealing with these issues, I make various assumptions in favour of the Applicants without deciding the issues. For example, I assume it is no bar to their obtaining relief that no notice of irregular step was issued in respect of GN 496 of 2021, that the contempt proceedings are brought under Case No LCC48/2021 and that not all grounds of objection are foreshadowed in the notice of objection. Moreover, while I entertain doubt, I assume (also without deciding) that the publication of GN 496 of 2021 can constitute an act subject to this Court's oversight under Rule 32(3)(c) or (d) of the Rules of this Court.

### **Legal framework**

30 Rule 27 entitled "Withdrawal of cases" provides as follows:

*"(1) Any party that has initiated a case in the Court may withdraw that case by delivering a notice of withdrawal –*

- (a) At any time before a date for the hearing has been determined; or*
- (b) Thereafter, only with the consent of all participating parties or by leave of the Court.*
- (1) A notice of withdrawal may contain an offer to pay costs. Such an offer will have the effect of an order of the Court for those costs.*
- (2) Should a notice of withdrawal not contain an offer to pay costs or should that offer be insufficient, any party may apply to the Court for an appropriate order as to costs."*

31 Rule 32 regulates "Non-compliance with Rules". Rule 32(3) provides that certain steps are irregular steps as follows:

- "(3) Should any party –*
- (a) ...*
  - (b) ...*

- (c) *Deliver any document which does not comply with these rules or with any order or direction of the Court; or*
- (d) *Perform any act in contravention of these rules or of an order or direction of the Court, This will be an irregular step."*

32 The Constitutional Court recently affirmed the legal principles applicable to contempt of court.<sup>11</sup> We are reminded that "[c]ontempt of court proceedings exist to protect the rule of law and the authority of the Judiciary."<sup>12</sup> Moreover, "the rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. .... ... disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery."<sup>13</sup>

33 The Constitutional Court affirmed the principles applicable to contempt proceedings as follows:<sup>14</sup>

"As set out by the Supreme Court of Appeal in *Fakie*, and approved by this Court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established. (Footnotes omitted)".

34 Reliance is also placed in these proceedings on section 165 of the Constitution which vests judicial authority in the Courts.<sup>15</sup> In *Dengetenge Holdings*, the

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<sup>11</sup> Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and others [2021] ZACC 18 (State Capture Commission).

<sup>12</sup> State Capture Commission at para [27].

<sup>13</sup> *Pheko v Ekurhuleni City* [2015] ZACC 10 at paras [1]-[2].

<sup>14</sup> *Id* at para [37].

<sup>15</sup> Section 165(1) provides: "The judicial authority of the Republic is vested in the courts."

Supreme Court of Appeal re-iterated that “respect for the authority of the courts, which is foundational to the rule of law, often serves as a bulwark against anarchy and chaos.”<sup>16</sup>

### **The withdrawal of the February 2021 referral**

35 The first issue for decision is whether the February 2021 referral was irregularly withdrawn.

36 First it is contended that it was withdrawn in breach of the provisions of Rule 27 of the Rules of this Court, cited above, in that it was effected without the prior consent of the participating parties to the proceedings. This is because these proceedings are integrally connected to the Manenzhe Community application, the hearing of which has already commenced.

37 In my view, the contention incorrectly conflates the Manenzhe Community application with the referral proceedings. While connected, they are not the same proceedings. In the first, the Manenzhe Community sought an order compelling a referral of its restitution claim. That is the subject of the rule nisi which has been extended, at this stage until 5 May 2022. The referral is the process through which the disputes in the land claim are to be determined by this Court pursuant to section 14 of the Restitution Act. At the time that the February 2021 referral was

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<sup>16</sup> *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5 at para [17]

withdrawn, no dates for its hearing had been determined. Accordingly, Rule 27 did not preclude its withdrawal at that stage.

38 Secondly, it is contended that the withdrawal had the effect of frustrating and undermining the 26 May 2021 directions, which regulate the further conduct of the Manenzhe Community application. I disagree. On the contrary, it was the February 2021 referral itself that had the potential to do so, at least insofar as it may have rendered the application academic.<sup>17</sup> By withdrawing the February 2021 referral, the matter can proceed as contemplated.<sup>18</sup> Indeed, a question may arise whether any referral by the Commission is competent in the face of the rule nisi at all. Mr Dodson submitted that it was, whereas Mr Havenga submitted it was not. But it is not necessary for me to decide this question in view of my prior conclusion.

39 Thirdly, the notice of objection records a complaint that the withdrawal of the February 2021 referral breaches the Oudekraal principle. I disagree as the withdrawal is a step in litigation effected in terms of Rule 27, which provides expressly for a withdrawal of a case subject to its provisions.

40 Fourthly, it is contended that the withdrawal of the referral breaches the varied order of May 2021 (and the 26 April 2021 directives) because it is for the Court and not the Commission to determine the number of farms to be referred. That, it is said, is the effect of the variation to the order effected on 31 May 2021 when

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<sup>17</sup> This is an issue I dealt with in the May 2021 judgment.

<sup>18</sup> To the extent that new or updated directions now require to be issued, that can readily be achieved via a pre-hearing conference.

the words “or such other farms as the Court may direct” were inserted into the rule nisi. In my judgment, I indicate that these words were inserted “(t)o cater for the fact that it may well transpire that the rule nisi if ever confirmed, may not be susceptible to confirmation in the precise terms granted in view of the uncertainty and dispute about the precise number of affected farms and, indeed, an apparent error that the claims as initially was published was in respect of 129 and not 127 farms.” It is difficult to understand how, on its own, the withdrawal of the referral could denude the Court of any authority that vests by virtue of the rule nisi as varied on May 2021. I return to this issue when dealing with the impact of GN 496 of 2021.

41 Fifthly, it is contended, with reference to Rules 25 and 38 of the Rules of this Court<sup>19</sup> that the Regional Commissioner was not entitled to effect the February 2021 withdrawal as it is the Manenzhe Community that, in effect, has initiated the referral. In terms of Rule 38(6), the claimant before the Commission is deemed to be the plaintiff in the case before the Court, and will have all the rights and duties of a plaintiff. Mr Dodson submitted that the contention is difficult to reconcile with the express wording of Rule 23 and Rule 38. Rule 23 is entitled initiation of cases and provides in Rule 23(1)(d) that “a case emanating from a referral of a matter to the Court by the Chief Land Claims Commissioner under section 14 of the [Restitution Act] must be brought on notice of referral, as set out

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<sup>19</sup> Rule 38(6) provides: “The claimant before the Commission – (a) will be deemed to have withdrawn his or her claim if he or she has not filed a notice of appearance under Rule 25(1), unless the Court orders otherwise; (b) will be the plaintiff in the case before the Court, and will have all the rights and duties of a plaintiff; and (c) must deliver a notice listing the participating parties as required under Rule 25(3).” Rule 25(1) is entitled Notice of Appearance and provides: “Any party that wants to participate in a case must, within ten days after service on him or her of the process by which the case is initiated, file a notice of appearance based on form 10 of Schedule 1 and furnish a similar notice to the applicant or plaintiff, or if there is more than one, to the first applicant or plaintiff.”

in rule 38 of these rules.” Rule 38 itself refers to the initiation of the case by the Commission by notice of referral. Accordingly, the argument continued, the express language of Rule 38 suggests that the Commission, which refers the matter, initiates the case. In my view, it is not necessary for me to decide this issue because in this case, the Manenzhe Community had not yet filed a notice of appearance in terms of Rule 25(1) read with Rule 38(6)(a) when the February 2021 referral was withdrawn.

42 I accordingly conclude that, viewed on its own, the withdrawal of the February 2021 referral is not an irregular step.

#### **GN 496 of 2021**

43 As indicated above, the Commission had, also in February 2021, purported to comply with paragraph 8 of the 30 October 2021 order and in doing so had gazetted 129 farms. GN 496 of 2021 was intended to limit the gazette to 26 properties referred to in Appendix 3.4 of the Venda University report and exclude farms already restored to the claimant communities.

44 Mr Shakoane submitted that GN 496 of 2021 sought to frustrate and undermine the varied order of May 2021 and the 31 May 2021 directives because it purports to determine the number of farms to be referred pursuant to the rule nisi, a function that vests within the Court’s authority under the terms of the rule nisi itself, and which was to be determined only after observance by all parties of the procedural requirements of the 31 May 2021 directives. In my view, the Court is currently vested with the authority to determine the number of farms to be included in any

order to refer pursuant to any confirmation of the rule nisi. However, that is not unconstrained authority and is confined by the terms of the Court order itself. Thus, whether GN 496 of 2021 purports to usurp that role and thereby both breach the 30 October 2020 order as varied and defeat the 31 May 2021 directives is a different question.

45 In my view, it does not. On a consideration of the papers before me, what it amounts to is an attempt on the part of the State Respondents to comply with prayer 8 of the 30 October 2020 order as varied. The order itself contemplates that there must be a 'remedial' gazetting, to bring Notice 962 of 1995 'in line with the recommendations contained in the Detailed and Comprehensive Research on the Vhembe Land Claim investigation report of March 1017 which was conducted after the initial gazetting process which limits the claim to areas where the claim is competent by no later than 31 January 2021 and in doing so will invite all affected parties to engage in settlement discussions in respect of the Manenzhe land claim.' The Court order itself thus contemplates that there will be a gazetting of a different number of farms prior to the return date.

46 In this regard, the State Respondents submit that Notice 127 of 2021, published in February 2021 in purported compliance with prayer 8, did not in fact so comply and, in order to so comply, had to be amended. This, they say was duly done relying on the provisions of section 11A of the Restitution Act resulting in the amended 4 October 2021 notice.

47 It warrants emphasis that the question whether the amended 4 October 2021 gazette in fact complies with prayer 8 of the 30 October 2020 order (as varied) remains an open question. That question is pertinently not before me.

48 The Oudekraal principle was also advanced to impugn GN 496 of 2021. While these are not review proceedings, in my view, the principle in any event cannot find application here because the State Respondents rely on section 11A to effect the amendment. Section 11A expressly empowers an amendment.

### **Contempt of court**

49 It follows from my conclusions above that the complaints levelled in these proceedings regarding contempt of court cannot be upheld. In arriving at this conclusion, I again emphasise that the question whether GN 496 of 2021 complies with prayer 8 of the 30 October 2020 order is not before me.

50 Accordingly, the application must be dismissed.

### **Costs**

51 Mr Dodson submitted that the Court should award costs against the Applicants in favour of the State Respondents. It is trite that this Court only awards costs in special circumstances. While the application was unsuccessful, the Applicants are ultimately seeking to assert important constitutional rights, here against the State. I can see no reason to depart from the usual approach.

## **Order**

52 The following order is made

52.4 The application is dismissed.

52.5 There is no order as to costs.



**SJ Cowen**

**JUDGE**

**Land Claims Court**

### **Appearances:**

#### *Applicants*

Advocate Shakoane SC, Adv Ngwana, instructed by Denga Inc

#### *First, Second & Third Respondents*

Advocate Dodson SC, Advocate Ramaano, instructed by the State Attorney

#### *Fifth to Ninth Respondents*

Advocate Havenga SC instructed by Deon Retief Attorneys