IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

SCA CASE NO: 583/11

Reportable

In the matter between:

MONWABISI MORRIS NJEMLA **APPELLANT**

and

KSD LOCAL MUNICIPALITY **RESPONDENT**

Neutral Citation: *Njemla v KSD Local Municipality* (583/11) [2012] ZASCA 141 (28 September 2012)

Coram: Navsa, Van Heerden, Snyders and Bosielo JJA and Southwood AJA

Heard: **23 August 2012**

Delivered: **28 September 2012**

Summary: **Interdict and allied costs order obtained in the Land Claims Court on the basis of misleading information – interdict rendered academic by subsequent events – application for rescission of costs order justified on the basis of the court having been misled.**

ORDER

On appeal from: Land Claims Court, Johannesburg (Bam JP sitting as court of first Instance):

(1) The application for leave to deliver further written argument dated 27 August 2012 is dismissed and the appellant's attorney, Mr M Tshiki of Tshiki & Sons Incorporated, Mthatha, is ordered personally to pay the costs thereof.
(2) The appeal is dismissed with costs.
(3) The registrar is directed to serve this judgment on the relevant law society for investigation and action in relation to what is stated in para 26.

JUDGMENT

NAVSA JA (Van Heerden and Bosielo JJA and Southwood AJA concurring)

[1] As will become apparent the facts of this case are peculiar. The present appeal, with the leave of this court, follows on a successful application by the respondent, the King Sabata Dalindyebo Municipality (the Municipality), for rescission of a costs order granted against it in the Land Claims Court. Earlier, Mr Monwabisi Morris Njemla, claiming to represent the Kwalindile Community (the Community) as its chief, had brought an application in the Land Claims Court. He had sought, inter alia, an order interdicting a development taking place, at the instance of the Municipality, on that portion of the Remainder of Erf 912 Mthata that lies alongside the fenced area of the Enkululekweni Ministerial Complex, pending the finalization of a land claim lodged by the Community with the Office of the Regional Land Claims Commissioner in terms of the Restitution of Land Rights Act 22 of 1994[1](the Act).

[1] Section 10 of the Act provides for the lodgment of claims and representation of communities. Section 10(1) reads as follows:

[2] The basis of the application for the interdict was that the Community had lodged a number of land rights claims over various portions of land, including that part on which the development was to take place. It was contended that the development, if it continued, would frustrate the objective of the Community's land rights claim. The Municipality, in resisting the application for the interdict, objected to Mr Njemla's authority to represent the Community. It did so on the basis that no resolution by the Community, in terms of which the respondent was so authorized, had been presented to that court. The Land Claims Court (Bam JP), however, found that the appellant had the requisite locus standi and granted an order in favour of the Community, as follows:

'A. (i) The *interim interdict* prayed for in paragraph 2.1 of case number LCC66/07 is granted and is immediately operative pending the finalization of serious and consultative negotiations with all parties concerned but before 30 November 2007. This does not concern any of the respondents who neither supported nor opposed the application.

(ii) In the event of the negotiations contemplated in paragraph 1 reaching an impasse, on or before 30 November 2007, the 1st respondent (KSD) is granted leave, if so advised, to make an application in terms of s 34[2] of the Restitution of Land Rights Act No. 22 of 1994 as amended.

(iii) The respondents opposing the application in case no. LCC66/07 are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.'

[3] No reasons were provided for the order. Subsequent to the order the parties engaged in the envisaged negotiations. During the negotiations, the Municipality persisted in its objections to the authority of Mr Njemla to represent the Community. Furthermore, it contested the authority of the appellant's then attorneys, Messrs Tshiki

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'Any person who or the representative of any community which is entitled to claim restitution of a right in land, may lodge such claim which shall include a description of the land in question, the nature of the right in land of which he, she or such community was dispossessed and the nature of the right or equitable redress being claimed, on the form prescribed for the purpose by the Chief Land Claims Commissioner under section 16.'

[2] Section 34(1) of the Act reads as follows:

'Any national, provincial or local government body may, in respect of land which is owned by it or falls within its area of jurisdiction, make application to the Court for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant.'

and Sons Incorporated, to represent the Community. Consequently, the Municipality issued a notice in terms of rule 7(2)[3] of the rules of the Land Claims Court challenging their authority. The respondent, in turn, filed a power of attorney, reflecting his authority to represent the Community. Thereafter, on 14 December 2007, Tshiki and Sons Incorporated sent a letter to the Land Claims Commissioner, copied to the Municipality's attorneys, the material part of which reads as follows:

'In view of the fact that the pending negotiations are aimed at settlement of the land claim by Kwalindile Community, we have had to revisit the fact that the land lying outside the fenced Enkululekweni Ministerial Complex, which includes the land under discussion in the pending negotiations, was never dispossessed by the former government of Transkei and has in fact been used and is still being used by the Kwalindile Community for grazing purposes, we have advised our client as follows: -

1. That the said land lying on the Eastern, northern, western and southern parts of the fenced Enkululekweni Ministerial Complex is not subject to the jurisdiction and powers of the Land Claims Commission including the Eastern Cape Land Claims Commissioner in that the land claims that fall within the jurisdiction of the said authorities are land claims in respect of land that was dispossessed from persons or communities after 1913 under racially discriminatory laws.

[4] As can be seen, the letter stated that the land under development did not form part of land which could rightfully be the subject of a land claim by the Community. In light thereof, the Municipality's attorneys wrote to Tshiki and Sons Incorporated, enquiring whether Mr Njemla was willing to abandon the order in the Community's favour. On 21 January 2008, during continuing negotiations, attorneys M Magigaba Incorporated presented the parties thereto with a letter and resolution indicating that *they* were now authorized to represent the Community. Neither Messrs Tshiki and Sons Incorporated, nor Mr Njemla, was present when this was done.

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[3] Rule 7(2) reads as follows:

Any party that disputes the authority of a person acting on behalf of any party may deliver a notice –

(a) within ten days after it has come to his or her notice that such person is so acting; or

(b) with the leave of the Court on good cause shown at any other time, calling on that person to prove his or her authority

[5] It is necessary to record that it is common cause that the Community had not in the past been dispossessed of the land situated around the fenced Enkululekweni Ministerial Complex, are currently using it for grazing purposes and are protected therein in terms of the Interim Protection of Informal Land Rights Act 31 of 1996.

[6] Thus, the Municipality approached the Land Claims Court for an order rescinding only the earlier costs order in favour of the Community, contending that the related orders had now become academic – the time period for negotiations referred to in the order of the Land Claims Court set out in paragraph 2 above had passed – and, having regard to what appears in the preceding paragraph, the Municipality, understandably, did not proceed to court for an order in terms of s 34[4] of the Act.

[7] The Municipality sought rescission of the costs order, contending that the order issued by Bam JP, set out in paragraph 2 above, had been obtained because Mr Njemla had misled the court by supplying false information. The basis of the application was said to be the lack of authority by Mr Njemla to represent the Community, and the fact that the land was wrongly stated to be the subject of a valid land claim by the Community. It was submitted on behalf of the Municipality that, had the court known the true facts, the order would not have been granted. Essentially, it was contended that, if the land in question was not subject to a valid land claim, the Land Claims Court would not have had jurisdiction in terms of s 22[5] of the Act and there would have been no need for that court to grant an interdict.

[8] In opposing the application for rescission Mr Njemla claimed that, since Bam JP had not furnished reasons for the orders set out in paragraph 2 above, it might well be that the costs order had been granted on a basis wholly unrelated to the Community's land claim. Mr Njemla pointed out that, since attorneys M Magigaba Incorporated only entered the scene subsequent to the interdict having been granted, it does not

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[4] See note 2.

[5] The exclusive jurisdiction of the Land Claims Court to determine rights to restitution of any right in land and allied matters is set out in s 22 of the Act.

necessarily follow that neither he nor Tshiki and Sons Incorporated were unauthorised at the time that the order had been made.

[9] Bam JP, in dealing with the application for rescission, rejected the first ground relied on by the Municipality, namely, that Messrs Tshiki and Sons Incorporated and Mr Njemla lacked authority to represent the Community at the time of the application for the interdict. He reasoned that the subsequent authority presented by attorneys M Magigaba Incorporated did not necessarily mean that Mr Njemla or the initial attorneys had lacked authority at the time that the interdict was granted.

[10] Bam JP did, however, hold in favour of the Municipality in respect of the other ground referred to in paragraph 7, namely, that the court below had wrongly been brought under the impression by Mr Njemla that the land in question was the subject of a valid land claim by the Community. In this regard, Bam JP referred to the correspondence set out above and to the affidavit by Mr Njemla opposing the application for rescission, from which it appears clearly that the land had not been dispossessed in circumstances entitling a land claim by the Community in terms of the Act. The learned judge president stated the following:

'The revelation, on the part of the respondent himself, that the property being developed was never dispossessed, has turned the whole *interim interdict* order upon its head and, in view of the fact that it was based entirely on the belief that the contrary situation might prevail, it has to be reversed.

It now appears that this court did not have jurisdiction at all and not just because the applicant asserted it, but because the *fons et origo* of that application himself asserted the same. It is still a mystery to this court why the respondent opposed the review application[6] and also why, once it had "revisited" its earlier stance, the respondent had not then abandoned the order for the *interdict* in its entirety and tendered costs.'

[11] Bam JP found it necessary to disclose in his judgment that it was with 'some surprise and amazement', that he received 'late' supplementary heads of argument on behalf of Mr Njemla, containing a 'submission' that the Community had not been

[6] Bam JP is referring to a review application brought by the Municipality for the setting aside of a notice in the Government Gazette, in which a land claim in relation to the land in question was published.

dispossessed of the land in question. Considering the affidavits filed on behalf of Mr Njemla, and the very basis of the application for the interdict, it is not wholly unexpected that Bam JP ignored that submission. The learned judge president also recorded the following:

'I also, subsequently ignored, as being unethical, a direct communication between the respondent's legal representative and the court, after judgment on the applications had been reserved, to the effect that the land fell outside the jurisdiction of the commission. Neither the late heads nor the unethical communication had any impact upon the orders given on the 2 October 2008.'

[12] Later, the learned judge president, with reference, inter alia, to *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 and *Nyingwa v Moolman* NO 1993 (2) SA 508 (TK), said the following:

'I am satisfied that there is authority that the court may assume its inherent jurisdiction to rescind in the interest of justice. In the instant case it would be manifestly inequitable and not in the interest of justice to implement the costs order given against the applicant. Indeed the costs order is the only portion still alive in the temporary *interdict* in case LCC66/07 on the 2 October 2007 order.'

[13] It is against that conclusion that the present appeal is directed. It is necessary to record that before the appeal was heard in this court, Mr Njemla passed away and his place in the litigation has now been taken by the executor of his estate. I shall hereafter refer to the executor as the appellant. The appellant submitted that it had not been competent for the Municipality to apply to rescind the costs order without the court below having provided the reasons for the order. Moreover, it was contended that since the Municipality, in its founding affidavit, had relied on s 35(11)[7] of the Act, read with rule

[7] Section 35(11) reads as follows:

'The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it -

(a) in the absence of the person against whom that order or judgment was granted;

(b) which was void from its inception or was obtained by fraud or mistake common to the parties;

(c) in respect of which no appeal lies; or

64[8] of the Land Claims Court Rules, in the application for rescission, it could not thereafter rely on the court's common law power to rescind judgments allegedly wrongfully obtained. It is difficult to discern the precise nature of an additional ground of attack on the decision of the court below. What follows is best gleaned from the appellant's argument. It was contended that the interdict, set out in paragraph 2 above, encompassed not just the Community's claim to the land on which the development was due to take place, it also included a claim for restitution of a right in land by the Abathembu Community and that the costs order might also have ensued because of that other claim. This submission appears to be an extension of the argument that no reasons were supplied and that the application for rescission was therefore premature.

[14] In oral argument before us, it was contended on behalf of the appellant that, considering that Bam JP, as recorded in his judgment, had been informed of the true state of affairs by way of the late supplementary heads of argument and by way of direct communication to the court after judgment had been reserved, it can hardly be argued, as the Municipality now does, that had Bam JP known the truth, he would not have granted the costs order.

[15] The submission that the Land Claims Court's failure to supply reasons for the costs order precluded an application for rescission is fallacious. It must surely be so that the application by Mr Njemla was granted on the basis that the requirements for an interim interdict had been met. Those requirements are trite and, having regard to the facts asserted by Mr Njemla in his founding affidavit, it can hardly now be contended that the application should not have been granted. The costs order by the Land Claims

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(d) in the circumstances contemplated in section 11 (5):

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.'

[8] Rule 64(1) reads as follows:
'Subject to section 35(11) of the Restitution of Land Rights Act, the Court may suspend, rescind or vary, of its own accord or upon the application of any party, any order, ruling or minutes of a conference which contains an ambiguity or a patent error or omission, in order to clarify the ambiguity or to rectify the patent error or omission.'

Court in favour of the Community could only have been reached on the basis that costs followed the result. This ground of appeal must be rejected.

[16] The contention that because the Municipality, in its founding affidavit filed in support of the application for rescission, relied on s 35(11) of the Act read with rule 64 of the Land Claims Court Rules, the court below was not entitled to rely on its common law power of rescission is, in my view, equally without merit. The facts are common cause. The court had been misled, leading to an understandable, but erroneous conclusion that the requirements for the grant of an interim interdict had been met. Put simply, the Community had not been dispossessed of the land in question, was enjoying grazing rights in terms of a different statutory regime and was thus not entitled to the interim interdict. The rescission order was undoubtedly correct.

[17] It was submitted that, since another community, namely, the Abathembu community, had submitted a claim for the restitution of rights to the land in question on the basis of having been dispossessed of rights therein, the interdict and the allied costs order were in any event justified. This submission, too, is without foundation. The Community, and the Community alone, sought the interim interdict on the basis that they had been dispossessed of rights to the land in question. The Abathembu community was never party to the litigation. The very object of the application for the interdict by the Community was to thwart the development on that part of the land not subject to a claim by it under the Act. That basis having fallen away, the Community was not entitled to any order in its favour.

[18] It is thus not necessary to debate further whether, in the light of a land rights claim being lodged by the Community, in terms of s 10 of the Act, the processes set out in sections 11 to 14 had to be followed before the court could be said to lack jurisdiction, or whether the substratum of the claim having been admitted to be lacking, the court was deprived of jurisdiction, rendering the order a nullity ab initio. In my view, it is enough for the court to have rescinded its order on the basis that it had been misled into granting the order that it ultimately set aside.

[19] The submission on behalf of the appellant, that Bam JP had been alerted in the late supplementary heads of argument to the true state of affairs, and that this somehow justified the costs order, is misplaced. Instead of filing the late supplementary heads, Mr Njemla ought, rightly, to have withdrawn the application and tendered the Municipality's costs.

[20] I can see no reason why, considering the court's common law powers of rescission, the court below should not have ordered the rescission of the costs order, which was the only remaining live issue.

[21] Another issue remains to be addressed briefly. Appeals against costs orders only are generally discouraged.[9] In the present case opposition to the application for rescission was ill-advised. Taking it further, particularly since Mr Njemla has passed away, this is even more so. This appeal should never have been pursued.

[22] During the hearing before this court, the appellant's attorney made repeated reference to the documents filed in support of the application for the interdict. A full set of those papers had not been placed before the court. At one stage the appellant's attorney submitted that it might be better if he applied to have those documents now admitted on appeal. It was put to him that there was no formal application before us and that, in the event that he sought to pursue that path, he would have to file the necessary application with an attendant affidavit explaining why a fuller record had not been placed before us earlier. It was also put to him that the Municipality would probably seek an opportunity to respond and that this would necessitate a postponement which would have cost implications. The appellant's attorney was given an opportunity, during an adjournment, to consider his options. Subsequent to the adjournment he informed the court that he would not pursue the 'application'.

[9] Farlam, Fichardt and Van Loggerenberg *Erasmus Superior Court Practice* Loose leaf edition at A1-50.

[23] Twelve days after the hearing of the appeal, the appellant's attorney filed documents in the registrar's office entitled 'Application for Leave to Deliver Further and Written Argument of the Appeal with Reference to the Founding Affidavit in the Main Application'. Careful scrutiny of the further written argument reveals nothing novel. The supporting affidavit is distressing. Regrettably, because of what I intend to say about it thereafter, it is necessary to repeat the rather lengthy relevant parts thereof:

'The following transpired during argument of the appeal namely:-

3.1 That the record in the main application which was not before court was indeed necessary to have been placed before court as only the record of the rescission application was before court.

3.2 The court wanted to know the grounds upon which the main application was founded and I was unable to recollect these grounds from the cuff.

3.3 The court also enquired from me as to the content of the founding affidavit in the main application which were of relevance to the appeal after I had indicated a desire to have the matter postponed in order for the appellant to place the said record before court before the appeal is decided. I was unable to recollect the said content save to mention what I recalled nebulously that the founding affidavit has the content of the letter that I wrote to the Eastern Cape Regional Claims Commissioner namely that the land on which development was taking place was never dispossessed from the applicant's community as they continued to graze their livestock from this land. I was discouraged from insisting in the application by intimidation by the court that it has negative costs implications for the appellant. I ended up not applying for a postponement.

3.4 These is a lot that generally turned on the record of the main application which was not before court especially the applicant's founding papers

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Upon adjournment of the appeal for judgment thereon, I was curious to remind myself about the content of the applicant's founding affidavit, copy of which is annexed hereto marked "BB", save some of the annexures that bear no relevance to the instant appeal, in the main application which I quickly perused and then discovered the following relevant information therein, namely:-

4.1 That the claim by the applicant's community is not limited to the land on which the development was taking place at the time the main application was launched. That land on which development is taking place is only a small piece of the land claimed by the applicant's community being the land situated below and outside the fenced Enkululekweni Ministerial Complex and the land inside the fenced Complex being claimed land claimed by the applicant's

community. This Honourable Court evinced some impression that the land claimed by the applicant's community was limited to the one the development was taking place so much so that the communication that was made on behalf of the applicant's community that this land was not dispossessed from the applicant's community revealed absence of jurisdiction of the Land Claims Court to have adjudicated on the main application. I confirmed that this is not the position. The land on which development was taking place is only a small piece of the whole land claimed by the appellant's community.

4.1.1 I annex hereto marked "BBB" a copy of the land claim made by the applicant's community.

4.2 I further recalled that the land claimed by the applicant's community is held under a title deed which was issued to the respondent after the same land had been donated by the Eastern Cape Provincial government to the respondent's predecessor called Municipality of Umtata. The donation of the said land was pursuant to the advent of the new constitutional dispensation in South Africa regarding disposal of the state land the right to which, in terms of the Disposal of State Land Act of 1961, vests in the State President which powers, in terms of the Land Administration Act of 1995, the President may delegate to the National Minister of Land Affairs who, in terms of the latter Act may also delegate to the provincial Mec's in control of the land in a particular province at which the particular land is situated subject to the conditions which the Minster of Land Affairs may stipulate.

4.2.1 The said title was first issued to the Eastern Cape Provincial Government and a copy thereof is annexed hereto marked "CCC" which is annexure "TJP2" in the main application.

4.3 The said land was, in the process of exercise by the MEC in the Eastern Cape Province dealing with land matters, donated to the respondent's predecessor the Municipality of Umtata which later acquired ownership over the said land.

4.3.1 I annex hereto marked "DDD" a copy of the said title deed holding the remainder of Erf 912.

4.4 The said land was donated by the National Minister of Land Affairs to the Province of the Eastern Cape subject to certain conditions to which a list of all the properties being donated was attached and the remainder of erf 912 is one of such properties.

4.4.1 A copy of the said conditions stipulated by the National Minister of Land Affairs is annexed hereto marked "EEE".

4.5 As stated above, the same land was donated to the respondent's predecessor by the Eastern Cape Provincial government. This donation itself was subject to the same conditions stipulated by the National Minister of Land Affairs as those set out in annexure "EEE" above.

4.5.1 A copy of the said donation is annexed hereto marked "FFF".

4.6 I further recalled that amongst the grounds for the application which are set out in the founding affidavit in the main application, the applicant relied on the violation of the conditions of delegation annexure “EEE” above which according to the applicant rendered the purported alienation of the land in question by the Government to the respondent and by the respondent to some tenants who are developers by means of lease agreements invalid and a nullity. An order was also sought for the setting aside of the said lease agreements.
4.6.1 I noted the said grounds in themselves when upheld by the court a quo could form a solid basis for the award of the costs of the application to the applicant without any reference to the merits of the land claims of the applicant and Abathembu Nation.
4.7 I was further reminded about the fact that the main application had the support of the Acting Chieftainess of Abathembu controlling the area over which the claimed land is situated. She supported it by means of a confirmatory affidavit which was annexed to the applicant’s founding affidavit in the main application. I thus noted that in such circumstances, the applicant was not just championing the cause of Abathembu Nation when he brought the main application also protecting the land claim by Abathembu but had the consent of their leader Chieftainess No-Italy Mtirara.
4.7.1 I annex hereto marked “GGG” a copy of the confirmatory affidavit of Chieftainess No-Italy Mtirara and “HHH” the land claim by Abathembu the existence of which precluded development as commanded by the Deed of Ministerial Delegation of Statutory powers.
4.8 I was also alerted to the fact that the claimed land which is described as the remainder of erf 912 had, at the time the main application was launched, been gazetted. I recalled that it was one of the arguments against the development of the land in question by the developers at the instance of the respondent that the gazetting of the said land by itself precluded anyone from developing the said land. I thus noted that this ground alone could have formed a solid basis under the provisions of **section 11 subsection 7 paragraph (Aa) of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994)** basis for the court to have awarded the costs of the application to the applicant as the development of the land in question was prohibited under the said section.
4.8.1 I annex hereto marked “JJJ” a copy of the said gazette.’

[24] There are several problems with what the appellant’s attorney stated in the affidavit over and above the procedural improprieties attendant upon what he has resorted to. I deal with the last aspect first. There was no formal application before the hearing of the appeal, nor is there one now, to have the record supplemented. The

appellant's attorney has put part of the record of the application for the interdict before us by subterfuge. The problem is not only that there is no guarantee of the authenticity of what was attached to the affidavit. It is not the full record and one has no idea of what the answering affidavit contained in response to all the issues raised. Furthermore, there is no explanation on affidavit as to why the documents now deemed necessary for adjudication were not put before us in the first place.

[25] Turning to what is set out in the passages, reproduced in para 23 above, the following observations must be made:

The appellant's attorney has been intimately involved with this case, apparently from inception. His claim, that during the exchange with this court when the appeal was heard, he was unable to recollect the grounds on which the application for the interdict was based, is entirely unconvincing. His statement that during the exchange he recalled 'nebulously' that the founding affidavit had made reference to the letter he wrote to the Regional Claims Commissioner in which he had informed her that the community had never been dispossessed of the land in question lacks credibility and reflects negatively on him. Whilst it is true that in the founding affidavit he has now attached to the application there is reference to the fact that the community used the ground in question as grazing land, there is no reference to the letter, nor is it clear that the community had never been dispossessed of the land. In fact, all the indications are to the contrary. His statement that, subsequent to the appeal, he was 'curious' to remind himself about the contents of the founding affidavit is, in my view, dubious. The title deed conditions now referred to appear to have featured in litigation conducted some years before and they add nothing more to the appellant's case. During the hearing, the appellant's attorney was rightly, in my view, informed of this court's concern about escalating costs, particularly because an estate was involved and it might well have an increasingly prejudicial effect on a widow who might be financially vulnerable. The appellant's attorney was provided full opportunity to decide in turn whether to seek an adjournment in order to decide whether to apply formally to supplement the record with a full explanation as to why the parts now considered necessary had not been placed before us earlier. The appellant's attorney's statement that he was discouraged by the court

does not redound to his credit. A legal representative's duty is to assert his client's case fearlessly, after considering all the implications of the propositions put to him or her by the court. By attaching a part of the record to his affidavit to support an application to permit further written argument the appellant's attorney was seeking to achieve that which he had expressly stated he had decided against pursuing. At the very least that conduct is disingenuous.

[26] The respondent wisely decided not to respond to the application referred to in the immediately preceding paragraphs. In any event, none of what is now improperly being sought to be placed before us affects the reasoning that appears earlier in the judgment. It provided no new insights and does not impact in the least on the very basic propositions that the land in respect of which the interdict was sought had never been the subject of a land claim by the community represented by the appellant. More importantly, as stated and acknowledged by the attorney himself, that community had not been dispossessed of that part of the land in respect of which the interdict had been sought. The attorney's conduct, in bringing the belated application in the manner described above, is in my view deserving of severe censure and he should be ordered personally to pay the costs of the belated application. In addition, the registrar will be directed to bring this judgment to the attention of the relevant law society for investigation and for such action as it might deem appropriate in relation to the issues raised in paragraphs 24, 25 and 26 above and concerning his conduct in connection with what was initially placed before Bam JP, in the application for the interdict.

[27] Subsequent to the appeal hearing and after judgment was reserved, but before this judgment was finalised, Snyders JA became indisposed. This judgment is therefore a decision of the remaining members of the court.

[28] The following order is made:

1. The application for leave to deliver further written argument dated 27 August 2012 is dismissed and the appellant's attorney, Mr M Tshiki of Tshiki & Sons Incorporated, Mthatha, is ordered personally to pay the costs thereof.
2. The appeal is dismissed with costs.
3. The registrar is directed to serve this judgment on the relevant law society for investigation and action in relation to what is stated in para 26.

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MS NAVSA

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	M Tshiki Instructed by Tshiki & Sons Incorporated Mthatha Mthembu & van Vuuren Bloemfontein
FOR RESPONDENT:	Adv. T.M Ntsaluba Instructed by Mnqandi Incorporated Mthatha