THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20626/14

In the matter between:

THE SALEM PARTY CLUB	**FIRST APPELLANT**
THE LINDALE TRUST	**SECOND APPELLANT**
HENDRIK JOHANNES NEL	**THIRD APPELLANT**
CUAN KING	**FOURTH APPELLANT**
JOHATHAN GOTTFRIED STANDER & MARIA PAULINA STANDER	**FIFTH APPELLANTS**
DAVID CRAWFORD GOWANS	**SIXTH APPELLANT**
WILLEM CHRISTIAAN LODEWYK SCHOONBEE	**SEVENTH APPELLANT**
EZRA CHRISTIAAN SCHOONBEE	**EIGHTH APPELLANT**
KIKUYU LODGE	**NINTH APPELLANT**
JONATHAN FLETCHER HARRIS	**TENTH APPELLANT**
PATRICK GRANT BRADFIELD	**ELEVENTH APPELLANT**
E S A LODGES (PTY) LTD	**TWELFTH APPELLANT**
SEVEN SUMMITS PROPERTY INVESTMENTS (PTY) LTD	**THIRTEENTH APPELLANT**
KENNETH JAMES SEYMOUR RICHARDSON	**FOURTEENTH APPELLANT**
VARYLYNN SHARRON HILL	**FIFTEENTH APPELLANT**

PHILLIP GEOFFREY AMM	**SIXTEENTH APPELLANT**
PATRICK GRANT BRADFIELD	**SEVENTEENTH APPELLANT**

and

THE SALEM COMMUNITY	**FIRST RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**SECOND RESPONDENT**
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**THIRD RESPONDENT**
THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	**FOURTH RESPONDENT**
THE CHIEF DIRECTOR OF THE DEPARTMENT OF LAND AFFAIRS	**FIFTH RESPONDENT**
THE PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	**SIXTH RESPONDENT**
THE MAKANA MUNICIPALITY	**SEVENTH RESPONDENT**
THE REGISTRAR OF DEEDS	**EIGHTH RESPONDENT**
THE LAND CLAIMS COMMISSION EASTERN CAPE	**NINTH RESPONDENT**

Neutral Citation: *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016)

Coram: Cachalia, Seriti, Pillay, Mbha and Dambuza JJA

Heard: 19 February 2016

Delivered: 13 December 2016

Summary: Land claim to the Salem Commonage under Restitution of Land Rights Act 22 of 1994 (the Act): whether requirements for restitution established: Hearsay and expert historical evidence: proper approach to and admissibility of: approach to evidence as decreed in the Act to be applied in a manner consistent with the spirit and purpose of the Act.

ORDER

On appeal from: Land Claims Court, Grahamstown (Sardiwalla AJ sitting as court of first instance), judgment reported *sub nom* as *Salem Community v Government of the Republic of South Africa and others (Regional Land Claims Commission, Eastern Cape as referring party)* [2015] 2 All SA 58 (LCC):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Cachalia JA (dissenting)

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Introduction

[1] This appeal, from the Land Claims Court (the LCC), concerns a dispute over land rights in respect of a portion of land once known as the Salem Commonage. It

is situated some 20 km south of Grahamstown in the Eastern Cape, and measures 7 698 morgen in extent. It is properly described as: 'Remainder of the farm Salem, No. 498 and portions 1 to 3, 7, 8, 13 to 17, 19 to 33, 35, 36 and 38 of the farm Salem No 498, district of Albany'.

[2] The first appellant and 16 others – the affected landowners – appeal the judgment of the LCC which had found that a 'community' as defined in s 1 of the Restitution of Land Rights Act 22 of 1994 (the Act) existed, and was dispossessed of 'a right in land' after June 1913 as a result of past racially discriminatory laws and practices in terms of s 2 of the Act. This appeal is with leave of the LCC.

[3] The word 'commonage' comes from England and describes the 'condition of land held in common, or subject to rights of common'. The 'right of common' usually refers to 'the right of pasturing animals on common land',[1] but is not restricted to this purpose. More specifically it denotes an 'estate or property held in common'.[2]

[4] The Commonage was part of a bigger piece of land allotted to one of several groups of between 4000-5000 British settlers by the British Colonial Government in the first half of the nineteenth century. They settled in different locations in the Zuurveld, a part of which became the district of Albany, between the Bushmans and

[1] *The Oxford English Dictionary* 2 ed (1989) at 568.
[2] Ibid.

lower Fish Rivers, to the west and east respectively, and became known as the 1820 settlers.

[5] One of these groups was led by Mr Hezekiah Sephton. They settled in Salem in the vicinity of the Assegaaibos River, and were known as the Salem Party or the Salem Group. They established farms and used the Commonage for their common benefit. Some of the appellants descend directly from the original settlers while others bought their farms from the original settlers or their descendants. These farms are now used for commercial farming. For present purposes it will be convenient to refer to the settlers and their successors in title as the landowners.

[6] The first to ninth respondents (excluding the seventh and eighth respondents) oppose this appeal, but only the Regional Land Claims Commission (the Commission), and the Salem Community filed heads of argument. The community comprising some 152 persons claim to be descendants and beneficiaries of Xhosa speaking people, who it is alleged occupied the Commonage, but lost their rights to this land when they were dispossessed. The nature of the alleged dispossession shifted a number of times during the course of the proceedings, but at the time of the lodgement of the claim, it was said to have occurred through an order of the Eastern Districts Division of the Grahamstown Supreme Court), granted in 1940, subdividing the Commonage between the landowners. I shall refer to this ‘community’ as the claimants.

[7] The claimants lodged their claim in 1998. The Commission appointed Mr Vincent Paul as its project officer to investigate the claim in terms of s 12 of the Act. He compiled a report as a result of which the Commission validated the claim. The report was also the foundation of the Commission's referral of the claim to the LCC under s 14(1) of the Act. In terms of s 14(2)*(d)* the Commission sought relief, amongst others, for:

(i) the rights of the claimants to be 'upgraded to that of full ownership', and for

(ii) full ownership rights to the Commonage to be restored to the claimants through a legal entity that will be created for this purpose.

[8] It is implicit in the unusual form of relief sought by the Commission that, in its view, the forebears of the claimants could not have had full ownership rights to the Commonage. There could be no other reason why the Commission asked the LCC to 'upgrade' the rights of the claimants to full ownership rights. Nonetheless, as is evident from the pleadings set out below, full ownership rights are claimed, an issue to which I shall return.

[9] The referral document, the claimants' statement of claim (which admits all the averments in the referral document), and the further particulars furnished in response to the landowners' request for further particulars, constitute the material allegations upon which the claim is founded. The essential averments are difficult to follow and in some instances contradictory. But, as far as I can glean, they are the following:

(i) The claimants are a 'community' of black families whose forebears traditionally occupied the *entire* Commonage from the 1800s.

(ii) They acquired 'ownership rights, residential rights, grazing rights, and the right to use land for agricultural purposes, access to firewood, burial sites and the use of land as Commonage for the entire community';

(iii) In addition to the rights mentioned above, the community also occupied the Commonage beneficially for more than ten years.

(iv) The rights were acquired from a Chief Dayile – the last chief of the community – and were exercised in accordance with shared rules of usage under traditional law and the so-called location rules.

(v) The Natives Land Act 27 of 1913 was passed to prohibit blacks from owning land outside of scheduled areas, and the Commonage was not a scheduled area.

(vi) In 1926 the community, which then consisted of several hundred, was 'herded' into a location on the Commonage and placed under the control of a 'native superintendent'.

(vii) The subdivision of the Commonage was facilitated through the implementation of s 49 of Ordinance 10 of 1921 (erroneously referred to as s 47) and the Natives (Urban Areas) Act 21 of 1923, which entitled the Native Commissioner to restrict and control the rights of the black community;

(viii) In 1940 the Village Management Board, which represented the landowners, who owned the adjoining farms in the village of Salem, applied to the Supreme Court in Grahamstown to subdivide the Commonage and have it transferred into the names of the individual landowners.

(ix) The court granted the application against the background of the racially discriminatory legislation then in existence, which formed the basis of the dispossession of the community's rights over the Commonage. Most of the land was bought by white farmers under the Native Trust and Land Act 18 of 1936.

(x) Pursuant thereto the location, which was then occupied by 500 members, was disestablished in 1941.

(xi) The dispossession of the community's rights began in 1947 and continued until the 1980s.

[10] The landowners submitted a comprehensive response to the referral document in which they set out the history of what occurred on the Commonage from 1820, when the settlers arrived in Salem. It will become apparent from the way the proceedings unfolded in the LCC, and from its findings, that a proper understanding of this history is necessary. I discuss this later.

[11] For now, it is sufficient to set out the bare bones of their defence: When the Sephton Party of the 1820 settlers arrived in Salem, there were no other people, black or white, occupying this land. The Colonial Government granted the land, which included the Commonage, to these settlers. The settlers were given allotments of erven on which they built their homes and cultivated their crops. The Commonage was strictly limited to the grazing of their livestock. No cultivation of crops or residential accommodation was permitted. The landowners zealously protected their

collective interest in the Commonage. The effect of this was that each settler owned his allotted erven and an undivided share of the Commonage.

[12] In time the landowners individually began to employ labourers. And later, some of those labourers and their families were permitted to occupy a small portion of the Commonage so long as they remained in employment. In return they paid a rental to the Salem Village Management Board (the Board), a body the landowners created to manage their collective interest in the Commonage. In some instances the owners permitted their employees to graze their own cattle as part of the owner's quota of grazing cattle.

[13] The employees, therefore, never acquired any right in land over the Commonage, whether traditional or otherwise. Nor did they constitute a 'community' who had any right to this land.

[14] The landowners sought a court order to subdivide the Commonage in 1940 because of disputes between themselves over its usage. The order was not sought or granted as a result of any racially discriminatory law or practice. Its effect was to end the joint ownership of the Commonage and to vest individual ownership of part of the Commonage in each landowner.

Synopsis of the Evidence

[15] The following witnesses testified on behalf the Commission:

(i) Mr Vincent Quba Paul, whose investigation and report formed the basis of the Commission's referral to the LCC, was called to explain the grounds for validating the claim.

(ii) Professor Martin Legassick,[3] a historian, prepared two reports, and testified that the claimants: (a) had 'indigenous rights as descendants of Xhosa who occupied the south-eastern Zuurveld before it was colonised by European settlers', and (b) 'independently of their claim to indigenous rights', had built up 'rights to land and cultivation' because their forebears occupied a location called 'Salem commonage' from 1879 to1884 until they were dispossessed and evicted as a result of a racially discriminatory practice in the 1940s.

(iii) Mr Garth Chandler, a land surveyor, prepared a report for the Commission, as did Mr Adie Gerber on behalf of the landowners. Whilst Chandler testified, Gerber did not. They prepared a joint minute, after examining aerial photographs showing the locations of all the traditional dwellings in the greater Salem area in 1942. They observed that the traditional dwellings on the Commonage had pathways connecting them to commercial farms indicating that that their occupants may have been farmworkers.

[16] The claimants called two witnesses. The first, Mr Msele Nondzube, is the claimants' primary witness and it is largely on his evidence that their case rests.

[3] Professor Legassick, sadly, died in March 2016.

Importantly, his was the only testimony to support the averment that the claimants derived their rights in the Commonage through Chief Dayile. The second witness, Mr Ndoyityile Ngqiyaza, testified that he was born on the Commonage where his father cut firewood for sale and also ploughed the land. After the land was demarcated following the court order in 1940 his father was compelled to work for one of the farmers.

[17] On behalf of the landowners, Professor Hermann Giliomee, also an historian, submitted two reports. In his testimony he confirmed his conclusions, which were diametrically opposed to Professor Legassick's, that there were no grounds for the claimants to support the claims to indigenous title or that they had 'built up' rights as a community in the latter part of the nineteenth century.

[18] The landowners called six other witnesses to refute the claimants' case that an independent community of black people lived on the Commonage with land rights. They were Messrs David Mullins, Spencer Hill, Cuan King, Albert Van Rensburg and also Mrs Alice Bradfield and Mrs Ethel Page. Their evidence was to the effect that Africans, who resided on the Commonage, did so as employees of the landowners, and not as an independent community, who determined their own rules for the allocation and use of land rights.

[19] Material on the history of the period in issue, including historical texts upon which Professors Legassick and Giliomee relied to support their views, forms part of

the record. The parties also prepared a core bundle of documents that were used at the trial without proof of their authenticity. The historical material and documents provide the factual and contextual background to the disputes in this matter. Where I have relied on other historical material, this is clearly referenced.

Historical Background

[20] Although it was not the claimants' pleaded case, the LCC found that 'the Xhosa' originally occupied the Zuurveld, including the Commonage, in the eighteenth century and acquired indigenous rights to this land then. The claimants, it found, regarded themselves to be an integral part of those original occupants and thus retained their indigenous rights.[4] Consequently, it is necessary to begin this potted historical narrative in the latter part of the eighteenth century.

The period 1780-1820

[21] From 1652 until 1795, the Dutch were the colonial masters of the Cape, including, eventually the area with which this case is concerned. In 1795, Britain took control of the Cape but returned it to the Dutch in 1803, only to occupy it again in 1806. The Cape remained a British colony until 1910 when the Union of South Africa was established by the South Africa Act of 1909.[5]

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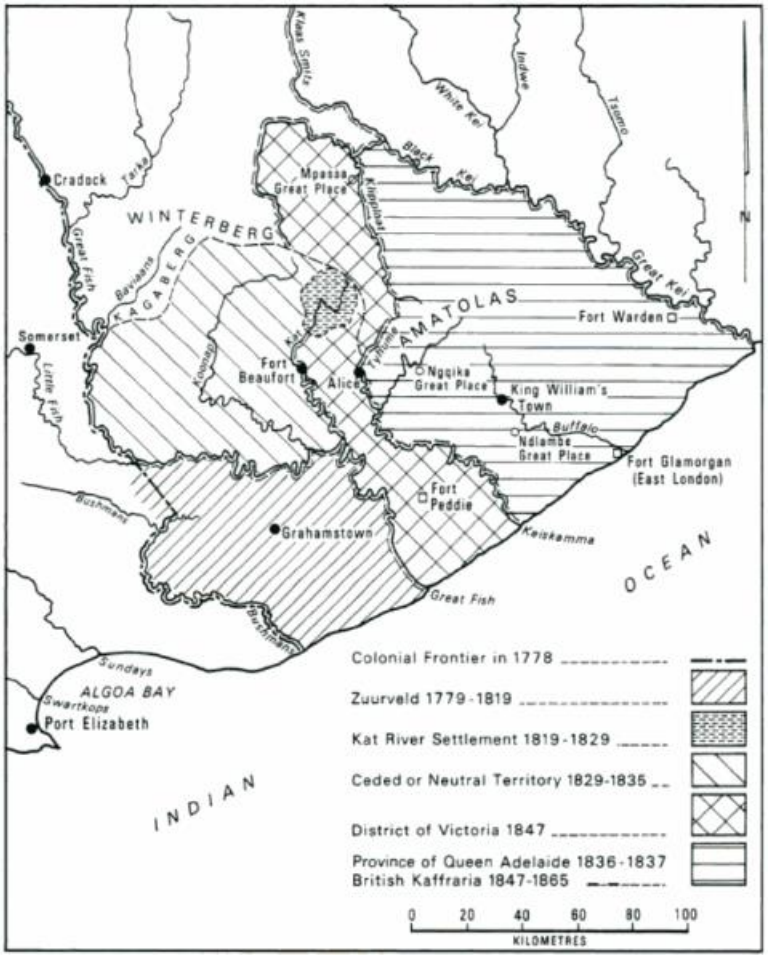
[4] *Salem Community v Government of the Republic of South Africa & others (Regional Land Claims Commission, Eastern Cape as referring party)* [2015] 2 All SA 58 (LCC) paras 114 and 148.
[5] T R H Davenport and Christopher Saunders *South Africa: A Modern History* 5 ed (2000) at p 36.

[22] From about 1780 the Cape Colony and the Xhosa had conflicting claims to the area between the Great Fish River to the east and the Sundays River to the west. The area included the Zuurveld where the Gqunukhwebe, a Xhosa tribe, was firmly established since about 1750, first under Tshaka and then under his son Chungwa.[6] Chungwa's behaviour, like those of other chiefs further to the east, was motivated by a 'desire to maintain his autonomy while maintaining his herds'.[7]



[6] J B Peires *The House of Phalo: A History of the Xhosa People in the Days of their Independence* (1982) at 59-65; Area depicted in map showing the shifting frontiers 1779-1848, reproduced in R Lubke & I de Moor (ed) *Field Guide to the Eastern & Southern Cape Coasts* (1998) at 80.
[7] J B Peires *The House of Phalo* (1982) at 58.

[23] Later, Dutch farmers (Boers) began moving into the area and occupied loan farms for which they paid a rental to the colonial authorities. This, they claimed, gave them rights to this land. By about 1790, there were 148 Boer families (about 1000 people) living on these farms.[8] There was on-going friction between the Xhosa and Boers regarding grazing, land possession and cattle raiding. Neither Xhosa nor Boer, it seems, were wholly innocent or wholly culpable.[9]

[24] Between 1779 and 1799 three Frontier Wars were fought between Boers and the Xhosa without any permanent resolution. [10]

[25] In 1793, Ndlambe, the Regent for the Xhosa nation, had sided with a Boer commando led by Barend Lindeque to drive all the Xhosa across the Fish River. In 1797, Ngqika became Paramount Chief of the Xhosa. Both Ngqika and Ndlambe were aware that the Cape Colony considered the Fish River to be the boundary dividing it from Xhosa territory further to the east. Ngqika respected that boundary and undertook to prevent his followers from crossing it. There is also evidence of Ndlambe having urged minor chiefs to withdraw across the Fish River to maintain peace with the Colony. Ndlambe would later rebel against Ngqika, who had moved west of the Fish River, and claim part of the Zuurveld.[11]

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[8] Jan C Visagie *Bevolkingsgroepe en Aansprake op Grond in die Suurveld* (2012) at 8, citing G M Theal (ed) *Records of the Cape Colony Vol II* (1897) at 393, which contains an entry in a journal by Bresler dated 18/2/1799..
[9] See eg J B Peires *The House of Phalo* (1982) at 56-58.
[10] Ibid.
[11] H Giliomee *Supplementary Expert Report.*

[26] By about 1799 the Zuurveld Xhosa were occupying the area along the banks of the Sundays and Bushmans Rivers.[12] But there is no indication in the historical material placed before us – other than in the evidence of Nondzube – of any Xhosa occupation of the area that is the subject of the present dispute. The papers, however, show that one of the loan farms occupied by a Boer, Mr Barend Bouer in 1785, was on land in the vicinity of where the Sephton Party later settled. It seems that Bouer had moved upstream along the Assegaaibos River, before their arrival. [13]

[27] In July 1786 the boundaries of the Graaff-Reinet District were proclaimed.[14] The eastern boundary of the new district was the same as the eastern frontier of the Cape Colony, which stretched from the coast up to the Great Fish River, to the confluence of the Fish River and the Baviaans River, and across the Winterberg to the Tarka River. This included the Zuurveld, all of which was now part of the Dutch Colony.[15]

[28] In 1806 the British annexed the Dutch Colony and the area it encompassed. They thus acquired sovereignty over the area, including the Zuurveld. But this act of

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[12] Ben Maclennan *A Proper Degree of Terror: John Graham and the Cape's Eastern Frontier* (1986) at 46-47.
[13] A E Makin *The 1820 Settlers of Salem (Hezekia Sephton's Party)* (1971) at 34-35.
[14] Hermann Giliomee 'The Eastern Frontier, 1770-1812' in Richard Elphick and Hermann Giliomee (eds) *The Shaping of South African Society 1652-1840* (1989) at 422-423.
[15] J S Bergh and J C Visagie *The Eastern Cape Frontier Zone 1660-1980: A cartographic guide for historical research* (1985) at 10-11.

annexation did not, in and of itself, extinguish any of the land rights the Xhosa or Boer inhabitants may have had at the time.[16]

[29] It is important to be cognisant that strife between Xhosa and Boer was not the only conflict in the Zuurveld.[17] The Boers were dissatisfied with various aspects of British control over the territory. This dissatisfaction resulted in two Boer rebellions in 1799 and 1801, and one later in 1815 at Slagters Nek, on the Baviaans River.[18] And among the Xhosa too, there were disputes over land. Chungwa, for example, clashed with Ndlambe, who had taken over his old grazing lands along the Bushmans River.[19] There is, however, no evidence of these disputes extending to Salem. Chungwa's name is today associated with 'Conga's Kraal', where he lived, and is situated about 50 to 60 kilometres from Salem.[20]

[30] In 1811 the Cape Colony, under whose jurisdiction the Zuurveld now fell, decided to end the perpetual conflict there. To this end it implemented a frontier policy aimed at establishing a fixed and regulated frontier between black and white.[21]

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[16] *Richtersveld Community & others v Alexkor Ltd & another* [2003] ZASCA 14; 2003 (6) SA 104 (SCA) para 49. The principle underlying the SCA's finding in this regard was confirmed by the Constitutional Court in *Alexkor Ltd & another v The Richtersveld Community & others* [2003] ZACC 18; 2004 (5) SA 460 (CC) para 69.
[17] B Maclennan *A Proper Degree of Terror* (1986) at 639.
[18] R Lubke & I de Moor (ed) *Field Guide to the Eastern & Southern Cape Coasts* (1998) at 434.
[19] J B Peires *The House of Phalo* (1982) at 57.
[20] H Giliomee's *Supplementary Expert Report*.
[21] R Lubke & I de Moor (ed) *Field Guide to the Eastern & Southern Cape Coasts* (1998) at 435.

[31] Lieutenant Colonel Graham was appointed to perform this task, which he undertook with concentrated brutality. Supported by an army of British troops, frontier farmers and a regiment that included Khoikhoi soldiers, the entire Zuurveld was cleared of all Xhosa presence in what became known as the Fourth Frontier War of 1811-1812.[22] Chungwa was killed. An estimated 20 000 Xhosa, were driven east, across the Fish River. A few hundred were killed, and many cattle seized in the operation. The Fish River was fortified to keep the Xhosa out and it became the boundary between the Cape Colony to the west and the Xhosa to the east. With the expulsion of the Xhosa by force of arms they were dispossessed of the land they had occupied for about 60 years. As I explain below, this expulsion would have terminated whatever 'right in land' they may have had.[23] The policy of racial separation had now begun in earnest.[24]

[32] In 1817 there was a meeting called by Governor Lord Charles Somerset at which Ngqika and Ndlambe were present. Somerset's purpose was to 'renew the friendship between the Colony and the Xhosa', but it seems that the main objective was to stop 'the thieving of livestock and the murder of colonists that sometimes accompanied it'. Ngqika made no claim to land to the west of the Fish River. But while acknowledging his authority he pointed out that he had no power over other chiefs. And an impossible burden would be placed on him if he were to be held

[22] J B Peires *The House of Phalo* (1982) at 65.
[23] *Alexkor Ltd & another v The Richtersveld Community & others* [2003] ZACC 18; 2004 (5) SA 460 (CC) para 70.
[24] Noël Mostert *Frontiers – The Epic of South Africa's Creation and the Tragedy of the Xhosa People* (1993) at 389-390.

accountable for the actions of others. He, however, undertook to do his best with his own people.[25]

[33] In 1819 a new Frontier War – the Fifth – began. It appears to have been triggered by the unauthorised action of Lieutenant Colonel Brereton, the newly installed military commander at Grahamstown. He led a commando to the east and raided 23 000 cattle from the Xhosa. They retaliated, determined to recover their cattle, by invading the colony and besieging Grahamstown in 1819. But they were repelled, and driven out, this time across the Keiskamma River, further to the east of the Fish River. The area between these rivers became 'ceded' or 'neutral' territory, which neither Xhosa nor white colonists were allowed to occupy.[26] Somerset secured this arrangement with Ngqika, the paramount chief of all Xhosa.[27]

[34] It was the policy of the then Colonial Government under Somerset to create a buffer area between Xhosa and the white inhabitants which included the Zuurveld, in which British settlers would soon settle. The 'ceded' territory would form a part of this buffer.

[35] The plan to populate the Eastern Cape, and particularly the Zuurveld, with British settlers was motivated by the need to strengthen the eastern boundary

[25] Ibid at 449- 450.
[26] Ibid at 467-507.
[27] J C Visagie *Bevolkingsgroepe en Aansprake op Grond in die Suurveld* (2012) at 14, citing G M Theal (ed) *Records of the Cape Colony XII (Intelligence from the Camp of Gwangwa),* which contains a detailed record dated 15/10/1819 of the meeting between Somerset and Ngqika, at 342-345.

separating the colonists from the Xhosa. This involved establishing a denser agricultural population of whites as there were insufficient numbers of Boers there. And with Britain beset by its own problems of poverty and unemployment, there were enough people willing to travel to the southern tip of Africa to start a new life here. In total, some 54 settler parties, numbering between 4000-5000 people were settled all over the Zuurveld.[28] By the end of July 1820, the Zuurveld, now the district of Albany with its headquarters in Grahamstown established in 1812, and depopulated of all Xhosa presence, bore no resemblance to what it had looked like a decade earlier.

The period 1820-1878

[36] The Sephton Party settled on the piece of land, measuring 5914 morgen, or 11828 acres in extent allocated to them, which they named Salem.[29] This included the Commonage. They soon erected a civic centre from the dilapidated reed and wattle building Bouer had left behind. In August 1820, a Sunday school was started.

[28] Ibid at 15-16.

[29] See the inserted map showing the original location of the settler parties of the Albany Settlement, 1820, reproduced in R Lubke & I de Moor (ed) *Field Guide to the Eastern & Southern Cape Coasts* (1998) at 436. The Sephton Party is at number 43 on the key, and Salem is the settlement located roughly in the centre of the map.

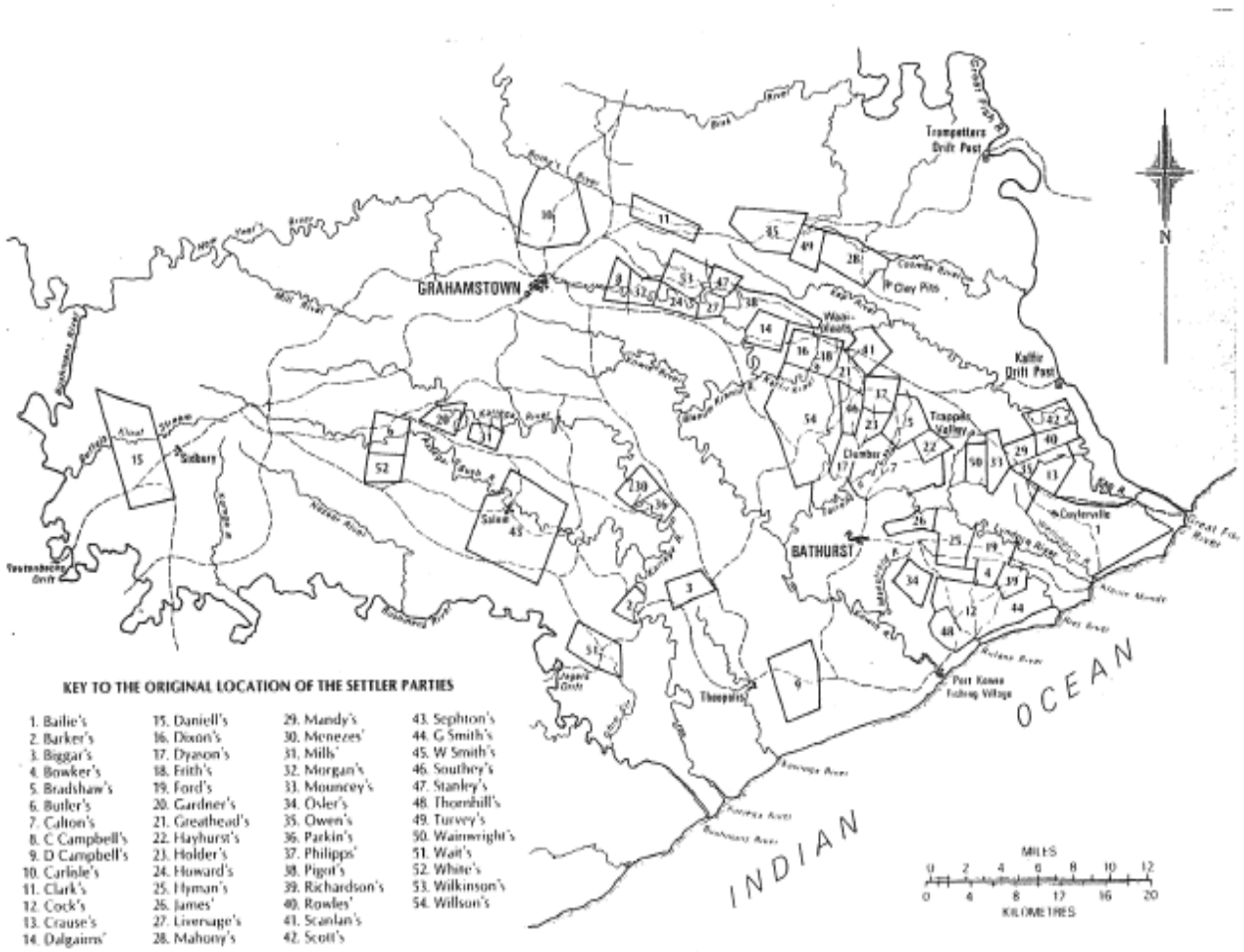

Figure 28.6: Map showing the original location of the settler parties of the Albany Settlement, 1820. (*The Settlers Handbook*, Chameleon Press, 1987.)

[37] The settlers soon took control of the Commonage. A minute of a meeting of the Sephton settlers in 1824 recorded that a total of 74 shares or subdivisions were provided giving each subdivision rights over 160 acres of the Commonage. Land was allotted to the Minister of the Church for the erection of a chapel, a burial ground and a church. Land was also made available for a school. The right of pasturage was limited to ten head of cattle and ten sheep per 100 acres and a further five sheep for every head of cattle withdrawn, and with two steers (until two years old) reckoned as one head of cattle. The wood, reeds and thatch on the Commonage not included in homesteads or enclosures were to be common to all for home consumption and

were not to be sold without the consent of the party of settlers. If so disposed the profits or produce was for the general benefit of the settlers. Natural springs were open for the use of all for culinary purposes and had to be accessible to all. Provision was also made for roads. During November 1826 the colonial authority surveyed the land allotted to the settlers, thus demarcating the boundaries of the settlement.

[38] Other than reports of cattle theft by 'natives from across the border' there was no contact between settlers and Xhosa-speaking people in the early years.[30] The apparent tranquillity of the Albany District was disturbed in December 1834 with news of huge Xhosa armies sweeping into the colony, provoking panic amongst the settlers. Grahamstown, and the nearby villages of Bathurst and Salem became 'hastily improvised laagers'. The villagers were inadequately armed and ill-prepared.[31] The Sixth Frontier War had begun.

[39] In Bathurst the invaders captured cattle, and the villagers fled in a convoy. In Salem it was reported that one of the settlers persuaded the raiders to leave them be in return for food provisions. The Salem settlers were not harmed, and the attackers moved on. No part of the Albany District was occupied. The war finally ended some nine months later with the Xhosa again suffering heavier casualties than the British.[32]

[30] A Makin *The 1820 Settlers of Salem* (1971) at 43.
[31] N Mostert *Frontiers* (1992) at 663-673.
[32] Ibid at 676-779.

[40] Mostert observes that the war hardened the attitudes of the settlers and 'hastened the evolution of what is South Africa's modern society and the aggravated racism of the British settlers was to be a significant factor in it, with repercussions throughout the nineteenth century and into the twentieth century'.[33] In all likelihood the Salem settlers would also have had this outlook, which would have extended to the Africans with whom they would later enter into master-servant relationships towards the end of the nineteenth century.

[41] On 15 December 1836 the first portion of the Commonage was formally granted to the settlers on a system known as perpetual quitrent, while the second portion was granted to them on 23 November 1847, on the same terms. The second portion was granted in terms of the provisions of Ordinance 15 of 1844. It provided for extensions of land grants to be registered in the Land Registers of the Colony, thus giving the settlers registered title to the erven and shares in the Commonage.

[42] Such land grants were hereditary, and owners had the right to sell the erven with their share of the Commonage. The purpose was to give security of tenure to the farmers and to encourage them to develop the farms. Farms were marked by beacons and registered as diagrams. Rents were adjusted according the size and quality of the land.[34]

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[33] Ibid at 778.
[34] N Mostert *Frontiers* (1992) at 399.

[43] In 1848, the security of tenure of the Salem settlers was further entrenched when their quitrent rights were converted into freehold rights after all rental payments had been redeemed. The allotment of the Commonage to the Salem settlers entitled each owner of an erf to an undivided share in the Commonage. Freehold title therefore gave the settlers permanent and absolute tenure over the land with freedom to dispose of their erven and shares in the Commonage, and is a pivotal factor in the resolution of the issues in this appeal.

[44] Almost 100 years later, in 1940, the Grahamstown Supreme Court said that the grant contemplated the permanent settlement of settlers at Salem. It was of grazing land to the Salem Party of erf-holders to be held communally, and if a person ceased to be an erf-holder, he ceased to have any right in the Commonage.

[45] The settlers formed a committee to manage their collective interest in the Commonage (the Committee).[35] Minutes of meetings reflect constant supervision of its usage. Thus the Committee took steps to ensure that the owners of the homesteads did not erect buildings on the Commonage (1856), ensured that whoever took wood for their private use was limited to the quantity and levied a cost per load (1861) and stopped cattle grazing by inhabitants of a nearby mission station, Farmerfield (1862). The Committee also formulated regulations ‘for the better management of the Salem lands and the Commonage’. The proposed regulations included determining the numbers of livestock the owners would be entitled to graze

[35] See eg A E Makin *The 1820 Settlers of Salem* (1971) at 62-63.

(1866). The Committee also leased a small portion of the Commonage measuring two acres for a period of five years (1887).

[46] The settlers used the Commonage for other collective purposes as well. In 1832 a Church was built. A cricket ground was established in 1844, and is still used today. Much later, possibly in 1894, a community hall was built. A cattle-dipping tank was also built in 1912. All of these events took place before 1913, which is the cut-off date for claims under the Act, and undermines the claim by the claimants to rights over the entire Commonage.

[47] During this period three more Frontier Wars – the Seventh in 1846, the Eighth in 1850, and the Ninth in 1877 – were fought. None of these wars concerned land occupied by the 1820 settlers. The Seventh took place largely in the Amathole Mountains, far from the disputed area in this case, and there is no evidence that any of the fighting occurred in Salem or its surrounds. The Eighth was largely in British Kaffraria – the area between the Keiskamma and Great Kei Rivers – east of the Albany District and the 'ceded' territory. There was, however, some conflict within the 'ceded' territory, but there is no evidence that it crossed over the Great Fish River and affected any part of the Zuurveld, including Salem. The Ninth and final Frontier War resulted in a severe defeat for the Xhosa after which their leaders fled into the Amathole Mountains, and further north.[36] After those defeats the Xhosa were made to surrender even more territory to the British. So ended, Mostert observes, 100

[36] N Mostert *Frontiers* (1992) at 1249-1250. The LCC mistakenly believed that there were ten wars (see *Salem Community (LCC)* para 137).

years of war between the Xhosa and the Cape Colony, and led to the military fall and subjugation of the Xhosa nation.[37]

[48] From the time of the arrival of the 1820 settlers until 1878, almost 60 years later, there is no evidence of any significant African presence in Salem. This is hardly surprising as the policy of the Colonial Government was to restrict their entry into the area under its control except for the purpose of obtaining employment. This policy was the precursor to the 'pass laws' introduced during the Apartheid era.

[49] The policy to restrict African entry into the Colony except to obtain employment was explicitly stated in the ignominiously named Kafir Employment Act 27 of 1857. This law was passed in the aftermath of the tragic events of 1856 -1857 – which the LCC erroneously thought was a Frontier War – when the Xhosa heeded the delusion of prophetess Nongqawuse to kill their cattle in the belief that the British settlers would be driven into the sea, and a new prosperity would arise. Huge numbers of Xhosa people, who heeded her call, died of starvation while many others were forced to seek employment in the Cape Colony.[38]

[50] By the late 1860s there were more than 500 Africans living with 985 cattle on 21 farms at Assegaai Bush, approximately 40 km from Salem, while at Kierage there

[37] Ibid at 1254; South African History Online *Frontier or Xhosa Wars 1779-1879: Colonisation and Land Supremacy*, available at: *http://v1.sahistory.org.za/pages/governence-projects/frontier_wars/frontier_wars.htm* (accessed 7 June 2016).
[38] See M Legassick's *Expert Report* and the authorities therein cited.

were some 2 500 living on 39 farms. Many would have been labour-tenants or rent paying tenants, while sharecropping between Africans and farmers, who had run into financial difficulties, was also prevalent.[39] There is no evidence of Africans living there in any other capacity.

The period 1878-1900

[51] Subsequent developments in Salem and on the Commonage in particular, must therefore be considered against the background of the Colonial Government's policy as it applied to Africans at the time.

[52] As Africans began to seek employment and live in areas now under the jurisdiction of the Colonial Government, laws were passed to regulate this development and to prevent illegal squatting. The Native Locations Act 6 of 1876 and its amendment by Act 8 of 1878 were the initial steps in this direction. They applied to the dwellings of 'Natives', defined as 'Kafirs [Xhosa], Fingoes, Basutos, Hottentots, Bushmen and the like', who were not in the employ of the owner of the private property on which the dwellings were erected. An owner of private property could establish a 'native location' – defined as exceeding five huts within one square mile – only with the consent of the Governor. An inspector of native locations was to be appointed to 'supervise and manage' such locations. The inspector's functions included collection of a hut tax from each occupier in the location. Any livestock in the location had to be registered, and if not, was liable to be impounded.

[39] See H Giliomee's *Supplementary Expert Report* and the authority therein cited.

[53] As the influx of and the need for African labour increased these laws were repealed and replaced by the Native Locations Act 37 of 1884, which provided for the better supervision of these locations and the more efficient collection of hut taxes. The definition of a 'Native Location' was relaxed to cover any number of dwellings on any farm occupied by three or more male adults, instead of five dwellings, as its predecessors had provided for. The Governor's consent was still required for the establishment of a 'Native Location'.

[54] This statute, therefore, restricted the occupation of land by Africans on private property, which included common land such as the Commonage in issue in this case. It is apparent that any rights the occupants derived from residing in a 'Native Location' – probably as tenants – could only be acquired through agreement with the owner of the private property on which the location had been established. Some of these tenants may have been what historian Professor Colin Bundy has referred to as 'squatter-peasants', who had entered into leases with farmers to farm a plot of land so as to avoid wage labour.[40]

[55] The Village Management Boards Act 29 of 1881 provided for the establishment of management boards to regulate villages and communities such as in Salem. Section 19 provided for:

'the management and protection of all common pasture lands and the preservation of all vegetation thereon, and the fixing of the number and description of any live-stock any

[40] See H Giliomee's *Supplementary Expert Report,* citing C Bundy *The Emergence and Decline of the South African Peasantry* (1979) at 134.

inhabitant shall be allowed to keep and depasture thereon . . . or . . . the impounding of all animals trespassing on such common lands'.

Pursuant to this Act the Salem Village Management Board (the Board) was established to ensure proper control over the Commonage. In effect it continued to function as its predecessor, the Committee, had done. It is beyond dispute that by virtue of the power vested in the Board it exercised exclusive control by law over the Commonage on behalf the landowners.

[56] The first indication of any African presence in Salem is in a report on the 'Returns of Natives, Stock etc' of the Inspector of Native Locations for the District of Lower Albany. The report includes the locality, the name of the proprietor, number of huts on each farm, population size and livestock. The first report compiled in 1878 recorded that there was one dwelling on the Commonage with three people residing there without cattle. There were, however, significantly more Africans and huts on some of the landowners' farms; for example there were eight huts, 41 Africans and 68 cattle on Mr Hill's farm. Throughout the district and in Salem there were 322 huts and an African population of 1533.

[57] The Inspector continued to render returns for Lower Albany until the end of August 1884, when he reported 24 huts, 130 people and 70 cattle on the Commonage. This was his last report because the management of the Commonage was now, in his words, 'under the Village Management Act'. In other words the management of the Commonage, including the collection of hut taxes, was henceforth the responsibility of the Board. It must follow that any 'right' Africans may

have had to reside in a hut on any of the erven or on the Commonage could only have been derived through agreement with the landowner or the Board.

[58] There is, however, no evidence of what occurred on the Commonage over the following 20 years. But some indication of what may have happened may be gleaned from Fiona Vernal's study of the Farmerfield Mission, which was close to Salem.[41] Concerning the period 1884-1916, she writes that Farmerfield tenants faced the same economic woes as other Africans in the Albany District. This, together with pressures on Africans to support the British after the outbreak of the South African War in 1899 caused thousands to leave Albany creating a temporary labour shortage.

[59] But Albany offered few opportunities for economic advancement and no residential options aside from white owned farms or overcrowded locations. This situation, commented the civil commissioner for the Albany District in 1899, 'does not lend itself to the improvement of the native who can never become more than a servant or tenant at the pleasure of a landlord'. And that other than in African locations on the outskirts of Grahamstown, 'there is no place where the native can make himself a permanent home, consequently there is little room for improvement'. Dispossessed of land and too poor to purchase any, Vernal continues, Africans sought employment on white farms and entered into sharecropping arrangements to

[41] Fiona Vernal *The Farmerfield Mission – A Christian Community in South Africa, 1838-2008* (2012) at 198.

make ends meet. It is likely that these conditions were generally prevalent in the district.

The period 1900-1942

[60] By the turn of the twentieth century labour requirements of white farmers had changed and the policy of prohibiting their employees from residing in locations on their properties began to hamper them. The Native Locations Act 37 of 1884, which gave effect to that policy, was repealed and replaced by the Private Locations Act 32 of 1909. Although this Act did not apply to the Commonage, which was administered under the Village Management Act,[42] its paternalistic tone and policy objectives were to be mirrored in the location regulations promulgated for the Commonage a decade later. In addition, it was possible for the Governor to extend the operation of the Private Locations Act to areas such as the Commonage,[43] though this never happened.

[61] The Private Locations Act had as it general purpose to 'regulate the residence of natives on private property in rural areas in the Cape Province'.[44] It therefore provided for labour tenants to reside in 'private locations' established on the farms with the consent of a local magistrate. This would allow farmers 'to keep upon their farms a certain number of men in addition to their continuous employees' in order to meet their seasonal labour requirements. But each application to establish a private

[42] Section 15 of the Private Locations Act 32 of 1909.
[43] Ibid.
[44] See the *Memorandum on Private Locations Act 32 of 1909 (Cape) and Regulations thereunder*.

location would be carefully scrutinised so as to prevent 'any large influx of natives as squatters into a European farming area'. Among its other purposes was to prevent or minimise 'the evils arising from the system known as "Kaffir Farming" . . . and preventing native residents from becoming a nuisance to neighbouring landowners'.[45]

[62] The Board continued to exercise control over the Commonage under s 19 of the Village Management Act. A letter from the Colonial Secretary to the Board on 7 November 1906 pertinently pointed out that the right of pasturage belonged only to the 'inhabitants', which both Professor Legassick and Professor Giliomee accepted was a reference to the landowners. Another letter from the Colonial Secretary's Law Department on 19 December 1907 regarding the fencing off of the Commonage warned that this would endanger the 'commonage rights' of other title holders. In 1910 the Board made regulations pertaining to the presence of dogs on the Commonage, demonstrating its active involvement over a range of issues pertaining to the area.

[63] Around 1916, (although this is not completely clear from the record) it seems that regulations[46] were adopted to inter alia control grazing rights on the Commonage, which were restricted to the landowners and their lessees.[47] Africans could lease grazing rights from a landowner only if they were sole occupiers of an erf or resident in Salem and in the service of a white resident, but the landowner had to

[45] Ibid.
[46] Regulations Touching Kaffir Beer & Knobkerries under Act 12 of 1893.
[47] Ibid reg 23.

give notice to the Board of such intent.[48] Furthermore, no person was entitled to live on the Commonage without the Board's permission unless a hut tax was paid for each hut.[49]

[64] The Board also had regulations dealing with 'native locations' on the Commonage promulgated in 1917 (the location regulations).[50] They permitted the Board to set aside a portion of the Commonage for the purpose of a 'native location' and to appoint a superintendent to oversee the location.[51] A person wishing to reside in the location had to apply for a site-permit from the superintendent, and had to pay a site-rental.[52] The hut or dwelling was deemed to be the Board's property, and if the holder of a site-permit was ejected from or left the building, compensation was payable for its value.[53]

[65] The location regulations were promulgated under s 147 of the South Africa Act 1909. The expressions 'site-rental' and 'site-permit' were used in place of a 'hut tax'. The reason was, as the Secretary for Native Affairs explained to the Provincial Secretary in a letter dated 9 December 1915, 'hut tax' had a special meaning applying to taxation under several statutes, and its use in connection with local payments could cause confusion. Legassick testified that such taxes conferred rights

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[48] Ibid reg 25.
[49] Ibid reg 32.
[50] Location, Knobkerry, Kafir Beer and Curfew Regulations, adopted 13 June 1917 under Acts 23 of 1897 and 12 of 1893 and 30 of 1895. In 1919, these regulations were repealed and replaced by new regulations covering the same subject matter. The differences between the two sets are not material to this judgment.
[51] Ibid reg 2.
[52] Ibid reg 3.
[53] Ibid.

of residence to the African community on the Commonage. I deal with his evidence later in this judgment.

[66] The location regulations also prohibited residents from grazing animals on the Commonage,[54] open-air dancing and assembly[55] or subletting their dwellings without the superintendent's permission.[56] Residents were furthermore prohibited from carrying 'knobkerries',[57] subjected to curfews under which they were not permitted to be in public spaces between 21h00 and 04h00,[58] or to make 'Kafir Beer' without the Board's permission.[59]

[67] However, as early as February 1920, the Board had practical difficulties with there only being a single location on the Commonage, because it meant that employees (servants and farmworkers) of the landowners would have to live some distance from their places of employment. The Board therefore sought the Administrator's permission to amend the location regulations so as to allow the employees to erect huts on the Commonage closer to their places of employment and to designate each hut so erected as a location under the express control of the Board. The Administrator responded by saying that because ownership of the Commonage is vested in the landowners, and not the Government, he had no

[54] Ibid reg 7.
[55] Ibid reg 19.
[56] Ibid reg 24.
[57] Ibid reg 29.
[58] Ibid reg 30.
[59] Ibid reg 31.

objection to the regulations being amended. But he advised the Board to seek the advice of the Commissioner of Native Affairs in Pretoria.

[68] Accordingly, on 10 May 1920, the Board wrote to the Commissioner (Secretary) of Native Affairs concerning this problem. In addition the letter mentions that sharecroppers occupied some of the huts on the Commonage also close to the private erven for the convenience of the landowners. The Board also sought advice on the status of huts that were removed from the location where the location regulations applied and the rest of the Commonage, which fell under the Board's jurisdiction where the regulations did not apply; the huts were now erected on private erven where the site-rental for which the regulations provided was not applicable.

[69] On 17 May 1920, the Secretary responded by advising that s 19 of the Village Management Act gave the Board authority to deal with huts on the Commonage. However, he went on to say that where parts of the Commonage (outside of the location) had been leased for agricultural purposes, the Board had forfeited its control and could not object to a lessee allowing his 'native servants' to reside there. The solution to this problem, he advised, was to 'make it a condition of such leases that no native should be permitted to reside on the land leased without the permission of the Board'. This exchange of correspondence suggests that Africans living on the Commonage at that stage did so at the behest of the landowners, who had leased parts of the Commonage, outside of the location, from the Board for their employees, labour tenants and those with whom they may have had sharecropping arrangements.

[70] In the meantime the arrangement whereby some landowners leased parts of the Commonage from the Board began to generate discord among other landowners. This appears from a letter that Mr Gardner, an erstwhile member of the Board, wrote to the Administrator on 13 November 1920 complaining that the Board was managing the affairs of the Commonage to the detriment of the inhabitants. In particular, he complained that the Board was leasing parts of the Commonage without collecting sufficient rental and allowing 'squatting natives' to erect huts in the location, graze their cattle and cut firewood on the Commonage at a nominal charge. He also complained that the Board permitted some of the lessees to allow sharecroppers to plough the land that had been leased. Gardner asked the Administrator to appoint a commission of enquiry to investigate these matters.

[71] The Board responded to the complaint in a letter to the Magistrate in Grahamstown dated 21 January 1921. The main points were the following:

(i) Because the Commonage was more extensive than was necessary to meet the pastoral requirements of the erf-holders, a portion was set aside and fenced for their use at a rental of 2/6d per acre.

(ii) It was common practice for erf-holders to engage the services of labour tenants who were allowed to let and cultivate land allocated for this purpose.

(iii) The rental had been reduced from 2/6d per acre to 1d per acre because the drought brought many people in Salem to the verge of starvation.

(iv) It was acknowledged that letting parts of the Commonage was illegal, but the practice had begun some time ago, when Gardner was a member of the Board,

before the present Board was elected. The current Board continued the practice as it was advantageous to the erf-holders.

(v) Some land had been set aside for the servants of the white inhabitants; this was in the interests of the whole community.

(vi) No unemployed ‘native males’ over the age of 18 years were allowed to reside in the location.

(vii) The charge for firewood was 4/6d per load. The Board had no power to prevent any erf-holder or lawful occupier from cutting wood on the Commonage and there was nothing to prevent such erf-holder or occupier from allowing his servants to use a portion thereof.

(viii) Many of the erf-holders would welcome a scheme for the division of the Commonage amongst the erf-holders as had been done in the Stockenström District, as this would result in better use of the Commonage for farming purposes.

[72] There were no further developments regarding Gardner’s complaint. Nevertheless, the Board continued to be confronted with problems over the management and the application of the location regulations to the Commonage.

[73] The minutes of a meeting of the Board’s Public Finance Committee in June 1921 alluded to some of these: the increasing laxity in collecting revenue from huts and for grazing; the inconsistency in allowing some members of the community to graze large herds free of charge while others had been charged grazing fees for their

servants' stock, countenancing the practice of 'native half-sowers' (sharecroppers) and indiscriminate wood cutting by 'native squatters'.

[74] The meeting concluded that the continued existence of the location and appointment of a superintendent was not justified 'as it would be a simple matter for every employer of labour to be responsible for the proper housing of his monthly servants, subject to the satisfaction of the Board'. By 1934 this was precisely what happened, when the location ceased to exist.

[75] Among the remedies suggested to deal with its management problems were that 'masters' were to take responsibility to collect 'Native dues' from their own servants and all chopping of wood by 'Natives for selling purposes be stopped'. Further, erf-holders should desist from letting 'grazing rights to Natives and others outside the jurisdiction of the Board'.

[76] Another problem that appears to have arisen was that the original boundaries dividing the farms from the Commonage were no longer clear. This resulted in some of the landowners erecting structures that encroached on the common land. The Board sought the surveyor-general's advice on this matter. In an undated letter the surveyor-general recommended that in every case of obvious encroachment, where it had existed for more than 30 years, and the party refused to surrender it, he be allowed to remain in possession, as he would have proved 'prescriptive occupation', ie acquisitive prescription. Where he could not prove this he should be compelled to

remove the encroachment or pay a rental to the Board. The surveyor-general emphasised that the 'common land is a valuable asset of the Board and it is to every erf-holder's advantage to jealously protect it from unlawful occupation and to assist the Board to do so'. He also advised the Board to resurvey the farms so as to establish their boundaries clearly. There is no indication in this letter that the Board was concerned about any encroachment or unlawful occupation of the Commonage by Africans.

[77] On 5 August 1921, Ordinance 10 of 1921, 'the Village Management Boards Ordinance, 1921' was promulgated. It repealed the Village Management Act of 1881, which had hitherto regulated the activities of village management boards such as Salem's. Section 61(32) gave the Board the power to make regulations for 'management and protection' of the Commonage, which merely continued the power it had already exercised for 40 years, and before this, when the Committee managed the community's affairs. Section 61(32) also allowed it to control the numbers of livestock inhabitants were entitled keep and depasture on the Commonage. An 'inhabitant' was defined as a person who occupies property of a value of not less than 100 pounds within the Board's area, which de facto excluded Africans from grazing their cattle on the Commonage.

[78] This regulation created difficulties as some of the erf-holders claimed an entitlement to graze their full quota of livestock, which would include cattle of their employees. In response to a query from the Board as to how to deal with the problem, the Provincial Secretary, on 18 October 1921, advised that s 61(32) of the

Ordinance permitted it to debar erf-holders from leasing their grazing rights and empower itself to grant such rights to non-inhabitants.

[79] But this did not deal with the difficulty of distinguishing between cattle of 'Europeans' and 'Natives'. The Board therefore sought the advice of the Provincial Secretary as to whether it would be permissible to insist that 'Natives' branded their cattle so as to distinguish theirs from those of 'Europeans'. On 4 March 1923, the Provincial Secretary advised that any regulation dealing with this matter would have to apply equally to 'Natives and Europeans as a regulation . . . applying solely to Natives from the provisions of which Europeans are exempt, would amount to class legislation and, as such, would be ultra vires'.

[80] On 14 June 1923 the Natives (Urban Areas) Act 21 of 1923 came into force. It gave municipalities greater powers to segregate housing, to police African communities and to control their movement through the pass system. By regulating the movement of Africans between rural and urban areas and providing for locations to be created for African occupation, the Union Government hoped to stem the tide of urbanisation away from rural areas.[60] Section 23(3)*(c)* of this Act provided for local authorities, which included village management boards in terms of s 29, to regulate the management and control of these locations. But as was mentioned earlier, there was a strong view within the Board and among the erf-holders that the establishment of a location on the Commonage would be counterproductive.

[60] J M Pienaar *Land Reform* (2014) at 95.

[81] This notwithstanding, on 23 July 1926, the Provincial Secretary (on behalf of the Board) sought the advice of the Magistrate, Alexandria as to whether the existing 'Native Location' may, with the approval of the Minister of Native Affairs, be established under the Natives (Urban Areas) Act. This request was referred to the Magistrate, Grahamstown, as Salem fell within the latter's jurisdiction.

[82] After investigating the matter, the Magistrate, Grahamstown wrote to the Provincial Secretary, Cape Town on 10 September 1926 recommending that the location not be established under the Act. He explained that the Board had a very small rateable valuation, with practically no funds, and did not wish to establish a location. Moreover, he continued, there were only 25 'European' rate-payers and only ten 'Native' adults living in the present location under 'practically rural conditions'. There were no further developments regarding the establishment of a location for a few years after this.

[83] On 11 September 1929, the issue that had arisen some eight years earlier in the meeting of the Board's Public Finance Committee – the subdivision of the Commonage among the landowners – was revived. The Board wrote to the Administrator on behalf of the landowners to seek his advice on whether this course of action was permissible.

[84] The correspondence between the Board and various government departments after this reveals that there was at least one significant legal

impediment to subdividing the Commonage between the present landowners. This was, as a letter from the Registrar of Deeds to the Provincial Secretary on 31 August 1931 pointed out, the condition of the original grant to the settlers stated that shares of grazing rights over the Commonage could only be transferred by the sale of a share or shares in the original arable lands or homestead of the settling party. Yet in some cases, grazing rights were sold off the allotments to which they originally belonged, apparently after the Deeds Office had sanctioned this. It was, therefore, unclear whether the current landowners had the right to subdivide the Commonage.

[85] Meanwhile, on 7 December 1931, the Assistant Health Officer for King William's Town visited Salem to inspect conditions in Salem. Among the observations he made in a report to the Acting Secretary for Public Health, Pretoria were: that there were presently only 22 families on the 50 allotments, the total 'European population' being 96; the Borough Ranger was the superintendent of the location in which ten families resided; each family paid a site-rent and had a small plot around his hut for cultivation; only 'natives' employed in the settlement were allowed to reside in the location; most of the inhabitants kept their 'native employees' on their own properties and there were three 'natives' employed for the eradication of cactus. The report concluded that the health of the community was 'very good'. The report made no mention of Africans residing anywhere else on the Commonage.

[86] The following health report was dated 30 June 1932. It records the 'White population' being approximately 84, and the estimated 'Native population possibly 300-400. No figures available'. It also notes that there is a 'small native location of

some half dozen huts; Most natives reside on the owners' private erven'. The health report a year later, in June 1933, repeated most of the information in the earlier report (including the estimated 'Native' population) except for recording the 'White' population as 90. These health reports are important because they confirm that apart from the ten African families who were living in the location at the time, most of the other employees were living on the properties of their employers. The LCC, as I discuss later, completely misconstrued these reports by finding that they confirmed a significant occupation of Africans on the Commonage.

[87] By June 1934, two years later, the Health Report stated that the 'White population was approximately 100' and the 'Native' population unknown. Significantly it recorded that the 'Native Location' had been done away with, with 'Natives' now residing on their employers' land, as the Board's Public Finance Committee said should happen in 1921. Again, there was no mention of Africans residing on any part of the Commonage.

[88] During this time the Board continued to lease parts of the common land adjoining the landowners' private property to the landowners in return for which they paid rent to the Board. One such example was to Mr Henson, who had erected his dwelling on one acre, had arable land of three acres, two acres for a camp and two acres for 'native huts'. In his case, therefore, Africans residing on the portion of the Commonage he leased would have done so by virtue of individual agreements with him.

[89] One of the proposals was for a five-year lease for 160 morgen on the common land to Mr Hill. Because of the huge extent of the land sought to be leased, there were objections from other landowners. So, the Board forwarded his application to the Administrator for approval on 6 August 1934. Hill had, however, in the face of the objections agreed that his application could be held over pending the Board's investigation into the feasibility of subdividing the Commonage among the erf-holders proportionately.

[90] The leasing of parts of the Commonage was beset with problems. Correspondence between an erf-holder and the Administrator in December 1934 mentions that one of the Board members, Mr Dickinson, had been leasing 20 acres for 25 years at a rental of 1/6 per annum an acre. However, the measurement of the leased area showed that he had enclosed 31 acres, 11 acres more than he had been paying for.

[91] Another Board member, Mr Hewson, resided on the Commonage, as did his brother. They paid the Board 2/6 a year. By residing on the Commonage, and not on a farm, they evaded the payment of rates and taxes, as the Commonage was not taxed as rateable property. It also transpired that Board members had been leasing some of the Commonage to people who were not erf-holders. In one case Mr Hall, who was a Board member at the time, had also leased ground even though he was not an erf-holder. The Board's function was to represent the collective interest of erf-holders to the common land, and therefore, only such people were eligible to be Board members.

[92] The difficulties that had arisen over the leasing of parts of the Commonage gave further impetus to the proposal to subdivide the land among the owners. The Board motivated this on the basis that the whole Commonage would then become rateable property.

[93] In June 1935, the Board sought advice from attorneys on whether erf-holders could fence in and cultivate portions of the Commonage for their own use. Their legal opinion was that this would only be possible if all erf-holders agreed. This followed implicitly from the fact that ownership of the Commonage vested in the erf-holders for their collective benefit; the Board could not itself grant such consent as it merely managed the Commonage on their behalf.

[94] In 1936 the erf-holders began to press the subdivision issue again. On 14 January 1936 its attorneys wrote to the Provincial Secretary to motivate their case. The letter stated that the Board had limited funds to combat the growth of noxious weeds on the Commonage, which had also become a breeding ground for jackals to the intense annoyance of the farmers; further that there was dissatisfaction because this land area could not be farmed communally, their stock got mixed, inter-bred, could not be camped and were lost to the owners.

[95] The letter stated that the erf-holders, who owned rights to the Commonage, had been trying to secure unanimity to subdivide the land so that each owner could fence, clean and cultivate the land for his own benefit. They had, however, not been

able to do so because one of the owners was 'sufficiently cantankerous to disagree although she makes very little use of the Commonage herself'. Accordingly, the Administrator's assistance was sought to resolve this quandary by introducing legislation to allow for the subdivision despite the opposition of an erf-holder. In a letter dated 29 February 1936, the erf-holders' attorneys requested that the proviso to s 49 of the Village Management Boards Ordinance 10 of 1921 be repealed so as to enable the Administrator to grant consent to the Board for this purpose.[61]

[96] The Provincial Secretary replied to the Board's attorneys on 2 April 1936. He considered it not possible for the matter to be dealt with by way of the proposed legislative amendment as, in his view, this would allow local authorities to interfere with the ownership rights of erf-holders who had placed land under their control. His advice was that the matter should be dealt with by obtaining the authority of a court to transfer an equitable portion of the area to each owner. This had apparently been the course adopted by the Bradshaw Party of settlers, who had obtained a court order in its favour on 18 May 1928.[62] On 6 August 1936, the Provincial Secretary informed the Board that the Administrator had refused its request to amend s 49 of the Village Management Boards Ordinance.

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[61] Section 49 provided as follows:
'**As to the disposing, enclosing, etc., of village lands.**
49. When the Board shall at any meeting duly convened for that purpose, resolve that it is expedient to dispose of or alienate or permit to be built upon, enclosed, or cultivated, any lands, whether common pasture lands or not, which shall be vested in the said Board, or which, not being Crown land, are under the control of the board it shall be lawful for the Board to apply, in writing, for the consent of the Administrator to the proposed sale, lease or other arrangement for the occupation or enclosure of any part or portion of such lands, and upon obtaining such consent, but not otherwise, to execute or carry into effect such sale, lease or other arrangement: *provided that no lands the ownership of which is not vested in the Board shall be dealt with under this section except with the consent of the owner thereof*.' (emphasis added)

[62] *Ex parte Bradfield & Three Others* (EDL) unreported case (18 May 1928).

[97] On 16 January 1940 the Board instituted ex parte proceedings in the Grahamstown Supreme Court for an order subdividing the Commonage in proportion of 153 morgen to each of the original erven. The application was brought in the name of the Board's Chairman, Mr Gardiner. The factual basis for the relief sought appeared from the unreported judgment of the court in *Ex Parte Gardiner: In re Salem Commonage*.[63] They were:

'[T]he commonage is too large for the small number of erf-holders, with the consequence that stock are often lost or stolen; that the Village Management Board has not the means so to adequately control it as to keep strangers' stock from trespassing or to keep down the growth of noxious weeds and the extension of erosion; that jackals and other vermin breed on the commonage, and that there is no means of eliminating them; that erf-holders cannot keep good stock owing to their own stock mingling with and becoming contaminated by inferior stock; and that erf-holders are unable to fence off and cultivate portions of the commonage for their private use.'[64]

[98] It is evident that there is no reference to Africans residing or 'squatting' in a location or elsewhere on the Commonage among the problems the landowners were concerned about. Nor did they rely on any racially discriminatory laws to support their cause of action. Their primary contention was that the erf-holders were in law absolute co-owners in undivided shares of the Commonage, and thus entitled to the order sought. The learned judges (Gane J, Lansdown JP concurring) concluded that the grants did not make the settlers co-owners in undivided shares of the land, for if

[63] *Ex Parte Gardiner: In re Salem Commonage* (EDL) unreported case (29 February 1940).
[64] Ibid at 1.

they were, it would have been a simple matter to approach the Registrar of Deeds to partition the land.[65]

[99] The grant, said the court, contemplated the permanent settlement of settlers at Salem.[66] It was of grazing land to the Salem Party of erf-holders to be held communally, and if a person ceased to be an erf-holder, he ceased to have any right in the Commonage.[67] Of particular interest was that the court compared the rights of erf-holders over the Commonage to 'native law' which, the court noted, also recognises that land held under tribal tenure belongs to the tribe, and not the individuals who constitute it. On the face of it, so the court reasoned, the relief sought was incompetent.

[100] However, given the difficulties faced by the erf-holders alluded to above, the court decided to leave the matter in the hands of the Administrator to exercise his discretion regarding the subdivision. Paradoxically, it considered that s 49 of Ordinance 10 of 1921, which the Administrator had refused to amend to deal with this issue, properly interpreted, gave him this authority. The Court accordingly issued a rule nisi on 29 February 1940 calling on all interested parties to show cause why the Administrator should not consent to the subdivision. It was ordered that the rule nisi was to be published twice in the Daily Mail, and twice in the Union Government Gazette, with an interval of not less than six weeks between the two publications. It was also to be served upon the Minister of Lands for the Union of South Africa and

[65] Ibid at 3.
[66] Ibid at 4.
[67] Ibid at 6.

upon the Administrator, the Registrar of Deeds, and the Department of Education, because of its possible interest in the school on the Commonage.

[101] On behalf of the Administrator, the Provincial Secretary wrote to the Magistrate, Grahamstown, to examine the issue and express an opinion on the matter. After investigating the matter the Magistrate wrote to the Administrator on 8 May 1940 recommending the subdivision. He expressed his reasons as follows:

'. . . [T]he only persons who can claim to make use of the Commonage now, would not suffer in any way if the Commonage were subdivided . . . .

The only persons who might feel annoyed would be those who have been making a profit out of grazing the animals of friends and Natives on the Commonage.

. . . *The position would now appear to be that the Commonage is now used by persons, some of whom have a good class of stock and others only scrub animals.* There are unending squabbles in consequence, and certain owners quite rightly take strong exception to the subletting of grazing rights to certain undesirable persons who are not erfholders.

Certain of the erfholders could make very good use of the portion of the ground for agricultural purposes or gardening or both, and are prevented from making a fair living out of their property . . . . Also, as long as the present state of affairs exists this very large Commonage must be used <u>solely</u> for grazing, and the difficulty of collecting stock for dipping, and the consequent increase in the difficulty in keeping down tick-borne diseases, make the duties of the cattle cleansing officers almost impossible of satisfactory performance.' (emphasis in italics added, underlining in original)

[102] After the Administrator's consent had been secured for the proposed subdivision, the court granted a final order on 8 August 1940. Following the final order for subdivision of the Commonage, the Native Commissioner recommended the disestablishment of the location on 15 July 1941. He did so after visiting the area in the presence of the Chairman of the Board a week earlier. He discovered that there was only one disused and dilapidated hut where the location had previously existed. That hut had been occupied by an African employee of the Board. The location was 15 acres in extent – less than one per cent of the land mass of the Commonage – and had ceased to exist some years earlier.

[103] The location, he learnt, had never been properly defined by resolution of the Board, but a portion of the Commonage was set aside for use as one. A superintendent, as envisaged in the regulations, was not appointed, and the location regulations were never really put into operation.

[104] Regarding the population size he reported the following:

'The European population of the village is between 90 and 100 with 25 families, while the Native population is about 500, of whom about 50 work as servants. These servants live on the premises of their employers, and on the present Commonage which is privately owned. I am given to understand that certain Europeans have permitted squatting in the past, but I am asking the local District Commandant to investigate the matter.'

[105] The estimate of 500 Africans living in the Village seems excessive when one has regard to the number of dwellings there were at the time, as I point out below. Be that is it may, the Commissioner was concerned with the disestablishment of the location on the Commonage, and not with whether there were Africans living elsewhere on the Commonage. He was not conducting some sort of population census as the LCC misleadingly put to Mr van Rensburg during his testimony, which is dealt with later.

[106] What is however clear from this report is that the estimated 50 servants resided on both the premises of their employers, and on the Commonage – in all likelihood on the portions that had been leased by erf-holders such as Henson. The Commissioner's conclusion was that even if the labour requirements on the farms increased in the future 'there would be ample room on each farm for these Natives to live as each farm will range in extent from 150 to 600 morgen'. The recommendation for the location to be disestablished because it served no proper purpose echoed the view of the Board's Public Finance Committee two decades earlier.

[107] Following the Commissioner's recommendation the Minister of Native Affairs formally, acting under s 2 of the Natives (Urban Areas) Act, abolished the location on 14 November 1941. This seems to be why the claimants were misled into thinking that the 'dispossession' occurred as a result of this racially discriminatory law.

[108] In regard to where Africans in Salem were residing in 1942 the aerial photographs of traditional dwellings taken at the time were inspected by Mr Chandler for the Commission and Mr Gerber for the landowners. They prepared a joint minute. Their pertinent findings, as appearing in the joint minute and the evidence of Mr Chandler, were:

(i) There were 48 traditional dwellings in the greater Salem area of which 22 were on the original farms and 26 on the Commonage around the Assegaai River adjacent to the farms;

(ii) There were pathways from the 26 dwellings on the Commonage leading to the farms. This may indicate that these dwellings were occupied by farmworkers.

The LCC overlooked this crucial evidence.

[109] On 15 February 1943 the Board informed the Administrator that the Board would cease to function once the land was surveyed and the subdivision was completed. It had in the meantime stopped exercising its right of control over the Commonage and no longer issued permits for wood or other materials, or leased the Commonage for grazing. The subdivision of the Commonage was finalised some time in 1943. Thereafter, the Board ceased to exist.

Conclusions on the historical background

[110] This history and documentary evidence suggest the following conclusions:

(i) Before the 1820 settlers arrived and settled in the Zuurveld, the Xhosa speaking tribes who had occupied parts of this area since about 1750, but not Salem, had been expelled in 1811 during the Fourth Frontier War.

(ii) The settlers settled all over the Zuurveld, which became the District of Albany, on (now) unoccupied land, formally granted them by the Cape Colony, including in Salem.

(iii) The Salem settlers were initially granted the Commonage on a system of quitrent, which was converted into freehold title in 1848, after their rental payments had been redeemed. The settlers exercised authority over the Commonage.

(iv) After the cattle-killings in 1856-1857, Africans began to seek employment in the District of Albany and the Cape Colony passed laws to control and regulate these developments. Land held in common, such as the Commonage, was also governed by laws that empowered the Board to exercise authority over the Commonage, which it did.

(v) From about 1878, Africans who sought employment in Salem resided on the private erven of the landowners and on the Commonage with the permission or the agreement of landowners. Among those who entered into such arrangements were labour-tenants and sharecroppers.

(vi) Among the Africans who resided on the Commonage were those who resided in the location, which covered a small area of 15 acres, measuring less than one per cent of the land mass of the Commonage. The number of huts in the location never exceeded ten, and from about 1920, the landowners felt that the establishment of a location would create difficulties for their employees because of its distance from

their farms. Most employees were therefore housed on the properties of their employers. And by about 1933 the location had ceased to exist.

(vii) There is no documentary evidence of any community or group of people being 'herded' into a location and thereafter forced to abandon this location, as the claimants have pleaded.

(viii) The landowners had difficulties managing the Commonage for the reasons mentioned earlier and therefore sought and obtained a court order in 1940 to subdivide the Commonage.

(ix) The aerial photographs of 1942 show that that there were 48 huts in Salem of which 22 were on private erven and the remaining 26 on the Commonage in close proximity to the private farms, and connected by paths to the farms. In the absence of any other evidence to the contrary, the 26 dwellings on the Commonage were in all likelihood occupied by Africans who worked for landowners.

(x) Even assuming that some of these Africans did not work directly for the landowners, it is clear that at least a substantial portion did (as evidenced by the pathways in the aerial photographs). And, given the jealousy with which the Commonage was guarded by the settler community, and the fact that the African community was tolerated only because it provided labour for the farms in the area, it seems likely that the African community as a whole occupied a form of servant-master relationship with the landowners.

(xi) There is no documentary evidence of an independent African community of 500 people residing on the Commonage or in the location, much less of such a

community exercising any authority over this land at any time. The documentary evidence points firmly to the contrary.

The Viva Voce Evidence

[111] The LCC set out the evidence neither fully nor fairly. It is therefore necessary for this court to do so.

Mr Vincent Paul

[112] The first witness for the Commission was Paul. It was on the basis of his report to the Commission that this claim was validated. Neither his report nor his evidence is easy to follow.

[113] His evidence in chief, read with his report, appears to amount to the following: The forebears of the community occupied the Commonage ‘as far back as the 1800s’, although this date is not really relevant because his investigation was concerned with events after 1913. The community had ‘ownership rights, residential rights, grazing rights and the right to use land for agricultural activities, access to firewood and the use of the land for burying the dead’. They also practised sharecropping with white people and combined their cattle for ploughing. The native returns of 1880 indicate that there were nine huts, 42 people and 47 cattle on the Commonage, which proves that there were ‘natives’ living on the Commonage. A location was established on the Commonage in 1926. Thereafter, the landowners

decided to divide up the Commonage among themselves, without consulting the African community, who rightfully owned this land.

[114] The African community was dispossessed of these rights with the implementation of s 47 of Ordinance 10 of 1921 through the court order subdividing the Commonage, and the disestablishment of the Location under the Native (Urban Areas) Act 21 of 1923. The dispossession began around 1947 and dragged on until the 1980s. Africans, who were living on the Commonage, numbering some 450 people, were, after they were dispossessed, permitted to ‘squat by their families’ on the farms of the landowners, while others left to live in Grahamstown. The community was no longer able to produce from the land and were forced to sell their livestock.

[115] As to how the community had decided where its members were permitted to plough or to graze their cattle, his testimony describes an idyllic state. He was told, he says, that the families of the claimants combined their oxen and ploughed collectively. No specific areas were allotted for this purpose because the land belonged to the whole community. Their kraals and huts were scattered over the Commonage. The cattle belonged to the whole community. They produced enough for the Community and the surplus was sold. No one else was allowed to use this land. The community had no written rules but had their own traditional way of doing things.

[116] Later on, he testified that the community lived by these unwritten rules passed down the generations and also by the rules of the location regulations. But his version of how this community organised itself was contradicted by the version Mr Notshe put to him on behalf of the claimants.

[117] Mr Notshe put to him that the claimants would testify (and Nondzube later did) that under the rules governing access to the land each family was given a piece of land where they lived, while their cattle were allowed to graze on communal land. When the head of the family died the eldest son inherited that piece of land. And when new families arrived on the common land, the head of that family would ask the chief to allocate a piece of land to him for his homestead. The newcomers' cattle would also graze on communal land.

[118] Despite this version of the existence of a highly organised system of rules at the head of which was a chief who exercised ultimate authority being totally at odds with that of Paul's idyllic system, he testified that he did not dispute it. When challenged on how he could have 'misunderstood' the nature of the community's social system in such a gross manner, he was unable to give an answer.

[119] Under cross-examination by Mr Roberts for the landowners he was asked whether he had examined the returns of the Native inspector of 1878, which formed part of the bundle of documents. He responded that he did not have time to look at them. When asked to examine the document and comment upon the entry that in

1878 there was only one hut and three people on the Commonage, without livestock or farming equipment, he answered, evasively, that this was before 1913. When pressed further as to whether one hut and three people constitute a community, he responded, again elusively, that he disagreed because the people he interviewed told him they were a community.

[120] Regarding the methodology he used to compile his report, he testified that in June and July 2003, he interviewed three people from whom he took statements. These were Mr Lindile Magwala, Mrs Nofikile Simayile and Mr Tim Ngqiyaza Ncede. These statements and the archival information formed the basis of the report. He conceded that he had not examined many of the documents that were placed before the court.

[121] Asked to comment on another report contained in the document bundle, prepared for the Commission by a consultant, Itemba, on 9 September 2002 and which was signed by Mr Gwanya, the Regional Land Claims Commissioner, indicating that the people who were dispossessed were labour tenants, he said that he was not aware of this report when he commenced his investigations. He then testified that it was merely a preliminary report. His investigation showed that the community was reduced to labour tenants as a result of the dispossession, and they were not labour tenants before this.

[122] He was questioned about why he had not interviewed the landowners before preparing his report. He first responded that he had a meeting with them but they did not cooperate. He then adjusted his evidence saying that he arrived at the meeting to tell them that there was a claim against their land, not to interview them. The Commission had instructed him not to interview the landowners, because 'that is the process of restitution; you deal with the people who are affected . . . .' By this he meant the claimants.

[123] When asked to confirm whether the land was vacant when the 1820 settlers arrived in Salem, he answered unclearly, evasively and contrary to the documentary evidence and the facts. The following exchange occurred between Mr Roberts and Paul:

'Adv Roberts: When the 1820 settlers arrived there, this land was not vacant, were people living there. Is that what you are saying? – People who were there were . . . forced out of the land at the time they arrived.

Who forced them out? – They were forced out by those who wanted to buy the land.

So they were forced out by the settlers . . .-- They were forced out by the white people.

Which white people? – South African white people.

Were they forced out by the Salem settlers or someone else? – The white people pushed the black people out. They were pushing them out because they wanted to put in the settlers in that land.'

[124] Thereafter, the following exchange took place between Mr Roberts and Paul, whose responses were again obtuse:

'Adv Roberts: 'Now let us get back to what information you obtained on the three people that you interviewed. Did you establish from them whether they occupied the entire commonage or just portions of the commonage? –

According to the people traditionally they occupy the land.

The entire commonage? – According to them yes.

Did you establish from them whether…they were aware of the Village Management Board? – They were aware.

And were they aware of the fact that the Village Management Board had authority over the commonage? – They were not aware, sorry. They were not aware of the specific of the functions of the Village Management Board because they were not part of it.

Did they acknowledge that, did they say that any portions of the commonage had been occupied by white people? -- Yes.

So they acknowledged that white people had certain rights on the commonage. – They acknowledged certain rights after they were pushed over or forced to move some to move further.

When was that Mr Paul? – That was during the dispossession.

That is from 1947 according to you. – That was at the time of dispossession after 1913.

And is it your evidence that after 1913 up till this date of dispossession only the black people occupied the commonage to the exclusion of the white people or not? – No I did not say they were not there. They were around.

So the white people were there. – They were there.

Where were they? – Which period are you referring to?

To dispossession, I have said 1913 to 1947. – They were around because they forced themselves into the land as I indicated.

When did they force themselves onto the land? – As it clearly stated the (indistinct) had land even before 1913 because they forced themselves after the people were chased away forced themselves onto the land ***even before 1913***.

I do not understand that. Can you just explain? Are you referring to the commonage? – I am referring to the commonage.

When did this forcing onto the land commence? – They forced themselves when they arrived because people were pushed over during the wars. They stayed on the area. There …was a portion of land that was undivided which was divided at a later stage.

Sorry can you just speak up please. Sorry Mr Paul? Maybe it is my age, I do not know. Can you just, sorry just repeat it? – I am saying they forced themselves into the land and they stayed on their erven.

Yes? – There was a portion of land that was still, I mean undivided as a commonage. When it was proposed that it must be divided, that is when the people because the case that we are dealing with here is after 1913 case.

Ja. – That is when people they totally dispossessed of their land.

Let us take 1913 as a starting point. Who then occupied the commonage? – As I indicated the black people were part of that.

What does that mean? Did they occupy only a portion of the commonage or the entire commonage in 1913? – Because the way things were done to them they still regarded themselves as owners of the land because they were not consulted. The process was not fit for them so in their minds they still kept that *this is our land*.

Mr Paul I will ask this question again. What was the factual situation as at 1913? Did the black people occupy the entire commonage or not? – They said it was their land.

Sorry, they said it is their land. – They said it was their land.

The question is still did they physically occupy the entire commonage as at 1913? Or did they not tell you that? – All they said the land was theirs.

So they did not tell you that as at 1913 they occupied the entire commonage? – They said they occupied the land. They stayed there and according to them and because of the history on that land that land was theirs.' (emphasis in bold and italics added, italics in original)

[125] He was then asked whether the areas where the cricket field was established (in 1844), the Methodist Church (in 1832) and the Civic hall (in 1894) were part of the claim to which he answered in the affirmative. This was followed by another incoherent response:

'Adv Roberts: So do you concede that there was no dispossession after 1913 of that particular area which includes the church, the lands, the hall and the cricket ground. -- As I said there were properties that were reduced because of the occupation then.'

[126] It was put to Paul that his interview with Mrs Simayile, one of the three people he interviewed to establish the claim, recorded that she was born on Mr Lloyd's farm in 1905, which he confirmed. Thereafter the following exchange took place:

'Adv Roberts: She was therefore not born on the commonage, correct? – She was born on the farm that is within the commonage in Tyelera.

. . . But what it then means is that the farm of Mr Lloyd was situated on the commonage – according to what she said.

Surely you must have accepted what she said or did you reject what she said to you? – Mine was to interview her and hear what she says; that was my duty.

What she clearly told you we read this she was born on the farm of which the owner was Mr Lloyd. And if that was on the commonage Mr Lloyd was resident on the commonage, correct? – Yes.'

[127] He confirmed too that the first time he had heard of Chief Dayile was during the inspection in loco, just before the hearing commenced, and that nobody he had interviewed or his archival investigations brought the existence of any such chief to light before this. The existence and role of Dayile is one of the central disputes in this case, and it is crucial to the claimants' case that the community derived its right in land on the Commonage through him.

[128] The Commission did not adduce evidence from a single claimant to corroborate Paul's hearsay evidence as to what was said to him during his oral interviews. Instead they sought to rely on the expert testimony of Professor Legassick to which I now turn.

Professor Martin Legassick

[129] Legassick's evidence, as I indicated at the outset, was aimed at establishing that the claimants had indigenous rights over the Commonage arising from the

Xhosa occupation of the Zuurveld in the eighteenth century, and independently of these rights had acquired rights as descendants of those persons who had occupied a location on the Commonage since 1879.

[130] His original report traces the occupation and expulsion of the Xhosa from the Zuurveld, the arrival of the settlers, and attempts by the Xhosa to return to the Cape Colony thereafter. The report does not deal with the acquisition of indigenous rights by any Xhosa speaking community in the Zuurveld or any part of Salem.

[131] His three key findings were: first, the native returns from 1878 to 1884 indicated that the habitation of the Commonage by 'natives' was 'officially recognised'. They therefore had 'rights to occupy the land', and 'rights to graze cattle on it'. Because they had occupied the land for a long time – about six decades – they would have established explicit or implicit rules of behaviour, including those determining access to land such as grazing livestock, where to plough, collect wood and bury their dead. They thus constituted a 'partly self-sufficient community'. The second finding was that the population figures from June 1884 to July 1941 showed that a substantial black population had not lived in the location and could not all have been servants; so they probably lived on the Commonage. And finally, because they had not been consulted by state officials – by the Board, the Magistrate or the Court – concerning the subdivision of the Commonage, or of the disestablishment of the location, this constituted a racially discriminatory practice, which 'violated their right of occupation and dispossessed them'.

[132] In his evidence in chief he testified that the Xhosa never accepted their expulsion, because they besieged Grahamstown after this in 1819 to 'remove this alien town from the Zuurveld and recover their land'. But he acknowledged that they had been unsuccessful in achieving this. Nevertheless, he testified, after the settlers arrived in 1820, there is no reason to suppose that the Xhosa would not have returned to their land between 1820 and 1870.

[133] Regarding the period after 1870 he offered the opinion that because Africans living on the Commonage and elsewhere were required to pay a hut tax this necessarily implied that they had had a right to occupy this land. The reports of the Native Commissioner in 1883 to the effect that Africans living in those huts appeared to be 'of a better class' whose huts 'are larger and cleaner' was indicative, he testified, of people 'subsisting for themselves', and not having resided there as farm labourers.

[134] The establishment of the Board under Act 29 of 1881, and the promulgation of the 1906 regulations, to manage communal areas on behalf of the landowners, he testified, 'ignored' and 'infringed' the existing rights of Africans residing on the Commonage.

[135] The reference in the Board records to squatters on the Commonage, he said, was probably a reference to 'people who were living on the Commonage, ploughing

the land and grazing cattle, but also possibly to supplement their subsistence by working for the farmers'.

[136] In regard to the claimants' assertion in the 'List of Agreed Facts' to the effect that the Board's location regulations recognised the Xhosa as inhabitants, and implied that all the inhabitants had lived in the location, he said that he had incorrectly approved of this because of the pressure of time when he was compiling his report. He testified that the true position was that there was small population inside the location and there was a population outside. Those outside the location were referred to as squatters because they were not recognised by the Board, and those inside the location had rights under the regulations. But the regulations were never put into operation because the Board was never properly in control of the location or the Commonage. So, he concluded, the community conducted their affairs on the basis of unwritten rules.

[137] With reference to the magistrate's report in July 1941, estimating that there had been 500 Africans of which 50 were servants living with the farmers, he testified that the remaining 450 were therefore not employees and had lived on the Commonage. The correspondence on cattle branding also indicated that the provincial authorities were aware of the existence of Africans on the Commonage. And he agreed with Paul's evidence that the community had combined their oxen for ploughing purposes and that they had cattle that grazed on the Commonage.

[138] He concluded, in his evidence in chief, that Africans who lived on the Commonage ‘may well have been connected to Africans who lived there in the eighteenth century, in one way or another who had established rights through the Cape Colony and their registration as hut tax payers in the 1870s and 1880s’. They lived there until the 1940s and were dispossessed by the judgment of the court, the actions of the Administrator and the disestablishment of the location in 1941.

[139] Under cross-examination by Mr Roberts he insisted, incorrectly, that he had not used the word ‘infringe’ to describe the impact of the 1906 regulations on Africans exercising their rights on the Commonage; he had used the word ‘ignore’. When it was proved to him by reference to the record that he had used this word he answered that he had been referred to the 1881 Act, not the regulations, and that the Act and regulations should not be conflated. He then testified that the Act was framed in ignorance of the fact that there was an African community on the Commonage, and when the Board formulated the regulations, it had infringed their rights, but the Act ignored their rights. But pressed further, he accepted that by providing that the right to pasture had belonged to white residents only, its effect was to exclude or ignore blacks from having this right; in other words it took the right away.

[140] Later on, when it was put to him that the effect of the regulations was that the African community was no longer able to decide where their livestock could graze because this was subject to the Board’s control, his answered in a manner that became a constant refrain in this case: ‘there was an attempt to control’. In response

to a further question whether this in fact took away their rights, he responded emphatically: ‘I say it’s an infringement of their existing rights’. And further, this was done on the basis of a racially discriminatory piece of legislation. It must be pointed out that this evidence all dealt with events before the cut-off date for the institution of land claims in 1913.

[141] When asked further whether three people and one hut in 1877, as recorded by the Inspector in 1878, constituted a community, he first resisted answering the question, and then grudgingly accepted that it is possible that no community existed then. However, he insisted, the three people already had rights and as more people joined they formed a community and acquired those rights. He then conceded that the three people would initially have had individual rights, but, he insisted, these rights would later have been ‘transformed’ into the rights of a community.

[142] Questioned further as to whether he accepted that the settlers became co-owners of the Commonage when it was granted to them, he responded that he could not comment on this because he is not a lawyer. When it was explained what this meant he conceded it. But he then added that as he understood it, they had the rights to graze cattle on the Commonage, but he was ‘not sure whether this (gave) them ownership’.

[143] When questioned on why he had testified that the government had officially recognised the right of Africans to reside on private property, such as the

Commonage, when the Native Location Act 6 of 1876 specifically dealt with huts or dwellings erected on private property, he answered that the Commonage was ‘common property’, not private property. It was put to him that the interpretation of the statute is a matter of law to which he responded that it was a question of grammar, not law.

[144] It was put to him that if the community now claiming the land only came into existence after 1877, they could not have acquired rights as a community because the land already belonged to the settlers. He responded that he disagreed with this proposition but without explaining the basis for his disagreement.

[145] In regard to why he was able to say that by 1884 a community had been established on the Commonage, he answered that because there were 130 people with 70 cattle, they would have had to have decided where to graze their cattle, erect their dwellings and would have had ‘laws and regulations’, thus constituting a community; this, he continued, was a matter of ‘common sense’. He conceded, however, that he had not investigated what the rules by which the community functioned were; his brief was only to examine the documentary record, and not to investigate the structure of the community.

[146] It was put to him that the 1866 regulations, which predated any African presence on the Commonage, also made it clear that landowners of the erven had a share in the Commonage. He answered that if there were Africans then, they were

ignored. He was asked whether the regulations suggested that the landowners controlled the Commonage to which he responded that (similar to the 1906 regulations) the 1866 regulations on paper did not create control; 'there was an attempt to control'.

[147] As to whether there were any complaints from Africans to the magistrate in 1941 regarding any interference with their rights, he responded that by the 1940s they would have been 'terrified of white power and intimidated from making complaints', an answer which he admits was speculative but, he retorted, was in response to a speculative question.

[148] In response to Chandler's report, and in particular that the 26 dwellings of Africans on the Commonage in 1942 were in close proximity to farming operations on the farms and indicated that they had probably been occupied by farm workers, he accepted that he was not an expert on this question and was therefore not able to challenge this evidence.

[149] The cross-examination thus far dealt with the rights that the African people acquired after 1880 by residing on the Commonage; not with indigenous rights. On this question – the acquisition of indigenous rights – he testified as follows:

'I have an open viewpoint. I believe that the Xhosa do have indigenous rights to the Zuurveld . . . and whether these Xhosa were there in the 1870s; it's possible that they inherited those ancestral rights as indigenous rights, but certainly those rights were confirmed by the Cape

Government through its actions, through the Inspector of Native locations, the collection of hut taxes etc.'

[150] It was put to him that the effect of the conquest of the Zuurveld in 1811 by British forces, together with the fact that that Cape Colony exercised exclusive control over the area thereafter, meant that any indigenous rights the Xhosa had over the area were extinguished. He responded that he does not accept that – an issue on which he was not qualified to give an opinion. When asked by the court how one established that a community had indigenous rights, he answered that his expertise, as an historian was to show that people – in this case the Xhosa – occupied the Zuurveld before the Whites had arrived there. He presumed that this gave them legal rights but he accepted that the determination of this question is one of law, and not of history. In response to a further question from Mr Roberts as to whether it was his contention that because the Xhosa had occupied the Zuurveld in the eighteenth century that they may claim indigenous rights for the entire territory, he responded that they could.

[151] On the issue whether the Africans lived on the Commonage to the exclusion of the landowners, he answered that the landowners had not lived on the Commonage; they only had rights to graze their cattle there. However, Africans also had cattle on the Commonage, and lived there with 'rights'. But he avoided answering the question directly.

[152] After Legassick's testimony was concluded, the claimants called their two witness, Messrs Nondzube and Ngqiyaza. Thereafter, midway through the landowner's case and after Professor Giliomee had testified on behalf of the landowners, the court recalled Legassick.

[153] It will, however, be appropriate to set out Giliomee's evidence at this stage and Legassick's subsequent testimony thereafter.

Professor Hermann Giliomee

[154] The landowners called Giliomee to provide an opinion on Legassick's views regarding the land rights of the claimants, its factual basis, to conduct his further research and to prepare a report on these matters. In summary his opinion was that the Xhosa existed as a political entity – not a cultural or linguistic entity as Legassick suggests – in the eighteenth century headed by a king. Its borders were defined by the extent of the land occupied by chiefdoms subject to the ruling Tshawe clan. Land occupied by a Xhosa chief would have been claimed as Xhosa territory, unless the King denied any such claim, as Ngqika did in respect of the Zuurveld. Any claims to land made by the Xhosa as a cultural and linguistic unit as it is considered today would be inconsistent with political claims that were then made by tribes on the grounds of prior occupation. Such claims were recognised by Professor Jeffrey Peires, the leading historian on the Xhosa.[68]

[68] See eg H Giliomee's *Expert Report*.

[155] He testified that the first farms were given to the Boers in the Zuurveld in 1779. By the early 1790s, 150 Boer families were reported to be living in the Zuurveld. Between 1793 and 1811, growing Xhosa numbers and extensive cattle raids caused large numbers of Boers to flee. By 1808, Ndlambe, who was no longer a Regent, claimed the Zuurveld on two grounds: he bought it from the Boers and he won it in war, not on the basis of prior occupation.

[156] The Gqunukhwebe did claim the right to live in the Zuurveld on the basis of prior occupation, but were expelled in 1811-1812 and never returned as a community. There were three waves of new immigrants to the area after the settlers arrived. The first were Tswana-speaking, the second the Mfengu and the third were Xhosa – but not the Gqunukwhebe – who fled to the Albany district after the cattle killing in 1856. It is therefore ‘highly unlikely’, he said, that anyone claiming to be a descendant of the Gqunukwhebe, who lived in the Zuurveld during that period would have lived in Salem 100 years later. And any other Xhosa tribe claiming indigenous rights on the basis of the Gqunukwhebe occupation would have been in an even weaker position to assert any right to the Commonage based on indigenous title.

[157] There is no evidence of any Xhosa clan or community living on the land that became known as the Salem Commonage before the expulsion. After the expulsion there was no occupation of the Commonage by any Xhosa community. And the Cape Colony became the single authority over the Zuurveld.

[158] Once white power had been established over the Zuurveld, he continued, the relationship between masters and servants would have evolved towards an unequal and exploitative one. This would have made it unlikely that the British settlers and their descendants would have allowed their labourers or other Africans living on the Commonage to establish rights.

[159] The legislation passed by the Cape Parliament shows that Africans could not have maintained sufficient autonomy to 'build up' rights as a community, as Legassick suggested they did. With reference to Legassick's contention that the acquisition of rights to the Commonage was 'the reciprocal side of paying taxes', Giliomee pointed out that the purpose of the Native Location Act 6 of 1876 was the opposite. Their purpose was 'to reduce the number of idle squatters' (namely, rent paying tenants economically acting on their own behalf).[69]

[160] In Giliomee's opinion, Legassick's formulation of the claim is one in which the claim is made by a community or people as descendants of the Xhosa nation to the Zuurveld without any borders or reference to the land that is the subject of this dispute. Giliomee says that such a claim is extraordinary because all frontier conflicts over land were between political authorities over contested boundaries. And there was no evidence of the existence of a community as contemplated in the Act.

[69] H Giliomee's *Supplementary Expert Report*, citing C Bundy *The Rise and Fall of the South African Peasantry* (1979) at 78.

[161] Giliomee refuted Legassick's contention that the Xhosa attack on Grahamstown in 1819, led by the prophet Makana, was to recover land lost in the expulsion, as not based on any factual or documentary evidence. And he points out that all writers on the frontier have commented that the attack by Makana was to recover cattle seized from the Xhosa by Lieutenant Colonel Brereton.[70]

[162] In regard to whether an autonomous community of African farmers – an African peasantry as historians call them – emerged in the Albany and adjoining districts, and Salem in particular, during the latter part of the nineteenth century, Giliomee pointed out that a large number of Africans settled on alienated Crown land or the farms of absentee landlords making a living as labour-tenants or as rent-paying tenants. So, in the vicinity of Salem, the farmers were likely to have permitted their labourers to graze their stock on the Commonage. But there is no reference to African farmers living there in any capacity other than as wage labourers and labour tenants, who received cattle as a supplement to, or in place of, wages. Such labourers were allowed to graze their cattle on the Commonage, but it is unlikely that they would have 'built up' rights as Legassick contends they did. The documentary evidence, Giliomee maintained, suggests the contrary.

[163] Giliomee also testified that he doubted Nondzube's evidence, which is considered later, to the effect that his great-grandfather trekked past a kraal that existed where the Grahamstown Cathedral (established in 1824) en route to the

[70] H Giliomee's *Supplementary Expert Report*.

Commonage before 1811. This is because if there was an African Kraal at that spot there would probably have been reports indicating this in district documents. And given Nondzube's present age, which is 68, it is unlikely that he would have had a great-grandfather over 100 years of age to have told that story.

[164] A hut tax, Giliomee explained, was imposed on indigenous people universally in British Colonies to force them into wage labour, and to inject more cash into the economy; they were not aimed at whites. If a farmer in Salem did not want an African to live in a hut, or if the tax was not paid, he could simply terminate the employment and evict him from the property. So Africans living there did so at the pleasure of the owner.

[165] Under cross-examination Mr Krige attempted to debate the interpretation of the laws and regulations that were passed towards the end of the nineteenth century regarding African occupation of white owned land with Giliomee. The essential proposition put to Giliomee was that these laws granted Africans rights to live on the Commonage. As with Legassick's evidence on these aspects, these are not questions that Giliomee was qualified to answer, and they should not have been allowed.

[166] It is further put to him that the claimants didn't know whether they were Gqunukwhebe, or Xhosa falling under Ndlambe, and that his suggestions that Xhosas owed different allegiances was simply one of divide and rule, which he

denied. This question, however, makes clear that the present descendants do not claim any rights by virtue of being Gqunukhwebe.

[167] Much of the cross-examination also involved Mr Krige arguing with Giliomee instead of putting questions for the purpose of establishing or disproving facts.

[168] Mr Notshe, for the claimants also put questions to Giliomee without challenging his central contentions. Surprisingly, he did not challenge the evidence in which Giliomee called into question Nondzube's assertion that his great-grandfather had passed through an African kraal where the Cathedral is now situated in Grahamstown in the latter part of the eighteenth century.

Professor Legassick's Supplementary Response

[169] In his supplementary report in response to Giliomee's supplementary report and evidence Legassick became more assertive about the claimant's indigenous right to the Salem Commonage. Contrary to his initial view that he had an open mind on this question he now asserted that to prove indigenous rights 'it is merely necessary to show that Salem was within the bounds of Xhosa territory at the time that European settlers established officially-titled farms in the Zuurveld'. The evidence was challenged in cross-examination on the ground that this would mean that anyone showing some tribal affiliation with the Xhosa would be entitled to assert a claim over the entire territory. He insisted that they could, which he was also not qualified to give an opinion on, and which I later point out the Act does not sanction.

The claimants' evidence

Mr Msele Nondzube

[170] As Mr Nondzube's testimony lies at the heart of the claimant's case, it is necessary to set it out in some detail. I mentioned earlier that it is primarily upon his hearsay evidence that the claimants' claim to have 'held' the Commonage in accordance with indigenous law rests. He is Chairman of the Community Property Association established to pursue this claim. His evidence in chief was as follows.

[171] He was born on the Commonage, which he knows to be called Tyelera, on 16 April 1945. He was thus 68 when he testified. The place of his birth was on what became Mr Jack Hill's farm, near the graveyards of his family.

[172] His grandfather was Landonda Nondzube. He learnt from Landoda where his family had come from. Landoda had explained that they were originally from the Transkei where they grazed their cattle. They moved to Dikeni, now known as Alice, and from there to Tyelera. They travelled through Grahamstown, it seems, before the town was established, but before the expulsion in 1811. There was a Chief's kraal where the Cathedral in Grahamstown is now situated. They have several clan names but are collectively known as the Jwara, and are of Xhosa descent.

[173] He was unable to say when Landonda was born. Landonda's father – Nondzube's great-grandfather – was Phuphana. Landonda told Nondzube that when

they arrived in Tyelera he was a ‘small boy’ and Phuphana was a young man. They were one of the first families to settle there and when more people arrived they called the place Lokishi. They were given a place to live and an area to graze their cattle and cultivate land.

[174] Some of the other places, apart from Lokishi, where people lived were Nkotyo, Ntyuweni, Maglolomini and Mantyi. They all had burial sites but most people were buried in Lokishi at a place called Soxhenxa. There are also graves that belong to the Lonzobe family under a Mqwashu tree (milkwood tree), and another grave site at Mtyuwani.

[175] He was not aware whether there was a leader at the time but he was told that as time went by a leader was appointed for them by the Paramount Chief from the Transkei. There were two leaders, of which Phuphana was one, and the other was Dayile, who he testified, ‘most of the people’ talked about. These leaders executed the orders of the Paramount Chief. Dayile was not of royal blood because he belonged to the Mantakwendas clan. All the people fell under Dayile’s authority. He qualified this by testifying that Dayile was entrusted to carry out the duties of a Chief, but was himself not one.

[176] The role of these leaders was to ensure that the people to whom they had allotted land used it properly. They also mediated disputes in the community. Where the leader lived, he learnt, was regarded as a ‘great place’.

[177] His grandfather told him that there were corn fields where they lived and the boys would herd the cattle over these fields, until they reached the river called Qhora.

[178] The community participated in initiation ceremonies where young boys were circumcised. When a son was ready to leave his homestead his father would give him an axe, which symbolically entitled him to set up their own homestead. The chief would then make a piece of land available for this purpose, as he would do for any newcomer to the area. They also practised traditional medicine involving a white clay to cure illness and for use by women who have given birth. The clay was also used during initiation ceremonies.

[179] Phuphana, to whom reference was made earlier, was appointed as a leader by the Chief from Mngqesha. When this happened Phuphana had to leave the location and stay at a place that later became Mr Hill's farm. Phuphana and Landonda considered this land to be their own.

[180] He related a story that he had heard from Landonda involving Mr Gush, one of the 1820 settlers, which occurred in 1835: A Xhosa impi arrived at Salem. And the Xhosa people living behind the church on the Commonage joined the impi on the opposite hill. Phuphana was one of these people. They stood on one side and Gush and the army he had arrived with in 1820, on the other. Gush and another white man

approached the impi unarmed. He told them that they had not come to fight. He offered seeds to plant because theirs, Gush said, was not of a good quality.

[181] They then began arguing about how they were going to share the land. But the white people then recorded the incident differently. They said the Xhosa were hungry and Gush had given them bread. But that was not true because when the settlers arrived ‘our grandfathers were cultivating the land, they were planting there’. He testified that this incident, involving Gush, took place long after his family had arrived in Tyelera.

[182] Nondzube was taken through various places pointed out during the inspection in loco, which he confirmed was the general area where Dayile’s homestead and their arable land were situated.

[183] Under cross-examination he was asked whether his father also related some of these stories to him. He first evaded answering the question directly; then he admitted that his father had also told him about what had happened. Pressed further about whether his father had one discussion with him or several, he again elided a clear response and answered that he had heard these things when they sat down as a family, and the elderly people told them these stories. And, he continued, as the children grew up they also related the stories to one another. When asked whether he had told his counsel that he had heard these stories, not just from his grandfather but from other family members as well, he once again avoided answering clearly

until the question was repeated. He then answered that he had not conveyed this information to him.

[184] His grandfather, Landonda, died in the 1960s. His father was Jamani Sukula. He lived some distance from the Nondzubes. He also lived in Tyelera, but not at the same place that Jack Hill had taken over. At this point in his testimony, he described Tyelera as 'the whole area we called commonage or Zuurveld, all that belongs to the black people'.

[185] He is asked whether his father lived on the Kings' farm when he was born, to which he responded that when he began to understand things, his father was living on Mr Ross Atwell's farm after the area was subdivided. When asked if this was on one of the privately owned pieces of land he answered unclearly: 'that place was Tyelera that is; that entire place was Tyelera and then they demarcated it and took it over'. The court then asked him: 'So Tyelera was the area where the white community lived on farms as well as the Commonage, is that what you are saying'? He responds, again unclearly: 'Tyelera is a place where black people first arrived and settled there, our grandfathers, there (were) no white people at that time.'

[186] In response to a further question as to how Salem got its name, he answered almost as a child telling a story would:

'My grandfather says when the white people arrived there, they were led by Colonel Graham and their religious leader was William Shaw. Then on a certain morning Graham woke up

and went to William Shaw and asked him what name they should give this place. William Shaw went to sleep and said I am going to tell you the next day. The next morning William Shaw woke up, went to Graham and said they are going to call this place Salem, which means bees.'

When asked further whether his grandfather mentioned all these names, such as William Shaw, he answered that his grandfather had not mentioned this but that he added both William Shaw's and Colonel Graham's names himself from what he learnt of the history of the white people. So, from this evidence it appears that some of what he learnt was from his grandfather and other things he learnt himself, and also from his father. These answers reveal that the sources of information upon which his evidence is based are unclear and, as I discuss later when evaluating this evidence, it is an important reason why it ought not to have been accorded any weight by the trial court.

[187] He testified that his father was born on 28 September 1899 and he died on 24 August 1997. Apart from Nondzube himself, his father had four other children: Fundeswa, Angelina and George, who all bore the surname Sukula, and one other child, who died at around 12 years' of age. He took on his mother's surname, 'Nonzube'. His claim as a beneficiary, however, was made under the Sukula name, after his paternal grandfather, Mr Kifa Sukula, and not his mother's name.

[188] He testified further that he had attended a school in Salem and went as far as standard four. He could not remember the name of the farms in the area. All he could remember was that the place where he was born was handed over to Hill

before his birth. After that they moved to Mr Knoud's farm, which is also in Tyelera. Knoud bought the farm from Mr Robyn Bradfield. He moved to Knoud's farm with Landonda. His farm was nearer to the school than Hill's farm was.

[189] He testified further that his great-grandfather, Phuphana came from Dikeni, now called Alice. When asked whether he came from the Transkei he agreed. He came with his family and was accompanied by other families.

[190] It was put to him that the experts could find no evidence of any hut on Hill's erf in 1942, neither was there any archaeological evidence of any graves there. He responded that his grandfather lived there and that the Nondzube family graves were there. And he insisted incredulously that when he went to school they passed the spot where he could see his 'grandfather's old bones lying around there'. He speculated that the whites must have ploughed the land; that is why there was no evidence of graves.

[191] It was put to him that one of the spots to which he had pointed where there had allegedly been graves was under a milkwood tree where a few stones were found during the inspection, and that tree is in an area that was not part of their claim. In response, he insisted incorrectly that it was.

[192] It was put to him that the photographs taken in 1942 show that there were no huts scattered around the Commonage but were concentrated close to the private erven. He responded argumentatively: 'What I see here after the white people dispossessed us they took photographs; now after they have chased people away, now you are showing us these photographs'. He was then asked whether they had done this deliberately to which he answered that they had. And, he continued: 'It's what I think considering the things the . . . white people did to us'.

[193] It was put to him further that the evidence on behalf of the landowners would be that apart from one area he had pointed out on the Commonage as being arable land, which had been ploughed by a landowner, none of the areas had been ploughed by anyone. And that his identification of those areas as having been ploughed by Africans was incorrect. Again, he insisted, that his grandfather had told him that 'they were ploughing there up until the road and over to Qgoga . . . up to the road from Mr Bradfield's farm to Seven Fountains'.

[194] An example of one of the areas that Nondzube pointed out to be arable land cultivated by the African people belonged to Jack Hill; and it was put to him that Hill's descendants applied to the Department of Agriculture in 1984 to cultivate virgin soil (ie land that had never been ploughed before), indicating that this land could not have been cultivated by anyone before this. In response he steadfastly insisted that his grandfather had told him this, and therefore it was true.

[195] He was asked to comment on two other areas he had pointed out as having been occupied by Africans, which are not part of this claim, and falls within the private erven of the landowners. He responded by saying that he could not understand why this area is not part of the claim because it was in Tyelera, which, contrary to his earlier description, he now described as 'the whole of that area which they call Salem is Tyelera'.

[196] Regarding his evidence concerning Dayile, it was put to him that he had not been able to point out the location of Dayile's homestead during the inspection in loco. He responded by saying that 'when we were there and I was pointing out where he was living, [the people attending] said [they] were tired and [we] did not go there'. He was then asked why this had not been recorded in the minutes of the inspection because they recorded that 'the exact area of his homestead is unknown'. It bears mentioning that his answers at the inspection were recorded on a dictation-phone. He responded unconvincingly: 'I said, I . . . can take you to that place and . . . tell you that his house was in this area, but not to point out the exact place'. When it was put to him that what he was saying now in court was also not recorded in the minutes he replied: 'I am not going to dispute that but what I am telling you, it is as it is, but it is like I am telling you'.

[197] His answers in response to questions about whether he told Paul about Dayile are also telling:

'Mr Roberts: Did he ever consult you about this claim? – Paul was always amongst us because he was investigating the claim, I cannot say that I told him this or I told him that but he was always amongst us.

Did you tell him what your grandfather told you? – I am not sure but there is nothing written down which I said to Paul.

So did you tell him that there was a Chief Dayile? – I have already mentioned that there were many things which we have discussed . . .

Did you tell him that there was a Chief Dayile? – Whoever told him because all of us, it is a story related to us by our forefathers, I do not maybe I told him, or I did not tell him, because all of us know that story because that is how our history was relayed.

Well when he was questioned, he said he did not know that name? – That would surprise me . . .'

[198] Concerning what his grandfather had told him about Colonel Graham's expulsion of Africans from the Zuurveld in 1811 he testified that he was told that they had fled to a place called Mnameni, which is now Alexandria. And then, incredulously adds, they took shelter in the forest and returned to Tyelera when it was calm.

[199] The conclusion of his cross-examination is even more telling; in effect he conceded the landowner's case, which the LCC also disregarded completely:

'Mr Roberts: . . . [D]id your grandfather tell you that white people also grazed their cattle on the commonage, yes or no? – My grandfather told me that when they were being killed by

Colonel Graham and they ran away, on their coming back, they would have stolen their cattle and that is how they had possession of cattle and they grazed them in that commonage.

So the white people did graze live stock on the commonage . . .? – Yes that is what my grandfather says.

And were those cattle also grazed together with the cattle of black people when they returned? – That is correct.

And the white people also erected houses on the commonage? – When?

Together the white people also ploughed on the commonage? – That is correct.

And the white people also erected houses on the commonage? – I say bear in mind that when you are conquered, the person do what he likes with your thing.

And did the black people start to work for the white people? – They did work for the white for the reasons which I have put forward; I can even add other reasons.

So there was a stage when the white farmers were farming and the black people commenced being employed by the white people . . .? – I did not deny that . . . I said they were conquered.

So once they were conquered the land belonged to the white people, is that what you are saying? – Yes, the reason that we have come to this Court is because they are now claiming the land and we are also claiming the land is ours.

Now did the black people work for the white people on the erven . . . and on the commonage? – Yes.

And they subjected them to the rules of white people when they were employed? – Yes I have told this Court that, if you are conquered the conquered person obeys the rules of the conqueror.

So…after the land had been conquered the whites decided what would happen on the commonage, not the blacks? – Yes without consulting the . . . oppressed people, they did what they liked.

So . . . Dayile could not decide any more what he wanted to do on the commonage on his own . . . he lost his superiority as a chief or headman when the whites conquered the commonage . . .? – That is correct.

. . . After the conquering the blacks had no say of what must happen on the commonage? – That is correct.

And the whites then controlled the commonage? – That is correct.'

After this catastrophic concession by Nondzube, Mr Notshe attempted to rescue the claimants' case in re-examination by asking him whether the loss of power referred to above occurred before or after demarcation. Nondzube responded that it was after the demarcation that the chiefs lost their power. However, in further cross-examination by Mr Roberts, Nondzube confirmed that the black people were conquered by Colonel Graham '[a]nd all the other people who came after Colonel Graham'. In other words, the conquest occurred long before the demarcation.

Mr Ndoyityile Ngqiyaza

[200] The only other witness for the claimants was Mr Ndoyityile Ngqiyaza who testified that he was born 'in Salem at Lokishi'. He is uneducated and his evidence was not easy to follow. He was unable to say when he was born, but his birth certificate indicated that he was born in June 1942. He comes from the Mqarwane clan. They lived in a home, made of trees and mud and had cattle and goats.

[201] His father supported the family by selling firewood in Grahamstown and cultivated lands in a place called Thafeni. He testified that they took the cattle long distances to graze. He left home after demarcation because there was nothing else left at home.

[202] His father then started working for Mr Bradfield. Bradfield would not allow his father's cattle on the farm; so he had to sell them. He was unable to say when his father died but he had heard from his sister that their mother died in 1940. Her grave is at Lokishi. When asked whether she died before or after demarcation, he replied that it was afterwards. His father's grave is on Bradfield's farm.

[203] Under cross-examination he testified that he would not be able to identify his place of birth in Thafeni. He agreed that during the inspection in loco he was not able to identify the place. He testified that their home where he was born was about 400-500 meters from the lime pit. He said that they had always lived there and had not moved there from any other place. There were several other huts and families near them, also close to the lime pit.

[204] It was put to him that one of Bradfield's relatives, Andrew Bradfield, said that he could not remember him. He answered that this was because Andrew was very young when he left. It was put to him that aerial photographs of the area showed that there were no huts in the vicinity of the lime pit in 1942. He insisted, however, that there were.

[205] In response to a question what demarcation meant to him, he answered that they were told that this farm belonged to one person and that farm to another person. Demarcation 'was made for white people and two coloured people'. Not for black people. '[I]t brought hunger and we had no place to store our mielies.'

[206] After a lunch adjournment, it was put to him that his parents only moved to the Bradfield's farm in the 1960s, long after demarcation. His answer to this (contrary to his earlier evidence) is that this was correct, they had moved there after Mr Don Bradfield had died. Asked whether he had stayed at Mr Walter Penny's farm before this he answered that his elder brother Tim had lived with the Pennys. He was asked again whether he was born on Bradfield's farm. He answered that he was not. And then the following exchange took place:

'Mr Roberts: Where were you born then? – I was born at this place now; it is Hobbits, which belonged to [Don Bradfield's] father.

Just give us the name again of that place? – Lokishi

And where were you born, just tell us again . . . were you born on the Lokishi or at Mr Bradfield's place

Mr Notshe: He is [inaudible] the witness, the witness has said four times, at [inaudible] Lokishi.'

[207] He testified that Mr Tim Ngqiyaza was his elder brother; who had died three years earlier. Tim stayed with Walter Penny and had been employed by him.

The landowners' evidence

Mr Arthur David Mullins

[208] Mullins was the first witness to testify on behalf of the landowners. His father moved from what was then Rhodesia in 1952 to Salem and farmed on the farm Moorelands, which is adjacent to the claimed area. Mullins was born there in 1955. His father farmed pineapples, vegetables and beef cattle.

[209] In 1964 Mullins senior took occupation of another farm, Avondale. He sold Moorelands to Mr Barret Fowlds. Avondale was virgin land, except for parts of the erven and a small piece of the Commonage where the previous owner, Mr Ross Attwell had grown pineapples.

[210] Upon their arrival at Avondale, the farm had two employees, one of whom was Mr Jamani Sukula, Nondzube's father. Sukula's age was then 65. He was revered on the farm as the senior citizen. He had two daughters and a son George. In later years Mullins became aware of a fourth child, Nondzube. When Sukula died 30 years later at the age of 94, Mullins was asked to read the eulogy at his burial ceremony. Sukula had played an important role in Mullins' life for more than 30 years and at the burial, Mullins was presented with a certificate of appreciation signed by, amongst others, Nondzube himself.

[211] During the 1980s Mullins senior bought the adjoining farms of Salem Park, Devonshire and Willowbank, and also a portion of Pleasant Prospect. All of these farms are in the claimed area.

[212] Mullins is a linguist and speaks isiXhosa fluently; he conversed frequently with Sukula. Sukula told him that his father, Mr Willie Kifa Sukula (Nondzube's grandfather), came from Seven Fountains and then moved to the farm Kingston where he worked for the King family. Seven Fountains is not within the claimed area. Kingston is contiguous to Avondale. They lived on the southern side of the Kingston homestead, ie on the erf, and not on the Commonage. And when they moved to Avondale they likewise lived on the erf.

[213] In the 1970s, as Sukula was ageing, Mullins senior built a brick home for him on the Commonage, 300 metres from the edge of the erven. The reason was that his previous dwelling was in the valley where it became very cold in winter.

[214] The second employee referred to earlier, who was on Avondale when the Mullins family took occupation, was Mr Nimrod Plaatjie, who is also one of the claimants. He also lived on an erf slightly north-west of where Sukula had lived. He also requested to move because he had taken over the management of the livestock. So Mullins senior built a home for him too, on the erf.

[215] Neither Sukula nor Plaatjie had their own livestock. Mullins senior assisted them to plough a small piece of land where they could grow vegetables. The Plaatjies had been on Avondale for about 25 years before the Mullins' had arrived there in 1964, and Sukula had been working on the farm for 40 years, since 1924.

[216] During his frequent conversations with Sukula, the latter described how his previous employer, Attwell, would, after the cattle had been milked, let them out for grazing on the Commonage. Sukula would then walk for a distance, sometimes to the edge of the Bushmans River, to collect them.

[217] Sukula described the Commonage as a 'vast open piece of land'. The landowners grazed their cattle there and the cattle often got mixed up. The black people who lived on the Commonage were close to the erven where they were employed. He never suggested that they had any right to arable land, or that the whites had taken their land.

[218] Sukula never mentioned that there were chiefs or headmen called Dayile or Klaas Nondzube (another name for Phuphana). Each individual farm had their own elders and they had served as a leadership group on that farm. They decided on disputes within the community who lived on the farms, and on initiation ceremonies. Where the disputes involved members from another community, the elders of the two communities would get together to solve them, and if still unresolved, the police would be called in and the matter would be taken to a magistrate. There was no chief

or headman's court. With regard to initiation ceremonies they first received permission from the farmer because there were rules such as the prohibition of snaring and hunting while the initiate was in the bush.

[219] The employees were given burial sites on the farms. On Avondale, for example, Mullins senior designated an area and when that area became congested, Mullins designated a second burial site. It is here that Sukula is buried. There are a number of graves at this site. As far as he is aware the landowners respected these grave sites.

[220] On their farms Avondale and Devonshire, in order to farm pineapples, they had to clear substantial areas of bush and applied for permission to the Department of Agriculture for this purpose. Of the farms that Mullins senior, and then Mullins himself eventually owned, constituting seven portions of land in total, there were no remains of arable land made by black people. The only piece of arable land when they arrived in 1964 was a small piece of land on which Ross Atwell grew pineapples, and there was a garden adjacent to the homes of the Sukulas and the Plaatjies'.

[221] He was taken to some of the aerial photographs used as exhibits, and in particular some of the points on those photographs that Nondzube had testified about. One of the areas on exhibit 'P' (one of the 1942 aerial photographs), was land that he had owned until recently. It was a portion of the farm Salem Park that had

previously been owned by Mr Cecil Tarr, Mr Spencer Hill, and originally by Mr John Harrison. A small portion of this land, in the south-western corner was fenced off and used for commercial farming. Before this the area was virgin bush consisting of thickened edible berry and mixed grass in between.

[222] Mr Gordon Hill lived in the area coloured in blue next to areas 21, 25, 26 and 27 in Mullins' father's lifetime. That is where the lone standing milkwood tree – the Mngqesha tree referred to by Nondzube – is situated. Hill ploughed that whole area. On the south-eastern portion of that area, in between areas 26, 27, 28 and 29 there is an area coloured in light green. This was part of the Commonage and had always been grazing ground, except for a small piece adjacent to erf 544.

[223] Next to Jack Hill's erf, number 545, there is a dam built in the kloof. It was built for stock watering purposes. Mullins owned that after 2001. In addition he identified the areas he had owned until he had sold them to the government after a claim had been lodged against them. Until then he had been the chairman of the farmer's association. He sold the land for commercial reasons and not because he believed that there was any validity to the claim.

[224] Regarding Nondzube's evidence that the Commonage was called Tyelera, he testified that this was 'completely incorrect':

‘Tyelera is the Kariega River that runs to the north of the claimed area; it rises below that the Highlands mountain and runs through a number of farms in the valley . . . [and] into the sea at Kenton on Sea. The Tyelera has no reference to Salem whatsoever.’

Mullins testified that African people refer to Salem as ‘Esalem’, and if one used it as an adjective there would be an ‘L’ in front. The area referred to in the evidence as Thafeni, is actually ‘Ethafeni’ and on the 1942 map it would be the flat area to the south.

[225] Between 1948-1954, there was a pineapple boom in the area resulting in a huge influx of Africans into the area to perform manual labour. The 1949 aerial photographs showed the homesteads of African people. The 1955 aerial photographs indicated a further expansion of arable land. In comparison with the 1942 maps, which showed very little agricultural activity other than grazing, the 1955 map revealed blocks of land that had been ploughed.

[226] Under cross-examination from Mr Krige he was asked to comment about events before the 1820 settlers arrived and thereafter, the evidence of the historians and the content of historical texts despite his making clear that he was ‘not aware’ of the history of that time. He was also asked whether he had any knowledge of Africans living independently on the Commonage before his father had arrived to which he responded that he had no personal knowledge. He was also requested to comment on the documents that form part of the record, including his attitude to the laws and regulations passed to restrict Africans.

[227] Under cross-examination by Mr Notshe he was asked whether he denied Nondzube's evidence that Phuphana had settled in Salem before the settlers arrived to which he responded that this could not be correct if one considers what his age would have been. He explained that on the basis that Nondzube was 68 years' old when he testified, and is ten years older than him; Nondzube's grandfather, Landonda, would probably have been born around ten years before his own grandfather. Mullins' grandfather was born in 1886, and so Landonda would probably have been born around 1875. On this basis Phuphana, Nondzube's great-grandfather, would probably have been born around 1840-1845 because most people have children between the ages of 25-30. However, on Nondzube's version, Phuphana was already a grown man in 1812, and would have been born somewhere in the 1700s. He also would have been 80-90 when Landonda, his son, was born in 1875, which is unlikely.

Mr Spencer Hill

[228] Hill was born in 1949 and farms in the Southwell area close to Salem. His farm is not the subject of this claim. His grandfather was Jack Hill, who was born in 1896 and died in 1981, at the age of 85, when he was 32. He is related to Thomas Hill referred to in the minutes of the Salem Committee of 1847. The minutes of 1887 reflect that two Hills were present at the meeting. One is his great-grandfather, and the other his great-grandfather's brother. He grew up on the Rippley farm, which his father acquired in 1946, after the Second World War. The farm adjoined Jack Hill's farm, which he visited frequently.

[229] His grandfather lived on the piece of ground number 545 on Exhibit ‘S’ with his two sisters. He also owned erven 542, 543 and 544.

[230] His grandfather told him that the Commonage was where the erf owners were allowed to run their stock. Most of them had employees who had worked on the farms, collected cattle and did general housework, gardening and whatever else. They lived close to the homesteads because transport was a problem; everybody walked to work.

[231] Hill also told him that the landowners had a village management board that made the rules regarding the grazing of their cattle on the Commonage.

[232] Regarding the now much spoken about mngqesha or milkwood tree, and the area surrounding it at points 21, 25, 26 and 27, the erf was part of the farm Rippley. His father sold it to Mr Havengouws. He visited the place many times; there were never African people living there. They ploughed the area from boundary to boundary and he never saw any graves or human remains there.

[233] The area to the left of that area shaded light green and, numbered 26, 27, 28 and 29 was part of the Commonage where the landowners grazed their cattle. It is across the road from the farm Rippley. This section was never ploughed. It has ‘red grass’, which could not grow on land that had been ploughed.

[234] He confirmed Mullins' evidence regarding why a dam was built in the Sephton's Kloof on the Commonage in 1847; because they needed permanent water for their stock. The Kloof is just below the area on which his grandfather lived and shows that the landowners used the Commonage for their benefit.

[235] The area on Exhibit 'S', numbered 21, 23, 24 and 25 also coloured in light green was the farm Salem Park, which he had owned. He had bought it from Harrison. Except for a small portion at 21 and 25 of a few morgen that had been ploughed, the rest was virgin bush. Harrison used that portion, which he had fenced off, to plant for his stock. In 1972, after Hill had bought it from Harrison, he applied to the Department of Agriculture to clear the bush and plough the virgin soil. The application was approved.

[236] The 1942 map, Exhibit 'P', shows that there were no huts on Rippley. In 1942, when his father moved to Rippley it was a bare piece of ground. They built a 'wattle and daub' house to live in and started farming. There was no labour either. When the pineapple boom came, there was an influx of labour and the huts on the 1949 map, Exhibit 'S' reflect this. The farm was sold to Mr Tarr, who sold it to Mullins. Someone else now owns it.

[237] Under cross-examination he was asked by Mr Krige to confirm that when he grew up in the 1950s 'the whole of Salem and the former commonage of Salem was White farmland and Blacks were there as labourers and servants'. He did. And

further whether his grandfather had told him that in 1941 that there was an independent African community numbering 450 people living on the Commonage to which he answered emphatically: ‘Definitely not’.

[238] Regarding his application to plough virgin land in 1972, Mr Krige put to him that if ploughed soil is left for 30 years, it is ‘axiomatic’ that it would return to its original state. Again he answers emphatically: ‘Definitely not’. His evidence on this crucial aspect was not contradicted and completely negates the claimants’ case that an African community had been ploughing parts of the Commonage for its benefit.

Mrs Ethel Phyllis Page

[239] Mrs Page was born in March 1926 in Grahamstown and was 87 years old at the time she testified. Her maiden surname was Van Rensburg. Her parents moved to Salem in 1934, when she was nine. Her father bought a property called the Residency, which had previously been occupied by Mr Rex Mathews. She attended school next to the church until standard six and Victoria Girls High in Grahamstown afterwards. She later worked in Salem as the postmistress for two years. She married at 20 and moved to Springs, in the then Transvaal, in 1946. She returned annually to visit her parents.

[240] As she was growing up she visited the homesteads of the Hills, Harris and Panel families. In fact everybody visited each other. She remembers visiting the Masons at the farm Devonshire, which borders the Residency. That farm was

occupied by Mr Gush in earlier years. The Kings lived a distance away and came to Salem Village on horse and cart.

[241] She recalls what happened when the Commonage was cut up and demarcated. Her father was allocated the farm Philmon's Hoek. Her brother, Fred lived there and he had erected a fence around it.

[242] The landowners used the Commonage to graze their cattle, but were not allowed to plough or erect homesteads there. Mr Fletcher Harris was in charge of the Board. She could not remember how many cattle each farmer was allowed to graze on the Commonage but she thought it was 20, which was the number of cattle her father had.

[243] Her father employed one male employee and a female maid for the house. Her name was Dorris, but she could not remember the male employee's name. They lived on another farm, not on the Commonage. She thought that they were not allowed any cattle on the Commonage.

[244] Jack Hill's farm was some distance from theirs. His sisters lived with him and she visited them. She would take the road going up towards the flats, which she remembered is called Voortrekker Road, on the way to Seven Fountains. The Seven Fountains Road is linked to the Kenton-on-Sea Road. She rode her bicycle on the

road often, about once a month, and further on the main road towards Alexandria. After she became tired of this road, she used other roads.

[245] She saw no black residential area on Hill's property. It was originally all bush, and he opened it up to plough. She would have been about 14 or 15 years old at the time she was cycling around the area. When she left Salem after getting married, there were still no black people living there. She remembered the milkwood tree on that property as well. There were no black people living there either. She was taken through Exhibit 'P' and pointed out the road she used, where Hill's property was situated.

[246] In an area shaded blue on the map she was asked whether there was a homestead of black people living there to which she answered: 'I never saw anybody'. She was taken further to points 26, 27, 28 and 29 and asked whether there was any ploughing there, as the claimants allege. Again she answered that she saw nothing like that. There was no ploughing, only grass and cattle grazing, which confirms the Spencer Hill's evidence. Particularly in relation to point 29 she was asked whether she had seen or heard of a homestead of Chief Dayile. She answered that she used to ride her bicycle past that spot and never saw any black person there.

[247] She identified another area, where Penny's cottage was near to the post office where she worked. Again, she testified that no black people lived there while

she was in Salem. She testified further that most of the black people who received mail at the post office were from Farmerfield, not from Salem. There may have been, she said, ‘one or two’ from Salem.

[248] At point ‘K’ on the map she was taken to points 17, 18, 30 and 3, demarcated in light blue on the map, which was alleged to be ‘the main homestead area of black people’. There too she saw no homestead of black people. She added: ‘The only people that were there were the people that were working on the farms and they lived on each farm’.

[249] Before demarcation and the fencing of the area, her father and brothers used to round up their cattle that grazed on the Commonage.

[250] The farmers on their neighbouring farms, the Harris’ and Burris’, employed labour who lived on their farms. The property belonging to the Panels was also in an area where there was ‘just bush and grass’. There was no African homestead there.

[251] Under cross-examination by Mr Krige she maintained that she saw no Africans on the Commonage or in the area where Dayile’s homestead is alleged to have been. When asked whether it is possible that she had not noticed them, she answered that she would have noticed had there been anybody there. She testified

that she would have been 16-17 when she cycled in the area, and the only 'native huts' she saw were those on Hill's property.

[252] In response to a question whether her memory had faded after 60 years, she responded that she had a very good memory. She was asked whether she was aware that there was a location to which she answered that she was not. She also testified she was not aware of Africans who had cattle on the Commonage.

[253] She remembered, after thinking about it overnight, that her father had two African families living on their property. The first family consisted of an adult male, along with his wife and a daughter. There was only an adult male in the other.

[254] The following exchange between Mrs Page and Notshe appeared in the record:

'Mr Notshe: You admitted that there were blacks living at Salem during the time . . .? – On the person's property there would be one or two huts.

Mrs Page is it your evidence that all the blacks who were at Salem were living on people's farms and were servants? – That is right.

. . . Are you saying this as a fact that all blacks at Salem were working as servants and were staying on their employers' farms? – Yes

You are saying this as a fact? – Yes'

And later:

‘Mrs Page how do you know that they were living on the farms? – Well Salem is a small place you know?

Yes. So? – The friends that I had, we knew that they lived on the farm. Where else would they live? They could not come and live on another person’s farm.

They lived on the native location. – Where was that? . . . I do not know the place you are talking about.’

And a bit later:

‘The blacks who were living there were growing their own food. Some of them even selling it in Grahamstown. – I do not know where they got their food. I did not see any blacks living in clusters. They lived on the farms and they got rations from the farmers.’

[255] After this, the court took over the cross-examination, inappropriately:

‘Court: Mrs Page just to try and get some clarity on this. You have told us what you saw. – Yes

And what you can remember. Now if there were other black families and homesteads and settlements and commonages that were around in the vicinity that you did not see, would that necessarily mean that they were not there or you just did not see them? – I never saw anybody.

But there may well have been? – Roaming around?

Yes, no I accept that. I know you have indicated repeatedly that you did not see people walking around, but if there were villages in the area . . . – I would have seen them or known about them.

You did not see them? – I did not; personally I did not see them.

Yes, but if there is other evidence to indicate that they were in fact there, you cannot really dispute that? – Because I did not see it.

Because you did not see it and whilst you were riding bicycles on the gravel road and there were bushes on both sides, am I right? – Yes.

It was a bushy area. It was a lovely green, lush, bushy area? – Yes.

You did not peep through the bushes to see how many huts were there? – No

You enjoyed your ride? – Correct, but if there were any people roaming about we would have known, because the man that rode the horses around would have known.

Yes. Let us talk about you. Forget the man with the horses. When you were riding the bicycle. – Yes.

On this gravel road with bushes on both sides, you were having fun as a young girl of fifteen and sixteen. – Yes.

You were not particularly bothered about peeping through the bushes to see who lives there, which hut is there, how many blacks are lurking around, because there are bushes that you cannot see it whilst you are riding your bicycle. You are concentrating on the road. Is that not the case? – I would say so yes.'

Mr Alwyn Cuan King

[256] Mr King was born in 1954 and resides on the farm Kingston. It is currently registered as farm 536 and was part of the old lot number 38 in his name. His father, Alfred, born in 1906, was the previous owner. They also owned farm number 539, which was part of the original lot 41.

[257] His father settled on the farm in 1936, which his father's two aunts owned earlier. Alfred moved there to assist his aunts and started farming himself at the age of 30. He died in 1989. Thomas King, one of the original settlers, was related to them.

[258] He was aware that the Commonage was separate from the allotments. From the conversations with his father, he had learnt that Alfred's aunts had employees, which he had taken over from them. They employed four families. Three lived on the erven and the other on the Commonage just off the erven.

[259] Alfred's aunts initially resisted the subdivision because they wanted a piece of ground on the other side of the Assegaai River, which now runs through the property.

[260] The Board was in control of the Commonage at that time. It ensured strict control measures regarding its usage. No ploughing was allowed unless permission was given. The number of cattle allowed to graze on the Commonage was restricted depending on the size of the erven the landowner owned. No buildings were permitted. When the rules were transgressed meetings were held and those responsible would have been 'sternly dealt with'.

[261] There was never any mention of an independent black community having lived on the Commonage. His father would not have permitted it. King was also an avid cricketer and is familiar with the cricket field included in this claim. To the best of his knowledge it was never used as grazing area.

[262] He confirmed Mullins' testimony that Salem is not referred to as Tyelera. Africans refer to the Kariega River as Tyelera. He also confirmed that the area demarcated by points 21, 22, 23 and 24 on Exhibit 'P' was virgin land until Spencer Hill was given permission to plough it. Importantly, he adds that once land is ploughed it cannot be restored to virgin land, as the types of grasses and trees that naturally grew do not return by themselves. This evidence too is consistent with Spencer Hill's testimony.

[263] In regard to the incident involving Gush and the impi in 1835, he testified that what he had heard of the incident from his family was different to how Nondzube had explained it in court. As far as he knew, there was only one group of attacking Xhosa. He had never heard of there being members of a locally resident Xhosa community coming from behind the Salem Church and joining the attacking force. He heard the different version of the incident from his wife, who is a direct descendant of Gush, from her father and from Mrs Merry Mason.

[264] In regard to the area marked as 'M1' and 'M2' just above Penny's place he had never heard of that place being an African residential area. Most of the areas

pointed out during the inspection were situated on private erven, not on the Commonage.

[265] Under cross-examination, Mr Krige put a patently incorrect ‘fact’ to King, which was that one of the motivations given for the disestablishment of the location in 1941 was because there had been 450 squatters there, to which he responded that he would not know about that.

Mrs Alice Theresa Bradfield

[266] Mrs Bradfield was born in 1957 and married Mr Andrew Bradfield, the son of Mr Don Bradfield, who settled on the farm Providence in Salem in 1940 at the age of about 20-21. She came to Salem for the first time in 1974.

[267] She had access to her father-in-law’s wage books. From the 1945 entries the first indicates that Mr Roman Jakala was employed at a salary of one pound per month. A further entry showed that Don Bradfield had purchased a bicycle for one of his employees because he travelled a distance to work. There are also entries in 1967 and 1969 showing that two of his employees owned cattle. He did not prohibit his employees from having cattle on the farm.

Mr Albert Alexander van Rensburg

[268] Mr van Rensburg was the last witness. Born in 1923, he was two months' short of 90 when he testified. Sadly, he also passed away recently. Page, who testified earlier, was his sister. He also moved to Salem with his parents and settled with them at the Residency. He attended school in Salem and then went to Alexandria High School where he completed standard eight.

[269] His father had 36-40 cattle that grazed on the Commonage. They rounded up the cattle every fortnight. He had two African families who built huts opposite the road from their house, on his property. They were employed after the Van Rensburgs arrived there. One of the employees was from the adjacent area of Farmerfield. They usually helped his father to round up the cattle and sometimes he did so as well, on horseback. The cattle walked long distances and sometimes went as far as the flatlands, and even the Bushmans River. One of the families had their own cattle and his father had some oxen, which helped with the ploughing. Their cattle also grazed on the Commonage.

[270] He testified that he had never seen any African settlement on any portion of the Hill's property. In regard to whether the entire Commonage was under the control of the claimants he answers: 'No such thing'. He also never saw any ploughing or African huts on the Commonage. He also never saw any homestead of any chief. He would have seen it if it was there. He would definitely have known had there been black people in charge of the Commonage.

[271] Under cross-examination by Mr Krige, he testified that he was not aware of any location on the Commonage. With reference to the report of the Native Commissioner in 1941 that there were about 25 white families with about 500 Africans of whom 50 worked as servants, the questioning proceeded with the Court again improperly intervening. Once more, the witness delivers some telling responses:

'Mr Krige: [The report] says the European population of the village is between ninety and a hundred with 25 families, while the native population is about five hundred of whom fifty worked as servants. I see you are laughing. – No, I never saw anything like that.

These servants lived on the premises of their employers. . . That is fifty and he goes on to say that "I am given to understand that certain Europeans have permitted squatting in the past." – Squatting?

Yes. – That I know nothing about.

You see Mr Van Rensburg I put to you that there are two possibilities. One is that the native commissioner was lying when he stated that that there were five hundred blacks living at Salem. – Look I can only speak the truth. I never saw anything like that.

The other possibility is that you did not notice these black people because you were not specifically looking for them. You were looking for cattle or you were looking for buck to shoot. – Now look we are not all blind. You see whether there are huts or groups of people living and that would . . . [interrupted]

Court: Were you, 1941, you must have been about sixteen years of age.

Mr Krige: 1939 judge.

Court: 1939?

Mr Krige: 1939 and he would have been sixteen.

Court: Sixteen, yes that is right. You would have been sixteen years of age. Would you have taken an interest in all these issues about huts and the kraals or would you still have been a young man? – No look you know, you are going out. You do not just ride blindly. You notice things. So you would have noticed if there were huts built on the flats or whatever and I can truthfully say I never saw something like that .

. . . Now it may be that you did not see it, but the commission records that there were in fact blacks. Can you deny that? – Well look I never ever saw it. I can only speak (of) what I saw.

That's fine.

Mr Krige: But the possibility is that you did not see because they were in an area where you were not? – Not five hundred people. Hell you could not miss something like that. How many huts would be included?

Court: So just for my understanding and really this confuses me . . . [T]he government at the time was conducting some form of census or statistic to establish how many people were there. Now when you say emphatically that you saw nobody, are they lying? – Well I am not saying they are lying, but I can only say what I did not see.

Mr Krige: Are you suggesting that you did not see them, but you are not stating that they were not there, just that you did not see them? – You know if you do not see something then obviously it is not there.

No there is a further deduction from that. If you did not see it, it is that you did not look properly and that is why you did not see it. – No, that is not possible.

So you are saying categorically that the native commissioner was wrong? – Well look I can only say what I saw, nothing. There was nothing.

. . .

Court: (to Mr Krige) I think he is a Jehovah's witness and he says he never speaks a lie and it is only the truth. So he may not just have seen it. I do not think you can take it any further.'

And later:

'Mr Krige: Now as far as black huts on the commonage are concerned, you said that you never saw any . . . ? Could it be that you had not observed any because you were not looking for native huts? – Look you know, one is not entirely blind to anything that is taking place when you are going through such areas quite regularly. You would notice if there were huts on the flats.'

Apart from the dubious value of this line of questioning, counsel's persistence in repeatedly pressurising an aged witness for the desired concession, aided and abetted by the court's condescending intervention, is to be deprecated.

[272] In response to questions regarding the conditions under which his father's employees worked, his answers yielded the following: One of the families had oxen and a wagon. They used the oxen for ploughing the 'little land around the house' for his father. He gave them a portion of land across the road and there they were allowed to plough and plant whatever they wanted for themselves. He could not say whether his father had paid them because he did not know what arrangement they had with him.

[273] Mr Krige suggests to him that his memory must be failing because these events took place a long time ago to which he responds: 'Look my mind is pretty clear and I know and can only tell you . . . what I know'.

[274] Under further cross-examination, Mr Notshe covered the same area as Mr Krige did in attempting, unsuccessfully, to get the witness to admit that he could have missed an African settlement on the Commonage, and that he could not categorically deny that Dayile was the leader of the African community. The court intervened and in an inappropriately patronising tone said to Mr Notshe, with reference to Van Rensburg's evidence:

'Remember you are dealing with an old man and you must take into account that his memory has faded and the fact that his almost every answer is not a direct answer, because he either does not understand or he just has a mind set about how he is going to respond.'

[275] I have read and reread Van Rensburg's evidence; the record does not support the judge's observation that his memory had faded and that he was not giving direct answers to questions. On the contrary his evidence was clear and to the point. This is despite the fact that he was being badgered by counsel and treated in a condescending manner by the court. It is, furthermore, inappropriate and improper for a court to declare its findings on credibility in respect of a witness before the witness has completed testifying and without having heard argument on the issue. By acting in the way in which it did, the court erred grievously.

The Proper Approach to the Evidence

[276] It is trite that in civil disputes the party claiming something from the other party in a court of law has to satisfy the court on a balance of probabilities that he or she is entitled to it. The standard is no different with claims for the restitution of land under the Act. In appeals against the factual findings of a trial court, the position was set

out thus by Zulman JA in *Santam Bpk v Biddulph* [2004] ZASCA 11; 2004 (5) SA 586 (SCA) para 5:

'Whilst a Court of appeal is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong (*R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706). This is especially so where the reasons given for the finding are seriously flawed. Overemphasis of the advantages which a trial Court enjoys is to be avoided, lest an appellant's right of appeal "becomes illusory" (*Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648D-E and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 623H-624A). It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration.'

For reasons that will become apparent, I am of the view that the LCC misdirected itself in its assessment of the evidence and its consequent factual findings.

The arguments raised by the Commission and the claimants regarding the nature of this appeal

[277] The Commission advanced a curious argument before us regarding the power of this court to interfere with the decision of the LCC. It contended that in upholding the claim the LCC was exercising its wide remedial powers under s 33 and s 35 of the Act. And it was therefore exercising a 'true and strict discretion' with which an appellate court may only interfere on very narrow grounds. It cited the Constitutional Court's judgment in *Florence v Government of South Africa*[71] to support this proposition.

[71] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC) paras 111-117.

[278] The issue in *Florence* was whether the LCC had exercised its remedial discretion properly in determining the appropriate form of equitable redress. There was no dispute between the parties that the Florence family had been dispossessed of a right in land.[72] The dispute before us, by contrast, is whether a right in land existed (and if so, what the nature of the right was), and whether, and if so, when dispossession occurred. These are factual matters the claimants have to prove, as they would have to do in any civil dispute.

[279] Questions of legal right are generally resolved by the application of the law and not by the exercise of judicial discretion. If the claimants are successful in their claim the issue regarding the feasibility of restoring the land to the claimants, or ordering some other form of compensation, which was deferred for later consideration, shall then arise. And it is then and only then that the LCC will be asked to exercise its remedial discretion. Mr Krige was constrained to concede this.

[280] The claimants advance an even stranger argument to prevent this court from examining the merits of the dispute. It was contended on their behalf that once the Commission validated the claim the landowners had to review that decision under s 6 of the Promotion of Administrative Justice Act 3 of 2000. Thus, the contention went, the landowners bore the onus of proving that the decision was irrational, ie that the decision was not one to which the Commission could reasonably have come on the evidence.

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[72] Ibid para 12.

[281] Unsurprisingly, Mr Notshe advanced no authority to support this contention. What is surprising, however, and deserving of censure, is that he did not draw the court's attention to contrary authority: In *Phillips v Minister of Rural Development*[73] the LCC rejected this very argument – raised by Mr Notshe himself – on the ground that the Commission did not adjudicate or decide on the merits of a claim. This is the function of the court. In that case, which was obviously correctly decided, Meer J cited three other cases to support her conclusion, one from the LCC (*Farjas* (*Pty*) *Ltd & another v Regional Land Claims Commissioner*, *KwaZulu-Natal*)[74] and two from this court (*Gamevest* (*Pty*) *Ltd v Regional Land Claims Commissioner*, *Northern Province and Mpumalanga*[75] and *Mahlangu NO v Minister of Land Affairs*).[76]

The claims advanced by the Commission and the claimants

[282] The claimants and the Commission, which supports the claim, therefore bear the onus to establish:[77]

(a) The claimants are a community;

(b) who had a right in land;

(c) that was dispossessed;

(d) after 19 June 1913;

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[73] *Phillips v Minister of Rural Development and Land Reform & another* [2014] 4 All SA 100 (LCC) paras 31-32.
[74] *Farjas* (*Pty*) *Ltd & another v Regional Land Claims Commissioner*, *KwaZulu-Natal* 1998 (2) SA 900 (LCC) para 41.
[75] *Gamevest* (*Pty*) *Ltd v Regional Land Claims Commissioner*, *Northern Province and Mpumalanga & others* [2002] ZASCA 117; 2003 (1) SA 373 (SCA) paras 28–29.
[76] *Mahlangu NO v Minister of Land Affairs & others* [2004] ZASCA 74; 2005 (1) SA 451 (SCA) para 13.
[77] See s 2(1)*(d)*, s 2(1)*(e)* and s 2(2) of the Act.

(e) as a result of past discriminatory laws and practices;

(f) the claim was lodged no later than 31 December 1998; and

(g) no just and equitable compensation was received for the dispossession.

For present purposes it is only elements (a) to (e) that are in dispute, and (f) only to the extent of whether a valid claim was lodged.

[283] Before I evaluate the evidence it is important to point out that the claimants and the Commission advanced a hotchpotch of vague, confusing, and contradictory claims that developed during the trial. The LCC glossed over this.

[284] In their statement of claim the claimants alleged that they are a 'community' of black families whose forebears traditionally occupied the *entire* Commonage from the 1800s. It is apparent from Paul's evidence that the date related to the latter part of the nineteenth century – from about 1880 – because this was the period he investigated. On the basis of this date the case was that the community occupied the Commonage and exercised traditional or indigenous rights to the land from about 1880.

[285] However, in response to a request for further particulars by the landowners as to whether the claimants admitted or denied that the Commonage was awarded to the 1820 settlers, the claimants responded by admitting that the Commonage was awarded to the settlers, but claimed that the AmaXhosa had occupied the entire

Zuurveld, including the Commonage before this. And by implication the claimants, who are also of Xhosa descent, are descendants of the people who had occupied the Commonage during that period.

[286] This meant that the claim to indigenous title over the Commonage was being advanced on two entirely different grounds: the first by virtue of being descendants of those who had occupied the land after 1880, and the second by being descendants of those who occupied the land before 1820. Moreover, the claims were being advanced together and not in the alternative.

[287] A completely different claim – the third claim – was advanced by the Commission's expert witness, Legassick, which was that the community occupied the Commonage from about 1880 and had 'built up' rights by virtue of having paid location taxes.

[288] The Commission's and claimants' assertion that an African 'community' occupied the Commonage independently and autonomously on the basis of shared rules regarding access to the land was also contradictory. Paul sought to make the case that the community had no rules but had their own traditional way of doing things, which he did not elaborate upon. The claimants' case directly contradicted the Commission's: their case was that the community had derived their rules of access to the land from a chief or headman by the name of Dayile. And yet a third

'inherently contradictory'[78] assertion, as the LCC characterised it, was that the community derived their shared rules from the location regulations.

[289] Regarding the nature of the rights that were alleged to have been lost through dispossession the Commission's initial investigation came to the conclusion that these were labour-tenancy rights. However, this was not the approach taken in the litigation. The case pleaded, following Paul's investigation and as set out in the claimants' statement of claim was that the rights lost were 'ownership rights, residential rights, grazing rights and rights to use the land for agricultural purposes, access to firewood, burial sites and the use of land as commonage for the entire community'. In its referral of the claim to the LCC for adjudication the relief sought by the Commission was for the court to 'upgrade the rights to full ownership rights'. This could only have meant, as I have indicated at the outset, that the claimants could not have had ownership rights.

[290] Regarding the dispossession, again several different and contradictory claims were made. The pleaded case was that in 1926 the community, then consisting of 500 people, occupied the entire Commonage. They were then 'herded' into a location on the Commonage and placed under the control of a 'native superintendent'. This action was facilitated through the implementation of s 47 of Ordinance 10 of 1921 and the Natives (Urban Areas) Act 21 of 1923, which entitled

[78] As described in *Salem Community (LCC)* para 135.

the Native Commissioner to restrict and control the rights of the black community. The implication is that the dispossession took place in 1926.

[291] But the other case pleaded is that the dispossession took place through the court order that was granted by the Grahamstown Supreme Court in 1940, which allowed the landowners to subdivide the Commonage and disestablish the location, where the African Community had acquired rights. The court granted the application, it is alleged, against the background of the racially discriminatory legislation then in existence and the location was consequently disestablished in 1941, thereby dispossessing the African Community of its rights.

[292] In the evidence of Legassick, a new ground was advanced to support the idea that a racially discriminatory practice – not racially discriminatory laws – underpinned the dispossession; the practice was the failure by the Board, the judges of the Supreme Court and the magistrate, to consult the African community before ordering the subdivision of the Commonage. In argument before us, when confronted with the inherent difficulties with this evidence Mr Krige sought to make yet another case: the racially discriminatory practice was the failure of the court to treat the African community equally, a contention that is difficult to understand.

[293] In summary therefore the Commission and the claimants advanced vague, confusing and contradictory claims regarding the nature of the rights the community was alleged to have had over the Commonage, the rules under which access to the

land was determined, how and when the dispossession took place and the racially discriminatory practice or laws that resulted in the dispossession.

[294] The following questions arise in this appeal:

(i) Did a Xhosa community or anyone else occupy the Commonage before the settlers arrived in 1820?

(ii) If there was such a community, what was the nature and content of the rights they acquired over this land?

(iii) Did this community have any relationship to the community that is alleged to have been dispossessed of its rights in the middle of the twentieth century?

(iv) Did the expulsion of the Xhosa from the Zuurveld in 1811 extinguish any rights that they may have held over this area and the Commonage in particular?

(v) What was the legal effect of the award of freehold title to the settlers in 1848?

(vi) Did a ‘community’ as defined in the Act exist on the Commonage from 1878 to the 1980s?

(vii) What was the nature and content of the rights this community possessed?

(viii) Was this community dispossessed of any of its rights? And if so when and how?

(ix) if there was a dispossession of any of the community’s rights, was this the result of a racially discriminatory law or practice?

The applicable principles relating to the evaluation of evidence in this matter

[295] The answers to these questions shall follow from an evaluation of the evidence. As is apparent from what has been said earlier there are fundamental disputes regarding the credibility of the various factual witnesses, their reliability and the probabilities. The technique employed in resolving such disputes is well-known, but it is necessary to quote the approach as formulated by Nienaber JA in *Stellenbosch Farmers' Winery Group & another v Martell et Cie*[79] in full. I do so because the LCC completely disregarded all rules in the manner it approached the evidence. This was incorrect. There is no reason to reject these elementary principles simply because this is a land restitution matter. The LCC's failure to do so is a misdirection that goes to the heart of its factual findings. Nienaber JA said the following:

'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness's reliability will depend, apart from the factors

[79] *Stellenbosch Farmers' Winery Group & another v Martell et Cie & others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) para 5.

mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[296] The parties also adduced both hearsay evidence and expert evidence regarding the historical facts relevant to this claim. They were entitled to do so under ss 30(1) and (2) of the Act, which allows all evidence that may be 'relevant and cogent' to be admitted, even if it would not ordinarily be admissible. The court is, however, not obliged to admit such evidence; it has a discretion to do so. And in this regard a court must remain alive to the dangers posed by the admission of hearsay evidence.

[297] Section 30(3) of the Act says that the court shall give such weight to any evidence adduced in terms of the preceding sections as it deems appropriate. This simply means that, as with all relevant evidence that is admitted, it must be sifted, weighed and evaluated in light of other evidence in order to give each piece of evidence the weight to which it is entitled. Some evidence may be unreliable and will be discarded completely, while other evidence will be given some weight but

discounted.[80] None may simply be ignored. It is self-evident that the process of fact-finding in this way must be underpinned by clear legal reasoning.

[298] The final category of evidence with which we are concerned is the expert evidence. The role of historians, as expert witnesses, has as far as I am aware, not received any particular attention by our courts. The issue is relevant in this case because the two historians who testified, Legassick and Giliomee, differed sharply on whether: there were Africans living on the Commonage before the expulsion of the Xhosa from the Zuurveld in 1811; the descendants of those people returned from about 1878 and resumed their communal existence on the Commonage; and whether the documentary evidence showed that this community, in addition, were permitted to 'build up' rights on the Commonage by the landowners. They differed not only over the facts and the inferences that may legitimately be drawn from these facts, but also on the proper methodology to be used to arrive at their conclusions.

[299] The use of expert evidence to assist the court to establish 'historical facts relevant to a particular claim' is specifically sanctioned by s 30(2)*(b)* of the Act. There is good reason for this. In *Marvel Characters Inc v Kirby*[81] the United States Court of Appeals for the Second Circuit said the following about the value of such evidence:

'We have no doubt that a historian's "specialized knowledge" could potentially aid a trier of fact in some cases. A historian could, for example, help to identify, gauge the reliability of, and interpret evidence that would otherwise elude, mislead, or remain opaque to a

[80] Frederick Schauer *Thinking like A Lawyer: A New Introduction to Legal Reasoning* (1999) at 210.
[81] *Marvel Characters, Inc. v. Kirby* 726 F.3d 119 (2d Cir. 2013) at 16-17.

layperson. [A] historian's task is "to choose reliable sources, to read them reliably, and to put them together in ways that provide reliable narratives about the past". He or she might helpfully synthesize dense or voluminous historical texts. Or such a witness might offer background knowledge or context that illuminates or places in perspective past events.' (footnotes omitted)

[300] A court must approach such evidence as it would any expert testimony. In this regard Addleson J in *Menday v Protea Assurance Co Ltd*[82] explained that:

'In essence the function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable.'

[301] But courts must also be alive to the dangers inherent in expert testimony. This is especially so because theories are sometimes advanced on the basis of untested and supposedly neutral facts; and conclusions drawn to confirm those theories. Ultimately, a court looks for the same qualities in historians as it would of other expert witnesses: appropriate specialisation, thorough research, and conclusions that are well supported by the record.[83]

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[82] *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569B-C.

[83] John A Neuenschwander 'Historians as Expert Witnesses: The View from the Bench' 30(3) *Organization of American Historians Newsletter* (Aug 2002), available at: *https://archives.iupui.edu/handle/2450/6017* (accessed 11 June 2016).

[302] In regard to establishing 'historical facts' it should be borne in mind that fact finding – even of historical facts – is the responsibility of the trier of fact, not the historian. A historian may give his opinion on the facts established from historical texts and documents and provide his reasons for these conclusions. This may aid the court, but it cannot displace the court's duty to establish the facts. A court must thus be alert to the dangers of such testimony particularly when it is directed towards supporting partisan causes, as in the present case. In addition, expert testimony – including that of historians – as to what the law is or what a document means is generally not admissible. With that in mind I turn to the evaluation of the evidence.

Evaluation of the Evidence

Evaluation of the oral evidence

[303] Nondzube's hearsay evidence was relied upon to prove that an African 'community' as defined in the Act resided on the Commonage before the 1820 settlers arrived, and remained until allegedly dispossessed of its rights, more than 120 years later. The LCC found that he was an honest and reliable witness, but the record shows the contrary.

[304] His evidence of when his great-grandfather, Phuphana, together with his grandfather, Landonda, travelled through the area where Grahamstown Cathedral was later built and settled on the Commonage is risible. They would have had to have undertaken this journey before the founding of Grahamstown in 1812. And, according to Nondzube, Landonda was a little boy at the time. He died only in the

1960s, which means he would have undertaken this journey more than 150 years before his death, which is impossible.

[305] Added to this piece of fiction is the story that Phuphana was part of the impi preparing to attack the Salem Village in 1835, but which abandoned the attack following negotiations with Gush. Phuphana would probably have been between 20-35 years of age when he passed Grahamstown before 1812 with Landonda. This would have made him 45-50, an unlikely age for a warrior. In addition, the sequence of events itself is bizarre. If it is to be believed, Phuphana had been living on the Commonage for decades and had been coexisting peacefully with the neighbouring settler village for around 15 years. Nevertheless, he joined the group of Xhosa intending to attack the village, thought better of it when presented with seed, and then returned to his land as if nothing had ever happened, and no further hostilities ever occurred.

[306] Nondzube's evidence is also inconsistent with contemporary written records, which establish that the Xhosa were expelled from the Zuurveld in 1811 and driven beyond the Great Fish River and that when the settlers arrived in Salem, nine years after the expulsion of the Xhosa, there was no sign of human habitation, other than the derelict remains of the Bouer farm. Apart from the Gush incident in 1835, there is no other evidence of any African presence in Salem until 1878, approximately seven decades after the war of expulsion, when there were three Africans reported to be resident on the Commonage. It is highly unlikely that there was a significant African presence before this, because the minutes of the Committee meetings of the settlers

give no such indication. And, as should be clear from the discussion above, the Committee would have been quite distressed if an African community had been living on what it considered to be its Commonage. There is also no reason to believe that it would have hidden such distress and not recorded anything in its minutes. This is, to say the least, highly improbable.

[307] Nondzube's evidence concerning the existence of a headman or chief by the name of Dayile, which lies at the heart of the claim, is also totally unreliable. It will be recalled that his testimony was that this man was the leader of the community and resided in a homestead on the Commonage, presumably with his family. Dayile determined where families would live, work the land and graze their cattle. In other words, he determined the rules regarding the community's access to the land.

[308] His hearsay evidence on this aspect stood alone; it was at odds with Paul's evidence for the Commission (which included records of interviews with other members of the claimant community), the credible direct evidence of Page and her brother Van Rensburg, and the objective evidence of the land surveyors. The expert historians were also unaware of the existence of any chief on the Commonage.

[309] Paul, who had investigated the claim and gathered information from some of the claimants, had only heard of Dayile's existence for the first time at the inspection in loco, and not from any of the other claimants with whom he had spoken. Paul's report and evidence regarding the shared rules under which the community existed

never mentioned Dayile. When this was put to Nondzube in cross-examination, his response was merely to express surprise.

[310] During the inspection in loco, Nondzube pointed out the general area where he was told that Dayile's homestead had existed. However, the minutes recorded that he did not point out the exact location. The reason he gave during his testimony for why he had not identified the exact spot was because the members of the court attending the inspection were tired. He was not able to provide any credible explanation why this had not been recorded in the minutes of the inspection.

[311] Page and Van Rensburg lived on the private erf of their father, and were familiar with the Commonage. Page rode her bicycle over the whole area, and Van Rensburg went hunting and rode on horseback to retrieve his father's cattle during their teenage years, between 1930 and 1940. They were emphatic that they had never heard of Dayile or seen any homestead in the vicinity of the area that Nondzube had identified as where Dayile's homestead had existed. Neither did they see any evidence of other homesteads or areas of the Commonage that had been ploughed by Africans.

[312] Their evidence is pertinently supported by the 1942 aerial photographs and the common cause evidence of the of the land surveyors, Chandler and Gerber, who found no evidence of huts or dwellings all over the Commonage, other than those

close to the private erven of the landowners. This evidence is also corroborated by Mullins, Hill and King.

[313] Chandler's evidence warrants closer attention not only because it is vital to the outcome of this appeal, but also because the LCC inexplicably simply ignored it in its evaluation of the evidence. Chandler's observations were that most dwellings were around the Assegaai River on the perimeter of the erven. A number of dwellings, which were not claimed, were on the erven. Chandler and Gerber agreed that in 1942, ie five years before the dispossessions had allegedly begun, there were 48 dwellings. Of these, 22 were on the erven and the remaining 26, which were on the Commonage, were in close proximity to the erven and linked by pathways to the commercial farming operations of the landowners. In my view, the most plausible probable inference to be drawn from these facts is that most or all of the occupants of the 26 dwellings were farm labourers and possibly labour tenants, and not members of an independent autonomous community with no connection to the landowners.

[314] This evidence is significant for another reason. The claimants placed much store on the Native Commissioner's estimate in July 1941 of approximately 500 Africans living on both the private erven and the Commonage, of which 50 were servants. They submitted, therefore, that the remaining 450 people were not employed by the landowners and probably resided on the Commonage as an independent community. As an aside, this was contrary to their pleaded case that there were 500 people living in the location. However, in any event, these figures

and the inference sought to be drawn are contradicted by the aerial photographs. It is impossible that 450 people were living on the Commonage in 26 huts – an average of 17.3 people per hut – while 50 people were living on the erven in 22 huts. It seems far more likely that the spread of people between the Commonage and the erven was closer to equal. And, in addition, given that there were only 48 huts in 1942, the population figure of 500 (ie more than 10 people per hut) seems improbably high. There is a strong likelihood that the total population was less than half of that. And, if that is correct, instead of there being 450 non-servants to 50 servants, the figure would be closer to 200 non-servants to 50 servants. Bearing in mind that these 'non-servants' would include children and elderly people, this would make it even more difficult to characterise the community as independent and autonomous.

[315] However, what is not only improbable, but cannot even be reasonably possibly true from Nondzube's evidence, is that for a period spanning more than 50 years, when Dayile was supposedly allocating land on the Commonage to his subjects according to rules with which the community supposedly complied, there is not a single indication in the minutes of any Board meeting, or any of the documents spanning this period, of his existence. The proposition that for more than half a century he could have existed and parcelled out land owned and controlled by the landowners, to an independent autonomous community, without the landowners being aware or taking any steps to challenge or document this, beggars belief. But even if Dayile existed and allocated land to people, he had no right to do so because the Commonage belonged to the landowners. Consequently, he was not able to transfer rights in that land to anyone.

[316] Ultimately, there was just no objective or corroboratory evidence for Dayile's existence: when he was born or died; when he arrived in Salem, whether he died there or departed from the area; where he resided or whether he had a family. He was no more than an apparition. So when a member of this court enquired from Mr Notshe when Dayile was supposed to have been present on the Commonage, he was driven to speculate, without reference to the record, that this was 'before and after 1913'.

[317] Another telling bit of evidence, which Nondzube only disclosed under cross-examination, was the existence of his father, Mr Jamani Sukula. He was born in 1899 and died working for Mullins at the ripe old age of 94. Mullins had a close relationship with him. Nondzube testified that he had heard the same stories that Landonda had related to him regarding their occupation of the land from Sukula.

[318] According to Mullins undisputed evidence, Sukula had worked and lived on the Attwell farm since about 1924. He had never mentioned the existence of Dayile or any independent community on the Commonage. Significantly, Nondzube's land claim was made under the name of his paternal grandfather, Kifa – Sukula's father – and not under his maternal family name, Nondzube. There was no attempt by Nondzube to explain how it was possible for his father to have been an employee of several landowners, while all his other relatives (including his grandfather) belonged to an independent community. The likelihood is that his other relatives too, were employed on the farms.

[319] Another piece of his evidence demonstrating his total lack of any reliability was his testimony regarding what the name ‘Tyelera’ referred to. He gave several inconsistent versions: Tyelera was the whole of Salem; it referred to the Zuurveld; it was one of the areas where the community ploughed and it referred to the Commonage. Both Mullins and King contradicted him explaining that Tyelera derived its name from the Kariega River. Mullins testified that Africans referred to Salem as Esalem. Their evidence was consistent and unshaken.

[320] It is therefore not surprising that at the end of his cross-examination, Nondzube’s version, that of an independent community governed by Dayile’s rules, fell apart with him conceding that the landowners determined the rules over the Commonage. Despite this issue being central to the claimants’ case, and Nondzube’s concession being nothing short of calamitous, the LCC simply ignored it.

[321] This does not mean that Africans who were residing on private erven and on the Commonage did not live by customary rules or practices. It is clear from the evidence that there were rules and norms governing social practices. However, because the African community was not independent and autonomous and did not have control over the land in the area, the rules did not extend to aspects of life such as allocation of land and grazing rights. Mullins evidence as to how the community functioned was persuasive and credible, unlike Nondzube’s. Paul’s evidence on this issue on behalf of the Commission was vague and, by his own admission, had not been properly investigated.

[322] Nondzube's evidence therefore did not establish that a 'community' as defined in the Act existed at any stage from about 1800 to 1940. His hearsay evidence should have been disregarded as being completely unreliable, and accorded no weight whatsoever. The failure on the part of the LCC to do so was a misdirection.

[323] Ngqiyaza was the only other witness for the claimants. The LCC found him also to have been a reliable witness. His evidence was sometimes difficult to follow, perhaps due to his lack of education and literacy. He explained that demarcation brought suffering because his father could no longer obtain firewood from the Commonage for sale in Grahamstown. This may possibly have been the result of the farms having been fenced off and subdivided.

[324] But parts of his evidence were not satisfactory. It is not clear whether he was born in Lokishi (the location) or on Bradfield's farm. His evidence that there were several dwellings next to his home in the vicinity of the lime pit is inconsistent with Chandler's evidence as to where dwellings were situated in 1942.

[325] The main difficulty with his evidence that he was born in the location in 1942 – if his birth certificate is correct – is that the location had ceased to exist by 1934 and was formally disestablished at about the time he was born. It is also apparent from the interview Paul conducted with Mr Tim Ngqiyaza, who was Ngqiyaza's older brother and is sadly also deceased, that he was also born in the location and had always worked for Walter Penny, which means he was a farm-worker and always

resided in the area as an employee. There is no indication from the recorded interview with Tim Ngqiyaza that his father was not employed on any farm.

[326] In my view, apart from the obvious difficulty that Ngqiyaza's evidence is inconsistent with Chandler's observations, and is also unclear, it does not materially advance the claimants' case. I accordingly discount it, as the LCC should have done.

[327] I have set out Paul's evidence in some detail earlier. He was argumentative and evasive. Some of his answers were incoherent. He was not able to deal with questions about: whether the Commonage was occupied by Africans when the settlers arrived; whether they were they forced out and by whom and whether this happened before or after 1913; whether the Africans occupied the entire Commonage or part of it; how occupation of the entire Commonage would have been possible in the face of the settlers having erected buildings and developed a cricket field on it; where the landowners were and what they were doing while the African community occupied the Commonage and whether the community was aware of the existence of the Board. The answers to these questions were vital to the Commission's (and the claimants') case.

[328] It is also apparent that the laws he mentioned as having resulted in the racially discriminatory dispossession of the African community, namely Ordinance 10 of 1921 and the Native (Urban) Areas Act 21 of 1923, discussed earlier, had no bearing on the issues in this case either. The LCC did not rely on them for this

purpose, and even though the location was formally disestablished on 14 November 1942 in terms of the Native (Urban) Areas Act of 1923, the facts show that the location had ceased to exist by 1934. This is fatal to the claimants' pleaded case that the dispossession occurred in 1942 after the formal disestablishment of the location.

[329] The importance of Paul's interview with both Tim Ngqiyaza and Mrs Nofikile Simayile was this. It appears from Tim Ngqiyaza's interview that he was always an employee of a landowner. And Simayile was born on Mr Lloyd's farm in 1905. This means that they resided on the farms of, or worked for, landowners and could not possibly have been part of a community that lived independently of the landowners.

[330] In general it is apparent that he conducted a very superficial investigation regarding the disputed issues in this case. No weight can or should have been attached to his evidence.

Evaluation of the expert testimony

[331] Legassick's brief was to examine the documentary evidence and give his opinion on it. His testimony, however, went well beyond this.

[332] He testified that: Xhosas had acquired indigenous rights over the Commonage before the settlers arrived in Salem in 1820; the legislation and regulations in force between 1870 and 1940 allowed them to build up legal rights; it

was a question of common sense, not law that a ‘community’ existed on the Commonage; the interpretation of laws and regulations were questions of grammar, not law; the legal rights of Africans living on the Commonage were violated because the African community were not consulted by state officials – by the Board, the Magistrate and the Grahamstown Supreme Court – concerning the subdivision of the Commonage, or of the disestablishment of the location, which constituted a racially discriminatory practice, and ‘violated their right of occupation and dispossessed them’. His opinion on all of these questions, being questions of law, was inadmissible and should not have been admitted.

[333] In regard to his opinion on the documentary evidence, the court, as I have said, is the ultimate arbiter of what facts are established by this evidence and the inferences that should properly be drawn from these facts. I find that Giliomee’s evidence on the disputed issues accorded more closely with my assessment of the evidence. In particular his evidence is supported by clear facts from the historical record that an independent autonomous African community could have existed on the Commonage.

Determination of the issues

[334] Having considered all the evidence, I must now decide the issues that arise as set out earlier. The first three issues may be considered together. These are: (i) whether a Xhosa community or anyone else occupied the Commonage before the settlers arrived in 1820; (ii) if there was such a community, what was the nature and

content of the rights they acquired over this land, and (iii) if so, did this community have any relationship to the community that was alleged to have been dispossessed of its rights in the middle of the twentieth century.

[335] It is undoubtedly so that Xhosa-speaking people occupied parts of the Zuurveld from about 1750, before any white occupation of this area. And, thereafter there were conflicting claims not only between colonisers and colonised, but also among the Xhosa themselves, as is evident from the dispute between Chungwa and Ndlambe. But this does not help us establish whether any community occupied the Commonage as a fact before 1820.

[336] Legassick's suggestion that it is sufficient to show that the Xhosa occupied the Zuurveld to lay claim to the Commonage cannot be correct. He was not an expert on matters pertaining to the acquisition of territorial rights by tribes, clans or political entities and the claimants led no other expert evidence on this issue.

[337] If Legassick is correct, this would mean that anyone, who was a descendant of any Xhosa tribe or clan that occupied the Zuurveld before 1820, would have a claim not only over the Commonage but over the entire Zuurveld. This would include not only the private erven adjoining the Commonage, which is not part of the claim, but every farm and town, including Grahamstown. The Act does not recognise claims of this nature.

[338] So, it is necessary for the claimants to prove that there was in fact a community that occupied the Commonage during that period. There is, however, no such historical evidence. The only evidence that we have is of the Bouer farm, established in the immediate vicinity of the Commonage in 1785, which had been abandoned when the 1820 settlers arrived.

[339] Paul's speculative and Nondzube's fanciful and demonstrably false evidence of prior African occupation of the Commonage I have already rejected. The record also shows that the first African presence on the Commonage appears from the report of the Inspector of Native Locations in 1878, 58 years after the settlers arrived. It indicates that there were three 'natives' and one hut on the Commonage. The claimants therefore did not establish a factual basis for the assertion that they were descendants of a community that occupied the Commonage before 1820. That disposes of the first three issues in this appeal.

[340] The fourth issue to be decided is whether the expulsion of the Xhosa from the Zuurveld in 1811 extinguished any rights they may have held over this area and the Commonage in particular. And the fifth, what the legal effect of the award of freehold title to the settlers in 1848 was.

[341] It is not strictly necessary to investigate the fourth issue, because I have found that the claimants have failed to prove that a Xhosa community occupied the Commonage before 1820 and therefore that they had any rights over it. However, in

view of the approach taken by the LCC, and the claimants, the issue must be dealt with. It is therefore necessary to explore the legal principles pertaining to the loss of indigenous rights.

The Legal Principles Pertaining to Loss of Indigenous Title and Their Application

[342] In *Alexkor Ltd v The Richtersveld Community (CC)*[84] the Constitutional Court described indigenous law as a:

'[S]ystem of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community . . .

The determination of the real character of indigenous title to land . . . involves the study of the history of a particular community and its usages. So does the determination of its content.'

[343] A 'right in land' as defined in the Act[85] is not confined to common law property rights but is of wide import. It means:

'[A]ny right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.'

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[84] *Alexkor Ltd & another v The Richtersveld Community & others* [2003] ZACC 18; 2004 (5) SA 460 (CC) paras 53 and 57.
[85] Section 1 of the Act.

[344] However, to establish indigenous title, it must be shown that indigenous people claiming such title exclusively and effectively occupied the land, even if only seasonally, as is consistent with a nomadic lifestyle.[86] This may be established by judicial notice, reference to writers on the topic and other authorities and sources, and may include the evidence of witnesses if necessary.[87] The landowners dispute that the claimants have proved indigenous title.

[345] In *Richtersveld Community v Alexkor Ltd (SCA)*,[88] this court recognised that any sovereign exercise of power by the State may extinguish indigenous land rights. But this would require a clear intention and conduct on its part evincing such intention. A grant of land to another person would be such a case.[89] It thus approved the following dictum from the Australian case of *Mabo v The State of Queensland (No.2)*:[90]

'Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases . . . .'

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[86] *Richtersveld Community & others v Alexkor Ltd & another* [2003] ZASCA 14; 2003 (6) SA 104 (SCA) para 23.
[87] *Alexkor Ltd & another v The Richtersveld Community & others* [2003] ZACC 18; 2004 (5) SA 460 (CC) paras 52 and 54.
[88] *Richtersveld Community & others v Alexkor Ltd & another* [2003] ZASCA 14; 2003 (6) SA 104 (SCA).
[89] Ibid para 40.
[90] *Mabo & others v The State of Queensland (No 2)* (1992) 175 CLR 1 (HCA) para 69.

[346] In *Alexkor Ltd v The Richtersveld Community (CC)*[91] the Constitutional Court said that indigenous law ownership may be extinguished if:

'*(a)* the laws of the Crown expressly extinguished the Community's customary law ownership of the land;

(b) the laws of the Crown . . . rendered the exercise of any of the material incidents of the indigenous law right to ownership unlawful;

(c) the Community was granted limited rights in respect of the land by the Crown in circumstances where the only reasonable inference to be drawn is that the rights of indigenous law ownership were extinguished; or

(d) the land was taken by force.'

It is thus clear that once indigenous rights are extinguished, either by law or by force, they cease to exist. And conversely such rights can only be regained by law (or, historically, by force).

[347] Among the questions with which we are concerned in this case is whether the forcible expulsion of the Xhosa people from the Zuurveld in 1811, and the subsequent grant of land, including the Commonage, to the Salem settlers, first through quitrent, and thereafter freehold title, had the effect of extinguishing any indigenous title to land of anyone claiming such title may have had.

[91] *Alexkor Ltd & another v The Richtersveld Community & others* [2003] ZACC 18; 2004 (5) SA 460 (CC) para 70.

[348] From the principles enunciated above, it is clear that any claim to indigenous title over any part of the Zuurveld was extinguished by the brutal expulsion of all Xhosa-speaking people in 1811.

[349] The LCC however found that the Xhosa factually never lost their rights. It reasoned that after the Fourth Frontier War during which the Xhosa were expelled from the Zuurveld, there were six more Frontier Wars in the Zuurveld. And thus that:

'[T]here is no evidence that the settlers at any time managed to have complete authority over the Zuurveld and that the Xhosa relinquished their rights and were completely expelled.'[92]

[350] The impact of the further wars was, however, not explored in the evidence and there was no basis for the court to make this factual finding. However, from Mostert's study of the Frontier Wars[93] it is clear that there were only five more Frontier Wars between 1835 and 1878, not six. And only the sixth, in 1835, involved contact with the settlers in the Zuurveld, and ended in defeat for the Xhosa. On that occasion the settlers at Salem were not attacked and no attempt was made to take over the land they had occupied. The incident is referred to earlier involving the meeting between Gush and the impi.

[351] Thereafter the theatre of conflict was concentrated mainly in the area between the Great Fish and Great Kei Rivers, far to the east of the Zuurveld. And none of

[92] *Salem Community (LCC)* para 141.
[93] N Mostert *Frontiers* (1992).

those wars, spanning more than 40 years, involved any of the land occupied by any of the 1820 settlers. So there is no basis whatsoever for the LCC's conclusion that after the expulsion in 1811, any part of the Albany district, including Salem Village or the Commonage was re-occupied by those who were expelled. Indeed, this flies in the face of the historical record. The fact that some of the Xhosa may have wished to return, of which there is no evidence, or may have believed that they were entitled to the land, has no bearing on the issue.

[352] The fifth issue concerns the legal effect of the award of the Commonage to the settlers in 1848. The Grahamstown Supreme Court held that the grant contemplated the permanent settlement of settlers at Salem.[94] It was of grazing land to the Salem Party of erf-holders to be held communally. Simply put the landowners owned the land communally. The court compared the rights of erf-holders on the Commonage to 'native law' which also recognised that land held under tribal tenure belonged to the tribe, and not the individuals, who constitute it. It is therefore beyond any doubt that the nature and content of the ownership right awarded to the settlers rendered it incompatible with the exercise of any indigenous rights by any other community. The award was therefore akin to the Crown by law expressly extinguishing any claims to prior ownership.[95]

[353] The LCC misunderstood the landowners' case to be that their common law rights should prevail over the unregistered indigenous rights the claimants held over

[94] *Ex Parte Gardiner: In re Salem Commonage* (EDL) unreported case (29 February 1940).
[95] *Alexkor Ltd & another v The Richtersveld Community & others* [2003] ZACC 18; 2004 (5) SA 460 (CC) para 70.

the disputed land.[96] But this was not their case; their case was that the claimants did not have any rights – indigenous or common law – as a community, which could have been dispossessed as contemplated by the Act. The events before and after the award are completely consistent with this. The LCC appears to have arrived at a similar conclusion to the one reached here after finding that over time the written rules of the Board 'took predominance over traditional and customary rules, as the two were inherently contradictory'.[97] However, this conclusion flies in the face of its main conclusion that the claimants had established indigenous title.

Were the forebears of the claimants a community?

[354] I turn to the sixth, and central issue, whether an independent 'community' as contemplated in the Act existed from between 1878 and the middle of the twentieth century. In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*,[98] the Constitutional Court propounded a two-pronged test in order to determine whether a claim was in fact a community claim by establishing whether the community (a) retained much of their identity and cohesion as part of the original clan; and (b) 'held' and determined access to the land in common through shared rules.[99]

[355] The LCC held that the claimants had established that they were a 'community' as contemplated in the Act and had resided on the Commonage on the basis of

[96] *Salem Community (LCC)* para 118.
[97] Ibid para 135.
[98] *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC).
[99] See generally J M Pienaar *Land Reform* (2014) at 546.

shared rules. In coming to this conclusion it accepted the evidence of Nondzube and Ngqiziya as 'honest and credible' and rejected the landowners' evidence as improbable. It found that the documentary evidence supported the claimants' case.[100] It is startling that even though the claimants' case on this aspect rested primarily of the existence of Dayile, which the landowners contested vigorously it was apparently not material to the court's reasoning.[101]

[356] The judgment upholds the claim that an autonomous community with rights in land, who were not employees of the landowners, resided on the Commonage. It says that the rights of the claimants were not merely economic rights to graze and cultivate in a particular area, but were rights of families connected to their forebears. And yet the concluding paragraph of the judgment perplexingly finds the opposite, totally contradicting the main premise of the judgment:

'[T]hey were not simply there by the grace and the favour of the Colonialists. The paternalistic and feudal-type relationship involved contributions by the family, who worked the lands of the farmer.'

[357] To have 'worked the lands of the farmer' in a 'feudal-type' relationship, the claimants' forebears would have had 'master-servant' relationships with the farmers. The further obvious implication of this passage is that the farmers owned this land,

[100] *Salem Community (LCC)* para 124.
[101] The LCC mentions Dayile briefly in paras 16 and 71, but appears not to consider his existence or lack thereof relevant to the outcome of the claim.

and contrary to the LCC's conclusion, the community could only have been there 'by the grace and favour' of the landowners.

[358] I have already held that Paul's and Nondzube's evidence of the existence of a community as contemplated in the Act cannot be given any weight. However, in regard to the documentary evidence, the LCC found that it supported the claimant's case. It found:

'None of the witnesses of the [landowners] could proffer an explanation for the large native population. . . [The 1878] native returns indicate that there were 42 natives, 47 cattle and 9 huts on the Commonage.'[102]

And later:

'In 1932, only 6 huts were on the Location yet there were 300-400 natives. It can be inferred that these natives were not all living in 6 huts. And it is Mr Nondzube's testimony that they lived on the Commonage.'[103]

[359] The Commission supported this finding, adding that by July 1941 there was an African population of 500 on the Commonage.

[360] These figures are quoted selectively and do not give the true picture. The historical narrative shows that the settlers controlled the Commonage since their arrival by establishing a Committee for this purpose. By 1848 they owned the Commonage. Africans began seeking employment in the area in the latter part of the

[102] *Salem Community (LCC)* para 129.
[103] Ibid para 132.

nineteenth century. Some obtained employment from the landowners, while others were labour tenants or had sharecropping arrangements with landowners.

[361] The legislation passed during this period and early in the twentieth century was aimed at controlling this phenomenon. It also gave landowners the power to exercise control over the Commonage. They did so. The Commonage was never abandoned as derelict and the landowners never gave up ownership – the evidence shows quite the contrary. They used the land for their collective benefit.

[362] The presence of Africans in Salem and on the Commonage must be seen in this light. The recorded figures of 1878-1884 show that there were indeed Africans residing on the Commonage. But the figures also show that there were significantly higher numbers of Africans living on the private erven. The most plausible probable inference to be drawn from this fact is that people on the Commonage were residing there by virtue of having entered into individual agreements with landowners, as ‘servants or tenants of the landlord’ and not by virtue of rules that the Africans themselves determined, much less by virtue of the authority of the mythical Dayile.

[363] It is significant that the figure of 24 huts on the Commonage in 1884 did not change materially over 60 years because by 1942, according to Chandler’s undisputed evidence, there were only 26 huts on the Commonage. There was therefore no growth in the numbers of Africans living there, which can only mean that Africans were not settling freely on the Commonage.

[364] The LCC's inference relating to the population figures in 1932 was based on the health report of that year, and is also incorrect. It is true that the report stated that there were only six huts in the location, but it also stated pertinently that there were no accurate figures of the African population, which was 'possibly' about 300-400. However, vitally, what the LCC omits to mention is the comment in this report that most of these people live on the private erven of the owners, which contradicts the finding that they were living on the Commonage. Even more telling is that the LCC ignored the earlier health report of December 1931 that there were ten African families living in the location and that *only Africans employed in the settlement were allowed to reside in the location*; and that '*most of the inhabitants kept their native employees on their own properties*'. The June 1934 report, which the LCC also does not refer to, stated that the number of Africans were unknown, but that the 'Native Location' had been done away with, and *'Natives' were now residing on their employers' land*. None of these reports make mention of Africans residing on any part of the Commonage outside of the location.

[365] These health reports, therefore, do not corroborate the claimants' evidence that Africans lived as an independent community outside the location and all over the Commonage, but point to the opposite conclusion; most resided on the private erven of the landowners. They corroborate the landowner's version and particularly the direct eyewitness testimony of Page and Van Rensburg.

[366] The estimate of 500 Africans living in Salem in 1941, as appears in the Magistrate's report is, as I have said earlier, probably higher than the actual number

of Africans who were living in Salem at the time. Chandler's evidence indicates that there were 26 huts on the Commonage close to the private erven and the other 22 on the private erven. And the most plausible probable inference from this fact is that the people residing in these 48 huts were employed in some capacity by the landowners.

[367] In *Goedgelegen*[104] the Constitutional Court said that the 'acid test' is whether the community derived its right of occupation from their own shared rules or those of the employer. If the rules came from the employer the employee had to obey them. In that case it found that labour tenancy rights of the Popela community did not vest in the community.

[368] In my view, the claimants failed to prove that they were descendants of a community as contemplated in the Act. Their forbears as a fact never 'held' the land in common. On the contrary, the evidence points conclusively the other way. The Commonage was owned and held by the landowners for more than a century; the rules governing its use were determined by the landowners through the Committee and the Board they had established for this purpose. And this happened within the legislative framework aimed at controlling and restricting the rights of African people at the time.

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[104] *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) paras 45-47.

[369] It is an understatement to characterise the conditions to control and regulate African occupancy on the Commonage as oppressive. While limited rights were given to those who had permission to erect dwellings or huts, the Board and the landowners determined the rules for occupancy, within the legislative framework of the time. The social mores among the white settlers at the time would also have ensured that they maintained their dominance over the African community. This is antithetical to any notion of African people acquiring rights and living on the Commonage independently as a community by their own shared rules. The claimants' case of an independent and autonomous African community having lived on the Commonage therefore fails *Popela's* 'acid test.'

The nature and content of the rights in issue

[370] This brings me to the seventh issue, which is the nature and content of the rights the African community did have. The pleaded case was that they possessed the full panoply of rights, including the right of ownership over the *entire* Commonage. They also claimed that they had beneficially occupied this land. The LCC did not analyse these rights but found that they had a 'right to be there'[105] and that this right was connected to their 'indigenous forebears'.[106] It also fixed the date of dispossession as 1947, for which there was no evidence.[107]

[105] *Salem Community (LCC)* para 147.
[106] Ibid para 161.
[107] Ibid para 123.

[371] I have mentioned that the 'right' in land alleged to have been dispossessed is of wide import. It is therefore necessary for the claimants to properly identify the nature and content of the right to enable a court to ultimately determine what appropriate relief should be granted. If, for example, the right lost was one of ownership, the appropriate relief may be to restore the land. On the other hand, if the right lost was only one of occupation, a court may order restoration of that right only or equivalent compensation.[108] The proper identification of the right may also require that a date of dispossession be determined so that the court can properly quantify the claim.[109]

[372] It is clear from what I have said earlier, that the African community who lived on the private erven and the Commonage did so by virtue of their relationship with their employers. And in the times they were living, it is appropriate to describe this as a master-servant relationship, which is not to be confused with the enlightened labour relations regime with which we are familiar today. So whatever 'rights', if any, the individual members of the community may have acquired on land that belonged to the landowners, this would have been as a result of the incidence of their employment relationships with their employers and not by virtue of being members of an independent community.

[373] In argument before us it was hardly surprising that Mr Krige was not able to sustain the case of an independent community with rights of ownership over the

[108] *Alexkor Ltd & another v The Richtersveld Community & others* [2003] ZACC 18; 2004 (5) SA 460 (CC) para 45.
[109] Ibid para 101.

entire Commonage. Instead he retreated into first contending that not all of those who made up the community had ownership rights; some of them, he speculated, may have been labour tenants or had other forms of employment with the landowners. And later he vacillated again, contending that the community exercised joint ownership with the landowners, a contention that he was not able to support on any factual basis. In this regard it must be pointed out that joint ownership could only have arisen by agreement of the parties. And there is no such evidence.

[374] Mr Notshe advanced a novel idea – not pleaded or explored in the evidence – that the African community exercised a parallel system of ownership with the landowners. As I understand the contention it is that a system of registered common law rights of the landowners co-existed with the indigenous rights of the African people over the Commonage. I am not aware that any such claim has been recognised in our law and no authority was advanced to support it. However, even if such a parallel system of ownership rights could exist, I have found that the exercise of any indigenous title to the Commonage was inconsistent with the award of ownership rights to the settler community in 1848, and accordingly the indigenous title was extinguished. On the facts, the suggestion that some system of parallel ownership – indigenous or otherwise – existed alongside the ownership of the landowners, in which they either acquiesced or of which they were unaware, is simply untenable.

[375] Having concluded that there was no ‘community’ as contemplated in the Act, it is not strictly necessary to deal with the remaining two issues, namely whether this

community was dispossessed of any of its rights; and secondly, if there was any dispossession, whether this was as a result of a racially discriminatory law or practice. However, for the sake of fullness I shall consider these issues briefly.

Was there a dispossession?

[376] The pleaded case of the claimants was that there were 500 people residing in the location and that this community was dispossessed of its right in land through de-proclamation of the location, not the subdivision of the Commonage. Neither the Commission nor the claimants adduced any evidence to prove their pleaded case, and the documentary evidence points the other way. The evidence as contained in the magistrate's letter of 15 July 1941 and the 1934 health report was that the location had ceased to exist several years earlier. De-proclamation was, therefore, a formality and had no bearing on anyone's rights as there was no one residing in the location at the time.

[377] The LCC held that 'in the case of Salem the dispossession was "completed or consummated" by 1947'.[110] How this conclusion was reached does not appear from the judgment, and was not examined in the evidence. The pleaded case was that the dispossession only *began* in 1947, and continued until the 1980s.

[110] *Salem Community (LCC)* para 123.

[378] The dispossession of a right in land may of course occur over a long period of time and can be the cumulative effect of various laws and practices.[111] But this must be 'as a result' of a racially discriminatory law or practice. In *Goedgelegen*, the Constitutional Court interpreted this requirement to mean 'as a consequence' of, and it need not be 'solely as a consequence of' the racially discriminatory laws and practices. However, the consequence should not be remote, which means that there should be a reasonable connection between the racially discriminatory laws and practices of the State on the one hand and the dispossession on the other. A context-sensitive appraisal of all the factors is necessary for this determination.[112]

[379] There was, however, no evidence led as to how and when the dispossession took place. The objective evidence was that there were 26 dwellings on the Commonage, which I have held was likely to have been occupied by people who had some sort of employment relationship with the landowners. There was no clear evidence – apart from the unsatisfactory evidence of Ngqiyaza – that any of them were 'dispossessed' within the meaning of the Act following the court order permitting the subdivision, in 1941. The LCC's finding that the dispossession was completed by 1947 before 1993 is not understood[113] and is not supported by the facts.

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[111] J M Pienaar *Land Reform* (2014) at 549.
[112] *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) para 69.
[113] *Salem Community (LCC)* para 123.

A racially discriminatory law or practice?

[380] In regard to the final issue, whether there was dispossession *as a result* of any racially discriminatory law or practice, the pleaded case was that the laws through which this happened were the 1913 Land Act, s 49 of Ordinance 10 of 1921, the Natives (Urban Areas) Act 21 of 1923, and the Native Trust and Land Act 18 of 1936.

[381] Neither the 1913 Land Act, nor the Native Trust and Land Act were used by the landowners to dispossess the claimants as had been pleaded. These statutes did not feature in the evidence for good reason: they were entirely irrelevant to this case. The location was disestablished formally under s 2 of the Natives (Urban Areas) Act of 1923, on 14 November 1941. But it had already ceased to exist several years earlier. So it had no bearing on the issues in this case either.

[382] The only relevant statute was the Ordinance, which provided for the management of villages and communities not being municipalities. It applied to the Board's management of the Commonage. The Grahamstown Supreme Court held that s 49 permitted the Administrator to authorise the subdivision of the Commonage into the names of the individual landowners. Neither the claimants nor the LCC relied on the Ordinance to prove a connection between the alleged dispossession and this law, which in itself was not racially discriminatory.

[383] Instead, an entirely different case was advanced on the basis of Legassick's inadmissible testimony: the black community was not consulted by the Board, the magistrate, the Administrator of the Cape Province and the judges of the Grahamstown Supreme Court, which violated their rights and dispossessed them. The decision to subdivide the Commonage was therefore a racially discriminatory practice by state officials.

[384] The LCC upheld this contention finding that:

'The decision ignored the natives, despite being aware of them, only because they were Black, they could not have rights and they did not need to be consulted despite the fact that they were affected. This was a racially discriminatory practice.'[114]

[385] Legassick had no facts before him to justify these legal conclusions on which he was obviously not qualified to testify. And the LCC had no proper basis to rely on his evidence for this purpose. The history of events leading to the subdivision is detailed earlier in this judgment.

[386] The LCC also found that 'the judge' who granted the subdivision order was aware of 'Natives on the Commonage' but ignored them in ordering the subdivision.[115] As I have pointed out above, the LCC made this finding on the basis of the letter emanating from the magistrate that was wrongly attributed as having emanated from 'the judge' – there were two judges who granted the rule nisi, not one – and then misconstrued its contents. The LCC's adverse remarks made about the

[114] *Salem Community (LCC)* para 155.
[115] Ibid para 154.

judge having ‘ignored’ the ‘Natives’ is therefore regrettable. In any event, whether the Africans living on the Commonage had an interest in the matter depended on the nature of their rights: the landowners asserted a right of joint ownership and, as I have shown, any Africans living on the Commonage did so as a result of having been permitted to do so by the landowners. They therefor had no legal interest that would have entitled them to notice or to be heard. That would still be the legal position today.

[387] The matter that concerned the Board for about 20 years was how the landowners could use the Commonage optimally for their own benefit. The Board concluded, as did the magistrate who compiled the report for the Administrator, that the African employees would be properly accommodated on the private erven of the landowners. Who they consulted in the process is not known and does not appear from the evidence. The court issued a rule nisi, which was widely published, allowing all interested parties to show cause why the subdivision should not be confirmed. There was no opposition and the rule was accordingly confirmed six months later. The LCC had no grounds to make this finding: it was not an issue on the pleadings and had no factual or legal basis.

Conclusions

[388] To conclude, the Commission and the claimants set out to prove that an African community occupied the entire Commonage from about the latter part of the nineteenth century until 1947. They had full ownership rights and the panoply of other rights arising from the incidence of their ownership. They derived their

ownership through indigenous law from a chief or headman named Dayile, who had a homestead on the Commonage. They also acquired rights in land through the location regulations. However, in about 1926 they were herded into a location, which was de-proclaimed in 1941. At the time there were 500 people living in the location. The de-proclamation of the location and its disestablishment resulted in the dispossession of their rights over a period from 1947 until the 1980s. The dispossession occurred as a result of various racially discriminatory laws.

[389] The Commission and the claimants, upon whom the onus rested, were not able to prove any of these allegations. Instead their case changed as the trial progressed, and ultimately bore no resemblance to the pleaded case. They made up the case as they went along, and during argument in this court it unsurprisingly fell apart completely, with counsel unable to maintain a coherent or consistent position on any of the disputed issues

[390] Paul was a very poor witness. The expert evidence of Legassick was largely inadmissible, unhelpful and not supported by the record. The hearsay evidence of Nondzube was unreliable, as was Ngqiyaza's. No weight should have been given to their evidence. It is not clear why the claimants relied only on two witnesses to support this claim. But it is apparent from the way the case was pleaded and then unfolded that it lacked any credibility.

[391] By contrast, the evidence of the landowners resonated with the documentary evidence, as did the evidence of their expert Giliomee, even though his opinion on the legal questions he was asked to comment upon should also not have been

allowed. Mullins, Page and Van Rensburg were particularly good witnesses. It is incomprehensible how the LCC so easily disregarded their testimony. In doing so without reason, it misdirected itself.

[392] At the heart of the case of the landowners lay the inescapable fact that the settlers were awarded freehold title over the Commonage in 1848. Their descendants and successors in title retained this right and held the land collectively until it was subdivided between them in 1941. This right is and was incompatible with the exercise of any indigenous rights over the land, much less any rights acquired through location rules. The settler community, initially through their Committee and subsequently through the Board, managed their interest in the Commonage for their collective benefit. Their rules determined theirs and anyone else's access to the land. No one else could or was entitled to assume this authority. And no one did.

The Validity of the Lodgement

[393] The landowners also take issue with what they contend was the failure of the claimants to produce evidence that they had authorised the lodgement of the claim. The lodgement of the claim, they contend, is therefore a nullity. Section 10(3) of the Act provides:

'If a claim is lodged on behalf of a community the basis on which it is contended that the person submitting the form represents such community, shall be declared in full and any appropriate resolution or document supporting such contention shall accompany the form at the time of lodgement: Provided that the regional land claims commissioner having jurisdiction in respect of the land in question may permit such resolution or document to be lodged at a later stage.'

[394] The claim form, forming part of the referral did not have annexed to it any ‘resolution or document’ authorising Mr Madlavu to lodge the claim; neither was evidence led of any such ‘resolution or document’ having been lodged at a later stage. Before us the Commission contended that the constitution of the claimant committee, which was attached to Paul’s report to the Commission, is such a ‘document’ as contemplated in the section. However, a constitution is a body of principles and rules by which an organisation is governed. It does not itself confer authority on Madlavu to lodge the claim on the claimants’ behalf. On the face of it, therefore, Madlavu had no authority to lodge this claim.

[395] The lodgement of claims in compliance with s 10(3) is not merely a technical matter. The purpose of this provision is to ensure that no improperly authorised claim is entertained, and to avoid fraudulent and competing claims. The court also takes judicial notice of the fact that several community claims have been confronted with these difficulties. In this case, it is clear from the evidence, to put it at its lowest, that some of the claimants may have been descendants of employees of the landowners, which disqualifies them as claimants to this community claim. In fact during the hearing counsel for the Commission conceded this much. When asked how many of the claimants fell into this category, he was unable to say. This raises serious questions regarding the validity of the claim. In my view the ‘Salem Community’ did not prove that Mr Madlavu was authorised to lodge the claim on their behalf. For this additional reason the claim must fail.

Costs

[396] I turn to the question of costs. The landowners were put through much trouble and expense to defend a claim that was still-born. The Commission not only failed to investigate the claim properly, but Paul's report, which formed the basis of the referral to the LCC, was shoddy and unprofessional. His testimony was disgraceful. It may perhaps be that some individual members of the claimant community do have valid individual claims of some sort under the Act, but the Commission regrettably never investigated this properly. This is particularly troubling given that the Commission's initial investigation concluded that the rights allegedly dispossessed were labour-tenant rights, but Paul apparently refused to follow or investigate this.

[397] No proper case was made for the landowners to answer. In fact they were placed in the invidious position of having to deal with a moving target on almost every issue in circumstances where the court was at best supine, and at worst gave the appearance of being unreceptive to their case. Their fears were confirmed with the dismissive manner in which the court dealt with their evidence. What followed was a judgment of the LCC replete with factual and legal errors.

[398] The pleadings of the Commission and the claimants were ill-considered, poorly prepared, and even worse, bore little resemblance to the evidence that was led. This court recently reaffirmed the rule that once the pleadings have defined the dispute between the parties, the court must determine that dispute and that dispute

alone.[116] While the parties may be given greater latitude in the way they plead their case in land claims such as this one, the rules of pleading cannot be totally disregarded. This case is one of the worst examples of the violation of this rule that I have seen.

[399] Counsel for the Commission, in particular, often traversed irrelevant material. A stark example was his cross-examination of Mullins, much of which was irrelevant and gratuitously offensive. Another was Legassick's testimony, much of which was inadmissible, unhelpful and traversed questions outside the pleadings. This necessitated the landowners having to instruct Giliomee to provide a contrary view. The expert evidence took 15 days. The evidence of the claimants, particularly of Nonzube, was very poor. The landowners are therefore entitled to their costs, including the costs incurred for Giliomee. I would have been inclined to grant a punitive costs order, at least against the Commission, had the landowners asked for it. However, as I have found that the 'Salem Community' was not shown to have authorised the lodgement of the claim, no costs order should be made against it.

The second judgment

[400] I have read the judgment that Pillay JA and Dambuza JA (the second judgment) have jointly prepared. Regrettably, it suffers from the same malaise that is evident from the judgment of the LCC: it misconstrues the legal issues and treats the evidence in a one sided and legally impermissible manner. A comparison between the two judgments is striking. The main judgment deals in detail with all the

[116] *Fischer & another v Ramahlele & others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) para 13.

evidence: documentary, viva voce and expert, and supports its findings through clear legal reasoning. By contrast the second judgment approaches the evidence in a selective and generalised manner, fails to evaluate it properly, and reaches factual conclusions on dubious legal grounds.

[401] Regarding its treatment of the legal issues, the second judgment fails to determine whether the claimants had established each of the requirements of s 2 of the Act. It finds that a 'community existed' but does not deal with the 'acid test' enunciated in *Goedgelegen*, which is whether the members of the community derived their right or permission to occupy parts of the Commonage through their own shared rules determined by Dayile or by the landowners. It finds further that the community was dispossessed of a 'right in land' by virtue of having beneficially occupied the land from the '1870's to the 1940's' but does not explain how this community was able to acquire this right in the face of the undisputed fact that ownership of the Commonage vested jointly in the landowning community, who exercised authority over through the Board until 1943.

[402] The second judgment also overlooks the fact that the claimants claim the entire Commonage despite the fact that the landowners built a church, a community hall, a cattle–building tank and established a cricket field there all before 1913. This means that if there was a dispossession of rights on these parts of the Commonage, the claimants could, at the very least, not lawfully reclaim them. Furthermore, the second judgment avoids dealing with the legal difficulty of determining a date or dates of the alleged dispossession against the pleaded case (not supported by any evidence) that this occurred over more than three decades. It elides the requirement

for the dispossession to have been as a result of a racially discriminatory law or practice by finding, presumably on the basis of Legassick's inadmissible evidence, that the 'failure to consult' the community, including the 'process' and 'conduct' of dispossession was racially discriminatory in 'nature'; and ignores the fact that the pleaded case relied on racially discriminatory laws as the reason for the alleged dispossession, which was found to be baseless. In short, whereas the main judgment found that none of the requirements had been proved, the second judgment, without a proper evaluation of the evidence or clear legal reasoning, found that all of them were.

[403] The main judgment found that the submissions on behalf of the Commission and claimants respectively to the effect that a system of 'joint' or 'parallel' ownership existed between the landowners and the claimant community were unmeritorious. It must be borne in mind that these submissions were advanced in response to questions from the bench after neither the Commission nor the claimants could sustain the case of an independent autonomous community exclusively occupying the entire Commonage at any stage for more than 170 years. Indeed, during the debate in court that case fell apart. It is, therefore, astonishing that the second judgment avoids this issue completely.

[404] The second judgment appears to accept that the Commonage was granted to the landowners for their common use and benefit. But it then suggests that this meant that the Commonage was a 'public resource' to be used in the 'public interest' and for the 'public benefit'. So that when the 'African occupants' were 'forced' off the Commonage following the court order in 1940, 'this event . . . serve(d) as a

conclusive bridge by which the claimants must succeed in asserting their rights in land'.

[405] The short answer is that this case was never made and there is no suggestion of it in the evidence. It was not put to the parties during the hearing, and it is impermissible to make a finding of this nature without having allowed the parties to respond to it. It is also obviously wrong. How is it possible for land that was given to landowners for their common use and benefit to become a public resource for use and benefit of the general public or in the public interest unless the land was expropriated for this purpose? And if the land was for use in the public interest, how can the claimants claim to have acquired rights in it? The reasoning is, with respect, difficult to understand.

[406] Regarding its treatment of the evidence the second judgment appears to find the evidence of the claimants preferable to that of the landowners. It also prefers Legassick's expert testimony to Giliomee's. And it finds that the documentary evidence supports the claimants' case. However, it deals with the detailed reasons given in the main judgment superficially, without refuting its reasoning; for example, the main judgment shows exhaustively why Nondzube's evidence is not only improbable, but implausible. And it demonstrates with reference to the record how he effectively conceded the landowners' case by accepting that the African occupants of the Commonage obeyed 'the rules of the conqueror', which refers to the landowners. But the second judgment elides this.

[407] By contrast, to cite another example, when dealing with the landowners' evidence, the second judgment rejects Mrs Page's credible evidence for the flimsiest of reasons by pointing to an apparent single inconsistency in her evidence when she said that the two employees who had worked for her father lived elsewhere, but under cross-examination said that having thought about it overnight she remembered that they had lived on the farm. Mr van Rensburg, her brother, confirmed this. So there was no inconsistency in her evidence at all. The second judgment overlooks Van Rensburg's direct credible evidence regarding the existence of African homesteads and ploughed areas on the Commonage, which corroborated Page's evidence. And it further overlooks the fact that their evidence was validated by the land surveyors, Chandler and Gerber, and also by Mullins, Hill and King.

[408] With regard to the historical expert evidence the second judgment does not take issue with the main judgment's legal analysis of the admissibility of some of Legassick's opinion evidence. Despite this, it concurs with his inadmissible legal conclusions on, inter alia, the existence of a community with land rights to the Commonage.

Judgment Delay

[409] Courts, including appellate courts, are required to deliver judgments expeditiously because litigants are entitled to know where they stand. Undue delays in delivering judgments undermine public confidence in the judiciary. Where there are delays it is desirable for courts to provide a proper explanation for it. What follows is an explanation for the delay in delivering this judgment.

[410] This matter was heard on 19 February 2016 at the commencement of a busy term. Pillay JA was allocated the responsibility for writing the judgment. However, as the judges of appeal disagreed on the result, with my view being in the minority, I undertook to write the first judgment. As is evident from its length and the issues traversed its preparation required a considerable amount of research and time, with the court having limited research capacity. The judgment was circulated to other members of the bench on 16 June 2016, four months after the hearing. Pillay JA, who is the first author of the second judgment, took ill on 5 June 2016 and was incapacitated as a result until 30 September 2016.

[411] As this is a dissenting judgment I would have made the following order:

1 The appeal is upheld with costs including the costs of two counsel.

2 The second to the sixth respondents and the ninth respondent shall jointly and severally be liable for these costs.

3 The order of the Land Claims Court is set aside and replaced with the following:

‘The claim is dismissed with costs, including the costs of two counsel. The costs shall include the cost incurred for Professor Hermann Giliomee. The second to the fifth plaintiffs, and the Regional Land Claims Commission, shall jointly and severally be liable for these costs.’

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A Cachalia

Judge of Appeal

Pillay and Dambuza JJA (Seriti and Mbha JJA concurring)

[412] We have read the judgment of our colleague Cachalia JA and regrettably we do not agree with his approach to the appeal, the reasoning he adopts and the conclusion he reaches. In reaching our conclusion we adopt a different approach to that of our colleague in considering the pleadings, the evidence led in the Land Claims Court (LCC) and the legal principles applicable thereto. This judgment must thus be read in the context of what Cachalia JA has stated in his judgment. Much of what follows is contextually related to the evidence he refers to and it is not necessary to repeat. In dealing with the evidence, we will thus only set out certain portions not mentioned by Cachalia JA.

[413] The claim that was referred by the Commission on Restitution of Land Rights (the Commission) to the LCC is founded on occupation of the land in question for a continuous period of more than ten years subsequent to June 1913. Our view is that, on a holistic consideration, the evidence supports the claimants' contention that their forebears were a community that was dispossessed of rights in the Salem Commonage land.[117]

[414] It is helpful, even before we consider the evidence, to briefly set out the background against which the law applicable to land claims is constructed. The Republic of South Africa is one of the youngest democracies. It has recently

[117] See reference in the definition to 'community' in s 1 of the Restitution of Land Rights Act 22 of 1994 (the Act), as 'any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group'.

emerged from a period of almost 350 years of discriminatory policy and practice which was systematically designed and maintained, in various ways, including legislation and violence, to racially and economically advantage, exclusively, those who landed on the shores of the Republic, first from the Netherlands (1652), and then later from Britain (1820), at the expense of those who had been living on the land prior to that. The latter were African while the former white.[118] This systematic policy and practice, which included land reservation and segregation, formed the fundamental basis for colonial rule and later, apartheid in South Africa.[119] The Land Act of 1913 formed the cornerstone of the apartheid land dispossession apparatus, causing Sol Plaatje famously to exclaim: 'Awaking on Friday morning, June 20, 1913, the South African Native found himself, not actually a slave, but a pariah in the land of his birth'.[120] It is common cause between the parties (and generally accepted) that what is now known as the Eastern Cape, did not escape this pattern and that the African people who lived in this region were, also at some time, dispossessed of their land. During preparations to establish a new democratic government in 1994, the history of dispossession of land and the need for remedial action was recognised, and, upon adoption of the interim Constitution in 1994 (and the final one in 1996), provision was made for steps to be taken by government to restore the rights in land

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[118] It is necessary to make this point since the distinction was an important cog in implementing the discriminatory systems, informally and formally, by which African people were treated for the benefit of white people. M K Roberts 'Black land tenure: Disabilities and some rights' in A J Rycroft et al (eds) *Race and the law in South Africa* (1987) 119-138 at 119. See also Jacob Dlamini 'The land and its languages: Edward Tsewu and the pre-history of the 1913 Land Act' in Ben Cousins & Cherryl Walker *Land divided, land restored: Land reform in South Africa for the 21st Century* (2015) 40-55.

[119] With the advent of colonialization in South Africa, a legislative process was started which eventually restricted 80 per cent of the South African population to ownership (or quasi ownership) of 13 per cent of the country's land. See Hanri Mostert 'Land restitution, social justice and development in South Africa '(2002) *SALJ* 400 at 401.

[120] Juanita Pienaar & Jason Brickhill 'Land' in Stuart Woolman & Michael Bishop *Constitutional law of South Africa* 2 ed (Revision Service 6, 2014) 48-1 – 48-68 at 48-1, quoting Sol T Plaatje *Native Life in South Africa* (first published in 1916, republished in 1982), which work was a foremost response to the Native Land Act that provides an account of the origins of the legislation and its devastating immediate impacts for Blacks in South Africa.

to those so dispossessed, or to their descendants.[121] In so doing, the Restitution of Land Rights Act 22 of 1994 (the Act) was passed by Parliament,[122] The Act must be read with s 25(7) of the Constitution which provides that a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to *equitable redress*.[123]

[415] The Act forms part of the constitutional framework for land reform aimed at redressing the past injustices of dispossession in this country. It is steeped in a challenging constitutional context in which the public interest imperative of land reform is pitted against constitutional protection of private property rights.[124] Against this background the Legislature has used specific language, in the Act, as a tool to achieve land reform in the country and to remedy the injustices which flow from the dispossession.[125] The Act requires *historically determined justice* and the application

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[121] The Interim Constitution of the Republic of South Africa (Act 200 of 1993) contained positive rights for the restitution of land rights in ss 28 and 121 to 123, from which flowed the Restitution of Land Rights Act 22 of 1994, which was enacted shortly after the transition to democracy, and has remained in force, although subject to several amendments, under the final Constitution, 1996. The drafters of the final Constitution, 1996 also inserted s 25(7) and (8) to place beyond doubt, a positive land reform restitutionary justice provision within the Bill of Rights. See a brief drafting history of the property by Pienaar & Brickhill *Constitutional law of South Africa* at 48-3. For the historical background to the property clause in the Interim Constitution see A Eisenberg 'Land' in M Chaskalson et al (eds) *Constitutional Law of South Africa* 1 ed (Revision Service 3, 1998) 40-1 – 40-5.

[122] For a history and analysis of the Act see Pienaar *Land reform* 533-658; Miller & Pope *Land title in South Africa* 313-397; and Jaichand *Restitution of land rights* 53-76.

[123] In *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) Moseneke DCJ said: '[32] . . . [R]estitution of land rights and land reform are constitutional issues. They sit in the heartland of the protective, restitutionary and land reform design of s 25 of the Constitution.' He went on in para [53]: 'It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution.'

[124] Section 22(1)*(cA)* of the Act. See also ss 25(4), (6) and (7) of the Constitution.

[125] See s 2(1) of the Act setting out the requirements for a claim, as interpreted with authority in *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC) ('*Alexkor*') para 6. And although in the different context of evictions, the injustices of dispossession were concisely

of the principles of equity and fairness.[126] So the Act clearly implores the courts to lean towards granting rights in land where it would be just and equitable to do so within the context of the provisions of the Act.[127]

[416] The history against which land reform and claims are set plays a pivotal role in the determination of justice.[128] It is clear from the provisions of the Act that the Legislature recognised that some of the true history of land occupation and ownership in this country would not be easy to establish. Accordingly the Act specifically contains certain peculiar features which are intended to grant to the specialised LCC, when adjudicating land claims, latitude to admit all relevant evidence in order to determine such history. The Act is therefore an extraordinary piece of legislation, *sui generis*, which generates processes and approaches not normally associated with normal litigation and rules of practice. It is therefore important to examine some of those special provisions which give structure and effect to the land claims processes.

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captured by Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ('*PE Municipality*') paras 9-10.

[126] See s 25(7) of the Constitution, which refers to 'equitable redress'. See also Mark Euijen and Clive Plasket 'Constitutional protection of property and land reform' (2003) *Annual Survey* 430 at 441: '[T]he entire purpose [of the Act] is to turn back the clock and rewrite history along more equitable lines.'

[127] Moseneke DCJ in *KwaLindile Community v King Sabata Dalindyebo Municipality* [2013] ZACC 6; 2013 (6) SA 193 (CC) ('*KwaLindlile*') para 33, described a claim for restoration of dispossessed rights in land as a 'pre-eminent constitutional issue' and as 'a vital part of the constitutional quest to heal divisions and exclusions of the past'. See also *Alexkor* para 98. And see also Pienaar & Brickhill *Constitutional law of South Africa* at 48-54, where factors which are taken into consideration by the LCC including 'justice and fairness' are noted; and 48-5 – 48-8, where it is noted that when interpreting land reform legislation, the founding values of the Constitution are likely to have a 'tilt' effect which gives greater weight to the rights and interests of the vulnerable and landless. Further see G Budlender 'The Constitutional Protection of Property Rights' in G Budlender, J Latsky & T Roux *Juta's New Land Law* (1998) at 1-69; Murphy *Confronting past injustices* at 116, in whose analysis says that the LCC 'ideally should be a court of equity'.

[128] See, as prefaced, in: *Land Access Movement of South Africa & others v Chairperson, National Council of Provinces & others* [2016] ZACC 22; 2016 (5) SA 635 (CC) para 1; *KwaLindlile* para 39; and *Alexkor* paras 34-41.

[417] The claim was brought in terms of s 2(1) of the Act which provides that:

'A person shall be entitled to restitution of a right in land if-

(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past discriminatory laws or practices; or

(b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past discriminatory laws or practices; or

(c) he or she is a direct descendant of a person referred in paragraph (a) who has died without lodging a claim and has no ascendant who-

(i) is a direct descendant of a person referred to in paragraph (a); and

(ii) has lodged a claim for the restitution of a right in land; or

(d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and

(e) the claim for such restitution is lodged not later than 31 December 1998.'[129]

[418] In terms of s 1 of the Act 'restitution of a right in land' means *(a)* 'the restoration of a right in land'; or *(b)* 'equitable redress'. A 'right in land' means 'any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and continuous beneficial occupation for a period of not less than 10 years prior to the dispossession in question'. 'Racially discriminatory practices' mean 'racially discriminatory practices, acts or omissions, direct or indirect, by *(a)* any department of State or administration in the national,

[129] Subsection 2(1)*(e)* of the Act has since been substituted by s 1 of the Restitution of Land Rights Amendment Act 15 of 2014 , which sought to change the time for lodging claims to 30 June 2019. This Act has been declared unconstitutional in the matter of *Land Access Movement of South Africa & others v Chairperson of the National Council of Provinces & others* [2016] ZACC 22; 2016 (5) SA 635 (CC).

provincial or local sphere of government; *(b)* any other functionary or institution which exercised public power or performed a public function in terms of any legislation'.[130]

[419] The Act provides an avenue to reclaim rights in land dispossessed after 19 June 1913.[131] It provides for the establishment of the Commission on Restitution of Land Rights whose function it is to assist and facilitate the land claims processes.[132] The Commission operates as an important administrative 'initial filter and first adjudication point . . . set up in such a way that a serious attempt is made at the outset to solve each land claim in a non-adversarial manner.'[133] Only if that process does not succeed is a claim referred for adjudication'.[134] As part of its facilitative role, the Commission is empowered and obliged to give assistance to claimants in the preparation, submission and prosecution of their land claims.[135]

[420] The Act also provides for the establishment of the LCC[136] for the consideration of land claim disputes. The LCC is a specialist court.[137] When the

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[130] *Alexkor* para 6.
[131] See long title and s 2 of the Act. See also *Alexkor* paras 37-41.
[132] Section 6 of the Act.
[133] Visser & Roux *Confronting past injustices* at 96.
[134] *Ibid*.
[135] Section 6(1)*(b)-(eA)* of the Act. See also rules 5 and 6 of the Restitution of Land Rights Act, 1994: Rules regarding procedure of Commission, GN R703, *GG* 16407, 12 May 1995. See also *Transvaal Agricultural Union v Minister of Land Affairs & another* 1997 (2) SA 621 (CC) para 15.
[136] Section 22. *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs* 2013 (3) SA 263 (SCA) paras 7 and 8; *Concerned Land Claimants Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association & others* [2006] ZACC 14; 2007 (2) SA 531 (CC) para 19 – which postulate that we ought to defer to the specialist jurisprudence of the Land Claims Court as opposed to superimposing the traditional interpretation and evidence rules we ordinarily apply.
[137] '[E]xercising power in a forum "where the conflicting values as embodied in the constitutional property clauses take on concrete form."'*Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC) para 25. The Constitutional Court has held that it would be

Commission refers the matter to the LCC it must request the Minister of Land Affairs to issue a certificate as to whether or not restitution is feasible.[138] Land claims are therefore put through an elaborate investigative, administrative and quasi adjudicative process before they are referred for adjudication to the LCC. Of significance, in relation to the functioning of the LCC, s 33 of the Act enjoins that court to have regard to the commitment to afford restitution of rights in land to persons or communities dispossessed as a result of racially discriminatory laws or practices. The LCC must also have regard to the need to remedy past violations of human rights, requirements of equity and justice, and the need to avoid major social disruption.[139] One of the special features of the Act is the *unqualified* provision for a court, at the hearing of an appeal, to hear further evidence.[140] A further significant attribute is the similarly uncircumscribed provision for admission of '*any evidence*', including expert reports, archival records and hearsay evidence,[141] whether or not such evidence would be admissible in any other court of law. In *Executor Estate late*

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slow to hear appeals from specialist courts unless important issues of principle are raised. See *National Education Health and Allied Workers Union v University of Cape Town & others* 2003 (3) SA 1 (CC) paras 30-31.

[138] Section 15 of the Act. See *Macleantown Residents Association: Re Certain erven and commonage in Macleantown* 1996 (4) SA 1272 (LCC) at 1282. For the purposes of the certification process, see Visser & Roux *Confronting past injustices* at 96-97.

[139] Section 33*(a), (b), (c),* and *(d)* of the Act. *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) para 53. This approach has been endorsed in subsequent decisions of the Constitutional Court, for example *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority & others* [2015] ZACC 25; 2015 (6) SA 32 (CC) para 35; and *Minister of Mineral Resources & others v Sishen Iron Ore Company (Pty) Ltd & another* [2013] ZACC 45; 2014 (2) SA 603 (CC) para 47.

[140] Section 28N. See also rules 9(2), 28, 38(5)*(b),* 45(1)*(a)*, and 49(1)*(b)* of the Land Claims Court, Restitution of Land Rights Act, 1994: Land Claims Court Rules, GN R300, *GG* 17804, 21 February 1997.

[141] Section 30. Section 30(1) and (2)*(a)* of the Act. See also in this regard *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) para 57, where Moseneke DCJ alluded to 'historical facts on State policy, practices and laws premised on archival materials' as cogent and properly admissible; and *Ex parte Former Highland Residents; In re: Ash & others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) para 15, where Gildenhuys J held that the court would nevertheless insist on the best available evidence.

Phillips and others v Government of the Republic of South Africa and another[142] at 583, Erasmus J remarked that s 30 relaxes the normal rules relating to the admission of inter alia, hearsay evidence before the LCC. These, and other distinct attributes in the Act, clearly imply that the courts, when considering disputed land claims, should liberally lean towards the realization of the objectives of the Act.[143] It is through application of these provisions and the philosophy underpinning the purpose of the Act that we reach a different conclusion to that of our colleague.

[421] It is true that the rights on which the claimants relied for their claim (as set out in the claim form lodged with the Commission) differ from those which formed the basis of the referral by the Commission to the LCC. When lodging their claim with the Commission the claimants asserted their *traditional* rights in the land claimed, derived from occupation of the land by their forebears, as the original occupants of the 'native location' which was sold to white farmers in about 1947. As against this, the Commission, after investigations headed by Mr Paul, referred to the LCC, a 'claim for restitution of the (community's) rights in land relating to the Salem Commonage, based on *dispossession of the claimants' ancestors of land which they had occupied for a period in excess of 10 years.*

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[142] *Executor Estate late Phillips and others v Government of the Republic of South Africa and another* [2003] 3 All SA 575 (C).

[143] Sections 28N, 30 and 33 of the Act. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), in relation to the PIE Act, the constitutional said the following, which is equally applicable in this instance: '[36] The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.'

[422] The Commission stated in its referral statement that the claimants' ancestors-

'. . . [L]ived on the land for many years before dispossession occurred. Certain areas were designated for ploughing, eg Tyelera, Thafeni, Lusenge, and Emagolomeni etc. Cattle were combined so that a large span of oxen could be created for ploughing . . . sharecropping was also practiced with some white people who did not have oxen. *The appropriate nature of the rights that claimants had on the claimed land originated from the beneficial use for grazing and farming and occupational rights which they acquired and used in accordance with shared rules of usage, both in terms of traditional laws as well as so-called location rules'*. (My emphasis.)

[423] The Commission further stated that in the 1940s (about 1947), the white community desired to take over the commonage and applied to the Supreme Court in Grahamstown to sub-divide the commonage and transfer and incorporated it into the individual titles, in the names of the farmers who owned adjoining properties in the village of Salem.

[424] It is also true that witnesses who testified on behalf of the claimants insisted in their evidence that the claimant's ancestors were holders of traditional rights in the land, thus re-asserting their traditional rights as initially declared in the claim form. On application of ordinary civil law principles and rules these changes in the rights declared would be viewed as defects which could, on their own, result in the dismissal of the claim. Our colleague refers unfavourably to these inconsistencies and in our view, wrongly finds that the claim, as lodged, was invalid. The claim, as asserted in the claim form, the referral by the Commission, the evidence and the

apparent variations in the nature of the rights which form the basis of the claim, must be interpreted within the spirit and purpose of the Act and the role of the Commission as set out therein. The terms of the referral resulted from the processes and investigation provided for by ss 11, 11A and 12 of the Act.[144] The Commission, having conducted investigations as aforesaid, into the claim, concluded that the claimants' rights to the land were more properly founded on continuous occupation of the land as provided for in the Act. The fact that the Commission reached a different conclusion from that of the claimants as to the nature of their rights, and the fact that, in their evidence, the claimants and their witnesses continued to assert traditional rights does not detract from the totality of the claim and the evidence in relation to the rights asserted in the referral to the LCC.

[425] For completeness sake, although detailed in the main judgment, the appellants' (landowners) case in the court below was briefly that, in the 1700s, the Zuurveld in which area the commonage fell, was taken from the African indigenous people by conquest as a result of the Fourth Frontier War in 1811 - 1812. They relied on that conquest, and argued that the conquest destroyed any right the claimants' forebears might have had in the land in question. Consequently no reliance on such rights in furthering the claim could be placed. Their case is further that when the

[144] Section 11 of the Act makes provision for the procedure after the lodgement of a claim. It gives the Commissioner a discretion to dismiss a frivolous claim and sets out a comprehensive process to be followed including publication in the *Gazette* where the claim has merit. Section 11A provides for the withdrawal or amendment of the notice of claim following publication of the claim in the *Gazette* and representations made as result of that process from the relevant stakeholders. And s 12 sets out the Commission's powers to investigate the claim and importantly in subsec (3), it provides that: 'If a claimant is not able to provide all the information necessary for the adequate submission or investigation of a claim, the regional land claims commissioner concerned shall direct an officer contemplated in section 8 to take all reasonable steps to have this information made available.' The legislative scheme provides for and accommodates substantial amendments to claims given this elaborate investigative process, thus freeing the land claims process from the strict rules for pleadings.

British settlers arrived in the Zuurland in the 1820s there was no community of African people on that land. (with any rights to it). They also asserted that no African people lived on the commonage during the relevant period at all. Yet they conceded that there were African people, a handful of employees of the erven owners, who lived on the commonage.

[426] Therefore it is not only the claimants' case that varied during the proceedings. The appellants' response, could, on a strict interpretation also be considered contradictory. However, a rigid approach to this inconsistency would be inimical to the spirit and purpose of the Act. Instead, a comprehensive and holistic inquiry into the truth is required.

[427] We do not intend to repeat the documented historical background to the settlement of the Zuurveld. It is set out in the main judgment. We record, however, that, as is widely known, the documented history as to the settlement, in this country, by white people, and the whereabouts of the indigenous people at various stages of that settlement, remains deeply controversial for various reasons.[145] This judgment is not intended to be a discourse of those controversies. The claim, as referred to the

[145] For example Worden notes that: 'The earliest histories of South Africa were mainly concerned with its white inhabitants. It is true that writings by missionaries, administrators and American intellectuals such as Sol Plaatje and Tiyo Soga in the late nineteenth and early twentieth centuries did pay attention to the experience of American communities, but these did not find their way into the mainstream of historical scholarship . . . Afrikaners nationalist writers tended instead to laud the achievements of the trekkers and their descendants, while English-speaking historians placed emphasis on the role of the British government and settlers.' Nigel Worden *The making of modern South Africa: Conquest, apartheid, democracy* 5 ed (2012) at 2. See also Annie E Coombes (ed) *Rethinking settler colonialism: History and memory in Australia, Canada, Aotearo New Zealand and South Africa* (2006) 1-12. And further see Paul Ricoeur & Charles A Kelbley *History and truth* (1965) 21-40; Aniruddha Chowdhury *Post-deconstructive subjectivity and history: Phenomenology, critical theory and postcolonial thought* (2014).

LCC by the Commission, can be determined on the evidence starting from the late nineteenth century. The earlier historical background, going back to the eighteenth century, serves a very limited and peripheral contextual role to this dispute.

[428] Although we have approached the matter in the manner set out above, there is however, a crucial legal finding made by our colleague, relating to the earlier history, which we consider necessary to deal with. This relates to whether the defeat of the African people of the Zuurveld, in the Fourth Frontier War, extinguished their traditional rights in the Zuurveld land. Contrary to the finding by our colleague,[146] we do not agree that such traditional rights were extinguished by the conquest. We accept, however, that, in respect of the land allocated to the 1820 Settlers to live on in the 1820s only, these rights were extinguished through a State-sanctioned administrative process in the form of the allotments to the British Settlers.

[429] In concluding that the Fourth Frontier War resulted in extinction of the traditional rights in land of the indigenous people of Zuurveld, our colleague has relied on a remark made by the Constitutional Court in *Alexkor Ltd & another v The Richtersveld Community & others*[147] (*Alexkor*) para 70, that:

'After annexation, the right of the Richtersveld community to indigenous law ownership could have been extinguished in a number of ways. The Richtersveld Community would have lost its indigenous law ownership if:

. . .

[146] Paragraph 347.
[147] *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC) (Alexkor).

(d) the land was taken by force.'

[430] Firstly, in this case, although disputed by the landowners' historian, there is evidence that, having defeated the Africans and the Khoi inhabitants of the Zuurveld in that war, Colonel Graham allowed some of them to return to the land and to resume their subsistence farming activities. Secondly, in *Alexkor* the Constitutional Court was not concerned with loss of indigenous rights in land as a result of conquest. In fact, the court, at para 70 said that '[t]his case is not concerned with the forcibly taking of land'. That court therefore, while seemingly approving it, did not comprehensively consider the exhaustive analysis of the issue by this court in *Richtersveld Community & others v Alexkor Ltd & another* (*Richtersveld*).[148]

[431] In paras 48 to 50 of *Richtersveld*, Vivier ADP affirmed the recognition of indigenous rights in land by the Dutch and the English colonists who came to this country in the early nineteenth century. The learned judge went on to compare the acquisition of the Richtersveld by Proclamation with a hypothetical acquisition by conquest or cession. He found that both had the same consequences as annexation.[149] He cited, with approval, the following passage by Brennan J in *Mabo and Others v The State of Queensland (No 2)* (1992) 175 CLR 1 (HCA) (at 57):[150]

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[148] *Richtersveld Community & others v Alexkor Ltd & another* 2003 (6) SA 104 (SCA) paras 34-50, particularly para 49 where Vivier ADP for the unanimous court said: 'In my view, it is clear from the Articles of Capitulation that when the British Crown acquired sovereignty of the Cape Colony by conquest and cession in 1806 the indigenous land rights of the inhabitants were recognised and respected.'

[149] Paragraph 52.

[150] Paragraph 60.

'The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognises in the indigenous inhabitants of a settled colony the rights and interests recognised by the Privy Council in *In re Southern Rhodesia* [[1919] AC 211 (PC)] as surviving to the benefit of the residents of a conquered colony.'

In *Mabo,* the High Court of Australia recognised the existence of native title to lands previously annexed under Imperial Authority. In so doing, the Court rejected the fiction of *terra nullius* and found that native title was not inconsistent with the Crown's radical title over its acquired lands. The existence of native title, the Court held, does not depend upon positive acts of recognition, rather it arises from proof that a group has a right to use or occupy particular land including uses tied to the community's traditional lifestyle. In drawing upon international law to bolster its conclusions, the High Court ushers in a new era for aboriginal land claims and portends new directions for Australian jurisprudence.[151] There is no indication, in *Alexkor,* that the Constitutional Court intended to alter this settled legal position.[152]

[432] Even further, as discussed more fully below, it was an express policy of the British, on settlement in various parts of the Cape Colony, not to unduly interfere with indigenous land rights, and generally, with the African way of life and indigenous administration. This had in fact been founded on the trite English constitutional and

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[151] Gary D Meyers and John Mugambwa *The Mabo Decision: Australian Aboriginal Land Rights in Transition* 23 Envtl. L. 1203 (1993).

[152] Jérémie Gilbert *Indigenous Peoples' land rights under International Law: From victims to actors* 2 ed (2016) at 1-57, especially at 32. See John Westlake KC *International Law*, Part 2: War (1907) at 42; L Oppenheim *International Law: A Treaties*, Vol 2: Disputes, war and neutrality 7 ed (1952) edited by H Lauterpacht para 140; Malcom N Shaw QC *International Law* 7 ed (2014) at 361-362; John Dugard *International Law: A South African perspective* 4 ed (2011) at 132-133. See also *United States v Percheman* 32 US (1833) 51; *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, 1923 PCIJ (ser. B) No 6 (Sep 10).

international law doctrines of acquired rights and continuity (also doctrine of aboriginal title) which favours the continuation of pre-existing customary land rights. See, in that regard the English *locus classicus*, *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 (KB) at 1047, where Lord Mansfield explained that: 'The laws of the conquered country continue in force until they are altered by the conqueror,' through the proper legislative processes of the conqueror to introduce new laws in the conquered country. It was through these very doctrines (together with the 1806 capitulation conditions) that Roman-Dutch law survived the British acquisition of sovereignty over the Cape colony when they affirmed the protection of the rights of all 'burghers and inhabitants' of the Cape. Professor Jérémie Gilbert writes that, in international law, even at the time of conquest or annexation, the victorious party must respect the doctrine of 'acquired rights', the significance of which is to posit the trite (conventional and customary international) principle that, a change of sovereignty over territory does not affect the property rights of the inhabitants.[153] In particular, he says:

'Under British colonial laws, when a conquest was made, there were two approaches to the effect of the acquisition of territory on the customary land rights of the inhabitants. The first approach was based on the doctrine of continuity, which favoured the continuation of pre-existing customary land rights, the idea being that conquest did not adversely affect these

[153] Gilbert *Indigenous Peoples' Land Rights under International Law* at 32. See also *United States v Percheman* 32 US (1833) 51; *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, 1923 PCIJ (ser. B) No 6 (Sep 10). And also see Westlake *International Law* at 42, noting the classic principle that: 'Permission to enemy subjects to remain in the country . . . must in common sense carry with it permission to enjoy their property while so remaining. And if enemy subjects being in the country may enjoy their property, it would be inequitable to confiscate that of those who are not in it and therefore as individuals cause no danger.' And also Oppenheim *International Law* para 140, where the learned author notes that: 'Immovable private enemy property may under no circumstances or conditions be appropriated by an invading belligerent. Should he confiscate and sell private land or buildings, the buyer would acquire no right whatever to the property.' Further see L Benjamin Ederington 'Property as a natural institution: The separation of property from sovereignty in International Law' (1997) 13 *American University Law Review* 263.

rights unless there is an express legislative intent to do so. The second approach was based on the doctrine of recognition. This doctrine affirmed that rights to land had to be given a formal recognition by the new power, as annexation resulted in the abolition of all pre-existing rights.'[154] (Footnotes omitted.)

[433] It seems to us that, against these clear pronouncements on the issue the obiter remark by the Constitutional Court should not be too readily interpreted as a conclusive revocation of settled domestic and international law on the issue. We therefore disagree with our colleague's conclusion that the Fourth Frontier War conquest resulted in a total extinction of indigenous rights in land. It is our view that the concession made on behalf of either the Commission or the claimants to a general extinction of traditional rights in land as a result of conquest was incorrectly made.

[434] Turning to the evidence, the main judgment concludes that, save for employees of some of the landowners, there is no evidence of occupation of the commonage by an indigenous community as alleged by the claimants.[155] This conclusion is premised on criticism of the evidence of all the witnesses who testified on behalf of the Commission and the claimants as extremely poor and even fabricated and on the discounting of the archival evidence. On the other hand, the evidence of all the witnesses who testified on behalf of the landowners is accepted by our colleague as unblemished.

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[154] *Ibid* at 32-33. See also Shaw *International Law* at 361-362.
[155] Paragraphs 387-390.

[435] In our view the archival evidence relating to the period starting from the late 1870s to the late 1940s, on its own, lends objective and independent support to the claim based on occupation of the Salem Commonage by a community of African indigenous people, as a community, as contended by the Commission. This evidence is, in fact, conclusive on the issue. It is true that some of the oral evidence led on behalf of the Commission is capable of criticism. But so too is the evidence led on behalf of the landowners. Some of the deficiencies were to be expected because none of the witnesses, both for the appellants and the claimants, had sufficient personal knowledge of relevant information. Some of them were not yet born at the relevant time. Even those witnesses that were alive, were either too young at the time or knew very little, if anything, of what was going on around them. It would be unsafe to rely solely on their evidence without regard to corroborative records.

[436] The evidence shows that after the Fourth Frontier war, in 1811 to 1812, the Africans never regained general administrative authority over the Zuurveld area within which Salem is located. Instead, by 1881 the Salem Village Management Board (the board) was the administrative authority over the Salem Village, including the Salem commonage. But there is no evidence that the board assumed active or actual control over the commonage. Indeed, there is evidence that its failure to do so gave rise to discontent and indeed uncertainty as to who officially controlled and managed the commonage, if at all. This will be dealt with in more detail below.

[437] Prior to the installation of the board, the civil commissioner of Grahamstown performed supervisory duties over the native locations around Grahamstown, including the Salem commonage upon which there was no formally defined location. As inspector of native locations, the magistrate did periodical inspections of the commonage, and kept records of the number of ‘natives’ living thereon, their huts and livestock. These records show that in 1877 there was one hut with three people on the commonage. The number of people grew steadily, such that by June 1884 there were 24 huts with a total of 130 people living there. This is where the records of the Inspector of Native Locations end. The inspections stopped, presumably because the board was established as the local authority over Salem, including the commonage, and was to continue the functions previously performed by the inspector. But, as already stated, that never happened. The only significant task relating to the indigenous people living on the commonage that the board embarked on was to prepare for the establishment of a formal Native Location within the commonage. Further evidence of the extent of occupation of the commonage by Africans only appears in correspondence between the board and the officials of the Cape Government.

[438] During 1915 to 1916 the board contemplated establishing a Native location within the commonage as provided for in the Native Locations Act 10 of 1870. In its preamble this Act provided that it was intended to provide for the management of native locations and other communities and for regulation of rights on

commonages.[156] With regard to the Salem Commonage, it was contemplated that the occupation of the commonage would continue in a more structured form, much in the manner provided for in the Native (Urban) Areas Act 21 of 1923. Indeed occupation of the commonage by Africans was beneficial to the landowners because it facilitated ready access to labour and the exploitative sharecropping practices. However there is no evidence or record that any landowner or even the board gave consent for occupation of the commonage by a specific African or indigenous employee. On the other hand, there is documentary evidence of leases granted by the board to white farmers who were not erven owners, to conduct farming activities on the commonage. Our conclusion is that no consent was ever given to indigenous occupants of commonage to occupy the commonage.

[439] It is true that the regulations issued under Act 12 of 1893 regulated life in Salem prohibited settlement on the commonage. But, clearly, the open occupation on the commonage by the indigenous people was never policed, curtailed or stopped in any way. Instead, some of the erven owner collaborated with the African commonage occupants in their farming endeavours.

[440] In preparation for the establishment of the Native Location, land was demarcated within the commonage and correspondence was exchanged between the board and the Cape Government on the content of regulations that were to regulate life on the commonage Native Location. The regulations were approved by

[156] It would appear that the term ‘location’ was already in use to describe ‘native’ settlement or places where indigenous people lived.

the Governor General in 1917[157] and promulgated under Government Notice No 454 of 1919. They provided, amongst other things, for natives to be holders of site permits in respect of the sites which would be allocated within the Native Location. A 'Location Official" would keep a record of the dwellings in the location and a stock register in which would be recorded the number of livestock belonging to the residents of the Native Location. Young natives (from 15 years old in respect of men and from 17 years old in respect of women) would be obliged to work for the white residents of the village when called upon to do so, at a prescribed fee. Resistance to such a call up would result in the recalcitrant youth, together with the owner of the hut in which such youth resided, losing the right to live in the native location.[158] It is our view that the need to establish a 'Native Location' on the Commonage further enhances the claim that their ancestors lived on the Commonage with an active social life within their community.

[441] The establishment of the commonage Native Location was later abandoned and the regulations were never enforced by the board. In any event, the evidence shows that in reality there was confusion on the issue of whether the board, in fact,

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[157] In terms of s 147 of the Union of South Africa Act 11 of 1909, which provided the following:
'The control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union shall vest in the Governor-General in Council, who shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs, and any lands vested in the Governor or Governor and Executive Council of any colony for the purpose of reserves for native locations shall vest in the Governor-General in Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by any such Governor or Governor and Executive Council, and no lands set aside for the occupation of natives which cannot at the establishment of the Union be alienated except by an Art of the Colonial Legislature shall be alienated or in any way diverted from the purposes for which they are set apart except under the authority of an Act of Parliament.'

[158] The second commission had recommended that 'the main principles relating to locations on private property should be applied to natives on crown lands other than those duly set apart as native reserves or locations, and that sanction for native occupation on such crown lands should not be given unless an adequate rent is charged to the native's occupier, based upon the producing value of the land' (at 18 of report).

had authority over the commonage and the people living thereon. For example, some of the landowners sought to have the homes of their employees that were already built on the commonage, but outside the portion demarcated for the location to be considered part of the contemplated Native Location. In motivation for this proposal it was stated that because of the vast size of the commonage (20 000 acres) some of the landowners' erven were far from the planned location, so their workers would arrive late at work and leave early to get to their homes before dark. The board pointed out that under the Regulations, huts placed anywhere on the common land, other than the demarcated area, were not under its jurisdiction. In a letter to the Native Commissioner dated 10 May 1920, the chairman of the board expressed concern that the huts in question belonged to persons who were 'monthly employees on the erven' and to 'half sowers'. This letter is important for several reasons. Inter alia, it shows that the board was aware of the existence of the inhabitants of the commonage. It also shows that the board did not consider itself as having jurisdiction over the commonage. Finally, the letter also shows that, not only did the employees of the landowners live on the commonage but importantly, it also puts paid to the assertion that the African people living on the commonage were workers only and 'allowed' to be there at the goodwill of the landowners. Before us counsel for the landowners could not explain the legal basis on which individual landowners gave consent to his or her employee to live on the commonage.

[442] By the early 1920s the land owners had become dissatisfied with the manner in which the board had, over the years, conducted the affairs in Salem. They were of the view that the board had shirked its authority over the commonage. The administration of the commonage had become too 'chaotic' for the liking of some of

the landowners. Some of the land owners started having disputes amongst themselves in respect of, inter alia, grazing fees charged to outsiders (other farmers who did not own erven). These disputes became difficult for the board to manage, resulting in some of the landowners forming a separate committee, chaired by Mr Leslie Basil Gardiner. The causes of unhappiness included the failure of the board to control the 'natives' living on the commonage and their livestock, which negatively affected the thoroughbred breeding industry and the quality of produce because their livestock (bulls and stallions) mixed with those belonging to the African occupants on the commonage. Consequently farming could not be conducted properly. Complaints also related to aggressive land usage methods by white farmers who were not landowners. One of these farmers was Mr Robin Bradfield, who started cultivating, with impunity, vast tracts of land within the commonage. Incidentally, a statement taken from Lindile Magwala, one of the claimants interviewed by the Commission during the investigation of the claim, refers specifically to the disgruntlement amongst the landowners as a result of Mr Bradfield's aggressive use of land on the commonage.

[443] There is also evidence that land on the commonage was leased to some board members (eg, Mr R Dickinson) who were not erven-owners and were perceived as abusing their leases. Another board member, Mr Luigi Henson and his brother, John Hewson, lived on the commonage, paying boarding of 2s 6d per year and thus regarded as 'evading rates and taxes'. The disgruntlement over the Africans living on the commonage, their ever increasing livestock which was regarded as of inferior quality, interference with the farming activities of the whites on

the commonage led to calls for the commonage to be subdivided and transferred to the erven-owners.

[444] In a letter dated 13 November 1920 Mr Gardiner requested the Provincial Administrator to set up a commission to investigate how the board was conducting the affairs in Salem. He expressed complaints relating to the failure of the board to monitor and enforce rules on transgressors, including breach, by some of the landowners, of an agreement that native half sowers would not be allowed to plough on a specified 400 acre piece of land which was specially reserved for use by the landowners. Mr Gardiner also alleged that the board had been allowing natives to squat, erect huts and to graze their cattle on common land at a nominal charge of 6 d per head per month, to the detriment of the land owners. The board also allowed the natives to cut fire wood which they transported to Grahamstown and sold for £3 – £5. In fact the records reveal that the Africans living on the commonage were engaged in vibrant business activities.

[445] Further complaints related to the trapping of game and the 'robbing' of beehives by the African inhabitants of the commonage. In all, the Africans residing on the commonage had become a nuisance to some landowners. However, some landowners found them to be valuable partners in their farming endeavours. Mr Gardiner expressed concern that 'if something is not done, the natives will soon be in possession [of the whole commonage] within the next five years'.

[446] In a letter to the Administrator (dated 21 January 1921), the board responded by asserting that it was common practice for European occupiers of land to engage the services of labour tenants who received portions of land as partial remuneration for their services. It stated that ‘unless the custom is abused, there is nothing particularly reprehensible about it’. Notably, this response, which was a general assertion, was not a denial of the increase in the numbers of Africans living on the commonage nor their activities. Importantly, the board did not refute occupation of the Commonage by African people who, the evidence shows, were also living there and part of a social structure that had developed over time – both within the closer community and generally, at least, with some of the landowners.

[447] By 1929 the majority of the erven owners were strongly advocating for subdivision of the commonage and transfer thereof to each one of them in proportion to their shares or their allotments. At some stage leasing subdivided portions of the commonage to the erven owners was explored. However, the board had no funds to enable it to prepare the commonage land for such leases. For example, it had no funds to facilitate removal of cactus on the land.

[448] Although the official Salem Commonage Native Location was never significantly occupied, there was some limited occupation thereof. At some stage there were six huts on the demarcated portion. At the same time (about the year 1932) about 300 to 400 African people lived within the commonage. The number was later estimated at 500 inhabitants, about 50 of whom were employed on the erven and staying thereon. In 1934 the native location was disestablished. However,

the disestablishment of the location did not necessarily coincide with the actual expulsion or eviction. Therefore although most people dispossessed of rights in land lived outside the area demarcated for the location, the statement that the claimants' forebears were dispossessed of rights to land in the location is not without foundation because a few families lived within the area demarcated to be the native location.

[449] The landowners approached the Supreme Court (Grahamstown) for an order authorising the subdivision. In 1940 the court granted the order. Correspondence exchanged between the board, the Cape Administrator and the remarks made by Gane J who granted the order are strong indicators as to the view held by the Cape Government and the court regarding the ownership rights which the landowners claimed to have to the commonage. These views become relevant and are discussed later in this judgement in relation to whether the commonage was the private property of the landowners in respect of which no restitution of land rights can be made.

[450] It is evident from the archival records that, apart from their financial obligations to the board, the African occupants of the commonage were left to regulate their own lives within the commonage. They decided (on their own) where each family would settle within the commonage, which piece of land each family would plough, where to graze their cattle, where they would bury their dead, where they would access wood and water and where they would perform their customary rituals. These were the different facets of their beneficial occupation. And they were

guided by African traditional laws and custom in enjoying such beneficial occupation, as the commission asserted.

[451] Much was made of the fact that the board was the official structure that was in 'control' of the Salem village, including the commonage, and that the 1866 and 1906 regulations governed life in the village, including location of grazing lands. But, apart from revenue collection there is no evidence that the 1906 regulations were enforced on the Africans living in the commonage. And, as already shown, although the 1915/16 regulations, intended specifically for the African community, were promulgated, they were never enforced because the native location was never significantly occupied. Instead the inhabitants of the commonage remained free to access land as they determined, according to their traditional laws and customs.[159]

[452] As stated earlier, it was a documented policy of the British Colonists, in line with English constitutional law, not to interfere with indigenous laws and customs.[160] The (Sir Barry) Commission on Native Laws and Customs, Cape of Good Hope, 1881-1883, a commission that was set up to investigate and to advise on native laws and customs during 1881 to 1883, recorded that:[161]

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[159] For example, when the board was requested to declare the houses on the commonage to be part of the native location.

[160] Paragraph 19 above.

[161] P A Linington *A summary of the reports of certain pre-Union Commissions on Native Affairs* (1924) 1-13 at 2. The Commission's terms of reference had, inter alia, been: 'To enquire into the Native Customs in the matter of land tenure and to make such suggestions regarding to tenure of land as may seem best suited to carry out when practicable the policy of the Cape Colony in the matter of individual tenure' and 'To report on the advisability of introducing some system of local self-government in Native Territories.'

'In 1835, natives living between Keiskama and Kei Rivers were declared British subjects, retaining possession of their lands and locations but governed by Colonial law and authority . . . In 1836 new treaties were entered into with the Natives living East of the Great Fish River, acknowledging their independence and recognising their full right to adhere to Native Laws and Customs. . . . War occurred again in 1850 and lasted to 1853 and after its conclusion Sir George Cathcart treated British Kaffraria as a "conquered territory in military occupation" and laid down the following principles for its government, viz., that the Colonists be restricted to their limits and that the Kafirs be not prematurely annexed to the Colony and subjected to Colonial laws but be allowed, as British subjects, to be governed as to their interior discipline by their Chiefs in accordance with Native Laws and Customs until European influence shall have removed objectionable and bad practices.'

[453] The Commission concluded:[162]

'Many of the existing Kafir Laws and Customs are so interwoven with the social conditions and ordinary institutions of the native population that any premature attempt to break them down or sweep them away would be dangerous, besides defeating the object in view. We consider it would be most inexpedient wholly to supersede the native system by the application of Colonial Law in its entirety; and we have directed our attention to the drafting of a special code which would leave such of their customary laws as are not opposed to the universal principles of morality and humanity, substantially unaltered and at the same time secure a uniform and equitable administration of justice in accordance with civilised usage and practice.'

[162] *Ibid* at 3.

[454] This policy undermines the argument, on behalf of the landowners, that it is improbable that the board would have allowed freedom of way of life and a traditional administrative structure on the commonage parallel to that of the board. Therefore the criticism relating to lack of credible evidence about the existence of Chief Dayile does nothing to bolster the appellants' contention that the people who lived on the community were not a community. The fact is that the Colonists acknowledged the African traditional leadership structures and even encouraged them. Even if it is accepted that the evidence relating to Chief Dayile and his background is unclear, documented history supports the contention that, as in all African communities, there must have been a traditional leadership structure on the commonage. Clearer evidence about the existence of Chief Dayile would not have, on its own, constituted, comprehensive evidence of shared rules of accessing rights in the commonage land.

[455] The board did not allocate land to the commonage inhabitants for residential and agricultural or farming purposes. It did not provide grave sites or establish a water or wood resources. These aspects must have been regulated by the established African community based system of rules and custom which was shared by those living on the commonage. As will be set out below, in the discussion of the oral evidence led before the LCC, one of the appellants' witnesses testified that there was a traditional leadership structure on the commonage, consisting of a group of male elders.

[456] There is no evidential basis to discount the estimates of the African population that lived on the commonage. The main judgment highlights the fact that a report of

the Assistant Health officer dated 7 December 1931 makes no mention of Africans living on the commonage. But that report does not say they were no Africans on the commonage at the time. And more telling is the later report dated 30 June 1932, also from the Health office, which estimated the number of Africans living on the commonage at 300 to 400. The report of 30 June 1932 recorded that 'white population of Salem V. M Board area approximately 84. Native population possibly 300-400 – no recent figures available. These records constitute independent evidence which is consistent with seven decades of community life on the commonage. The view that the estimate of 450 people on the commonage is improbable because such a number could not be accommodated in the twenty-six huts shown in the 1942 aerial photograph does not take into account that by 1884 there were already 24 huts and 130 people on the commonage. In fact these undisputed figures show that by 1884 there was already a community of African people living on the commonage. It is probable that there by 1942 there were more than 24 huts on the commonage as will become clear below.

[457] Mr Adie Gerber prepared a report on the observations by the archaeologists, Tim Hart and David Halkett who were appointed to conduct an information gathering survey of the Albany District. They inspected various grave and hut sites on the commonage. Their conclusions, drawn from the observations made during the inspection, were:

'Our field observations led us to conclude that there is ample evidence of human occupation of the farms that make up the land that was once the Salem Commonage. This consists of dwelling houses, places where natural resources were exploited (lime quarry and springs)

and numerous graves which were pointed out by our informants. Unfortunately the circumstances under which we were working were restrictive – the survey is by no means comprehensive, and in many places dense vegetation cover impeded our ability to observe the ground surface.'

[458] Even in the restricted circumstances under which the archaeologists conducted the inspection,[163] according to their 'table of observations and co-ordinates' they observed, at least 47 huts and possible huts.[164] The following also appears on the report:

'The party was escorted to a large known cemetery that our informants told us was related to the old "location" in Salem. Our inspection revealed that this was indeed a large "informal" burial ground of some 200-300 graves (again estimates difficult due to dense vegetation). The site extends up to the existing Salem – Alexandria Road and further to that is bisected by the remains of an earlier historic road alignment. Mr Nondzube informed us that when he was young, he remembers human bones being exposed when the current road was built which implies that the cemetery extended to the crest of the slope. We inspected the road cuttings for evidence of graves or human remains but saw none. Bone does not preserve well once it is exposed to the elements'.

[459] Regarding the 1942 aerial photographs on which the appellants' contention of a handful of labour tenants is founded, Mr Gerber's report reveals that:

[163] The report refers to restrictions as a result of dense grass and bush cover which restricted what Mr Gerber and the archaeologists were immediately able to see in the study area.
[164] They were not able to establish when exactly these huts were built and were of the view that such an investigation would require more time.

‘On our return from the inspection, 1942 aerial photographs were made available to us that reflected the southern portion of the commonage but excluded the area of Salem and farms to the north. On aerial photographs of 1942 only one very small settlement was observed on the commonage land. None of the numerous settlement sites depicted on the 1:50 000 maps were present indicating that there was a fluorescence of population after the subdivision of the land took place. Further analysis of the complete aerial photograph set is desirable.’

It therefore seems to us that the 1942 aerial photographs depicting a few huts are far from conclusive on the issue, particularly in the light of the more reliable evidence that as far back as the 1880s there were already 24 huts on the commonage and what Hart and Halkett recently observed during their investigations. The aerial photographs showing footpaths between the erven and these few hut-remains are equally inconclusive. This is understandable because of the thick undergrowth which is likely to have prevented an accurate aerial view and photographs.

[460] Consequently, the independent evidence contained in the archival records and the aerial photographs shows that over the seven decades, starting from the 1870s, indigenous people occupied the Salem commonage until the 1940s when it was subdivided and the subdivided portions were allocated to the white farmers of Salem, the effect of which was racially discriminatory as is evident in the correspondence penned by Gardner, as leader of a disgruntled group of landowners, prior to and including the application to the Grahamstown Supreme Court. A result of the subdivision and transfer of the commonage to the individual landowners was dispossession of the African inhabitants of their rights therein. Interestingly, under prescriptive acquisition they would have acquired ownership thereof, at least by the early 1900s.

[461] It was submitted on behalf of the landowners that the African people who lived on the commonage or their descendants are not entitled to restitution of any rights in land because in 1878 only one family, consisting of three people, was found on the commonage. That family did not constitute a community for purposes of the Act, so it was argued. Neither did the 130 people that lived on the commonage in 1884. The contention was that, essentially, the forebears referred to by the community were illegal squatters who did not 'build up' any rights during the period that they lived on the commonage. This argument misses the basic approach to land claims and indeed the spirit of the Act. The fundamental principle that governs land claims is that the determination of the existence of rights, the nature thereof, and whether such rights should be restored is not made according to the laws which prevailed at the time of occupation.[165] The determination is made within the current land restitution legal framework. For obvious reasons, the African community living on the commonage could have no rights based on the laws of the time during which it lived on the commonage. Further the fact that in 1878 only a family of three lived on the commonage does not detract from the fact that over time the inhabitants of the commonage grew in number, such that by the time they were dispossessed of access to the commonage, they were a community of several hundred people. The evidence shows the existence of a community, although it was conveniently invisible, save as a source of labour and the benefits derived from its members' skills as half

[165] This approach has been criticized as unduly narrow and restraining the purpose of the Act. See in this regard Mark Euijen and Clive Plasket 'Constitutional protection of property and land reform' (2003) *Annual Survey* 429-455 at 441 where they criticise this court's endorsement of the starting point of the court a quo in that case, namely that the title of the claimants to the land had to be judged solely with reference to the 'conditions and rules in existence at the time' (para 62 in the judgment on appeal). Their view of this is that: '[I]it seems parsimonious in the extreme, if not plainly illogical, when applying a statute whose entire purpose is to turn back the clock and rewrite history along more equitable lines, to import a narrow common-law view, itself not free from controversy, into a statutory definition of "rights in land" that clearly attempts to broaden the vision of rights and interests in land beyond those recognized by the common law.'

sowers. These are the very injustices that the current legal dispensation is designed to remedy. The argument of the landowners flies in the face of the fundamental spirit and purpose of the Act, which is to restore the dignity of people who suffered the shame of being caused to be pariahs from their homes.

[462] Turning to the oral evidence led before the LCC, Professor Legassick testified as an expert historian on behalf of the claimants and Professor Gilliome testified on behalf of the landowners. Again, their evidence is set out in the main judgment. Apart from giving opinion as to the early (pre-18th century) settlement of the Zuurveld, both experts also gave their opinion on the issue of occupation of the Salem commonage by a community of indigenous people as alleged. Their opinion was based on the content of the archival records.

[463] Professor Legassick's evidence and opinion was that the archival records supported a claim based on both traditional rights and on occupation of the commonage for a period of ten years as provided in s 2 of the Act. As to the claim referred to the LCC he opined that:

'These returns [by the inspector of native locations] are significant. They indicate that the habitation of the Salem Commonage by natives was officially recognized as legitimate by the Cape Government. The population of Salem Commonage, in other words had rights to occupy the land and rights to graze cattle on it. Even though the returns ceased, the population with their cattle remained in occupation of the land. Already in 1883 they had been there for six years. Ten years residence is required to establish beneficial occupation and to guarantee rights – and certainly they remained for that length of time. In fact there is

no evidence that they were removed – until their dispossession in the 1940s, sixty years, or some two or three generations later. People occupying the land in a given place for two to three generations must interact with one another, visit each other, do things together, establish rules of behaviour, including those determining access to the land, and in other words, must constitute a community, at least partly self-sufficient.'

[464] Professor Legassick was criticised for this opinion on the basis that on the claimant's own version, the alleged occupation of the commonage was never authorised by the board. Our colleague finds that his evidence was inadmissible and that his rationale that the occupation of the commonage was recognised was false because the board exercised strict control over access to the commonage, to the extent that no unauthorised persons could settle thereon.

[465] We have already expressed our disagreement in this regard. Even if he was not qualified to give an opinion on the nature of the rights on which the claim was founded, his evidence was based on the same records that we remain entitled to consider and from which we draw our own conclusions. As stated, from its establishment, the board paid no regard to life on the commonage. The meticulous records that had been kept by the Inspector of Native Locations were discontinued. There is no evidence that the board kept record of statistics of the inhabitants of the commonage and their livestock, or erven-owners who had given permission to their employees to reside on the commonage, or where exactly, on the commonage those employees were permitted to live. It was the lack of control by the board over the commonage that led to complaints against it and its eventual replacement. As we

have already stated the issue of the rights that accrued to the community must be determined through the prism of the Act, rather than the laws that were applicable at the time of occupation. The test is whether on application of the provisions of the Act to the facts as they existed or unfolded over time, the members of the community acquired rights in the land on which they lived, viz the Commonage.

[466] Professor Legassick's contention that the occupation by the community was recognised by the authorities is based on the evidence that the occupants of the commonage were caused to pay certain dues and taxes for their occupation and for the livestock they kept. It is not in dispute that they paid these dues and taxes. Professor Legassick's inability to understand how people could be caused to pay dues and taxes, yet their existence be disputed, is quite understandable.

[467] Further, Professor Legassick's conclusion that the occupants of the commonage constituted a community is drawn from the evidence showing that life on the commonage was orderly or systematic. The inhabitants were a cohesive community unit. Land was accessed in a shared pattern for residential purposes, access to water and wood, ploughing, performing of rituals or customs and for burying the dead.[166] They pooled their cattle for purposes of ploughing (Amabhoxo). They made communal decisions as to when and where boys and girls would be initiated. They attended each other's traditional ceremonies and they regarded themselves as a distinct community amongst other communities in the region.

[166] Further details appear in the report of the archaeologists, Mr Nondzube and Mr Ngqiyaza, about which more is said later in this judgment.

[468] The conclusion, by Professor Legassick, that the Africans who occupied the commonage were recognised by the Cape Government as occupants of the commonage accords with logic and the probabilities when one considers the fact that they paid Hut Tax to the authorities, their livestock was recorded by the inspector independently of that of the erven holders, they also paid dues for grazing their cattle on the commonage and a monthly fee for cutting wood. Over and above that, the complaints about the African nuisance fortifies this. It is also relevant that when the erven owners sought to have the Africans forced to brand their cattle, to distinguish them from those of the erven owners, the Administrator rejected the proposal, asserting that the proposed law would be ultra vires as it would be discriminatory (as between the erven-owners and the Africans).

[469] Our view regarding the criticism levelled at Mr Paul's is similar to that expressed above in respect of the evidence of Professor Legassick. Mr Paul's evidence and conclusions were founded on the same bases as those of Professor Legassick, particularly, his support for a claim based on traditional rights. Mr Paul's evidence mainly consisted of conclusions drawn from the archival records. In the same way as Professor Legassick, the criticism against Mr Paul's evidence related to his opinion that the land claim is founded on traditional or indigenous rights because the claimant's ancestors were the original occupiers of the land in question. We accept that their insistence on asserting the claimants' traditional rights is irrelevant in as far as proving a claim founded on beneficial occupation for a period in excess of 10 years. However where their evidence supports that claim it cannot be ignored. The court remains enjoined to consider all the evidence before it.

[470] Mr Paul's report formed the basis for the referral of the claim by the commission to the LCC in terms of s 14(2) of the Act. The report reveals that at some stage during the investigation of the land claim, some of the landowners were prepared to and others did relinquish ownership to portions of the claimed land. However settlement negotiations with the current landowners failed as the parties could not agree on the pay-outs.

[471] Mr Misile Nondzube bore the brunt of the criticism in our colleague's judgment. We accept that his evidence was not a model in clarity. But the criticism of his identification of certain sites, such as Chief Dayile's kraal, his family's gravesite and ploughing fields must also be viewed in proper context. In his report Mr Gerber said the following about the assertions made by Mr Nondzube:

'Mr Nondzube indicated that the graves were of relatives of his. We were informed that there were huts a short distance away but these had been destroyed by ploughing. There were no visible indicators. The graves themselves were identified to us as being directly under the cover of a tree. The only indicators of human activity were about 5 rocks which had been transported onto the site and a single low mound under a bush. We could not determine if the mound was human made or had accumulated as a result of windblown debris and humus trapped by the bush. Our informants told us that the stones were on the site because they had been placed there as a token of respect by persons visiting the graves. A contrasting explanation was given by Mr Theo Harris (interviewed two days subsequently) who said that the stones were thrown onto the site by farmers to get them away from the planting and ploughing activities.

We are unable to confirm the presence of the graves independently of the oral history provided by our informants. The only feasible way to do this would be to open the ground and check for the presence of human remains.'

[472] The archaeologists were not dismissive of the allegations made by Mr Nondzube and his companions. They did not find them bizarre. Their comments were only that the allegations could not be independently confirmed. Even if Mr Nondzube's allegation about the graves of his family is discounted, that does not mean that all his evidence was devoid of value. Certain portions of his evidence are borne out by some of the documented history. For example, he testified that he was told that Chief Dayile, who became the traditional leader within the commonage, was not born of royal blood and that as a minor chief, he reported to the paramount chief who had remained in the Transkei.

[473] We disagree with our colleague's finding that the claim hinged solely on the evidence of Mr Nonzube and more specifically on proof of the existence of Chief Dayile. The Act does not prescribe proof of a specific personality as a requirement for a Community. It requires a 'group of person whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group.'[167] We reiterate that in the referral, the Commission said, the rights which the community had were 'acquired and used in accordance with shared rules of usage, both in terms of traditional laws as well as so-called location rules'. The fact that the existence of Chief Dayile's was not conclusively

[167] Section 2 of the Act

established was not fatal to the land claim. As shown above, features in the life of the commonage community, such as an established orderly settlement pattern, common traditional practices, pooling of resources for farming purposes, economic activity, and a leadership structure, demonstrate that the occupants of the commonage were an established community as envisaged in s 2 of the Act[168], with or without their chief.

[474] For the same reasons, the short-comings in the evidence of Mr Ndoyisile Ngqiyaza are not destructive of the land claim. We accept again, that his evidence is not a model in clarity. It is difficult to discern, from his evidence, which events happened while his family lived at the 'location' prior to subdivision and which happened when his family lived on Mr Don Bradfield's farm after the subdivision. He also testified that his mother's grave was in the location, yet during cross-examination he said his mother died when his family already lived on Mr Bradfield's farm. Whilst this is not necessarily contradictory his evidence on these aspects remains unclear. He obviously had difficulty testifying with reference to specific years. Yet he was consistent in his version that his father went to work for Mr Bradfield after the subdivision and that at that time he no longer had his own livestock. Prior to this, when they still lived in the location, his father sold wood in Grahamstown. He insisted that his family left their home in the location as a result of the subdivision of the commonage. This is consistent with the general body of evidence and apart from the inconsistencies, there is ample documentary corroboration for what he generally testified.

[168] See the definition of 'Community' under s 1 of the Act.

[475] In our view, just as the oral evidence led on behalf of the commission and the claimants was not perfect, so too was the evidence led on behalf of the appellants. Apart from Mrs Page and her brother the witnesses who testified on behalf of the landowners were only born after the subdivision. Their direct evidence relates to the period starting after the subdivision. Reference to the earlier period was based on hearsay.

[476] We first consider the evidence of the landowners' expert, Professor Hermann Gilliomee. He disputed that the first occupants of the Zuurveld were indigenous people. Both Professor Gilliomee who testified on behalf of the appellants and Dr Visagie whose expert report forms part of the record asserted that the prior occupation of the land by AmaXhosa was temporary or sporadic and did not constitute permanent settlement that could give rise to indigenous rights. We are of the view that the evidence and most historical writings prove the contrary. We re-iterate, however, that the real issue is the continuous occupation of the Salem commonage by a community of indigenous people for a period in excess of ten years, subsequent to 1913, not what occurred before.

[477] The evidence of Mr David Mullins was based on hearsay from his father. His father farmed with beef cattle, vegetables and pineapples on the farm Moorelands from 1952 and moved to the farm Avondale in 1964. Later he bought more farms, Salem Park, Devonshire, Willow Bank and a portion of the farm Pleasant Prospect, which were all within the claimed land but have since been sold to the Government. It will be noted that Mr Mullin's father would have settled on the claimed land some

time after the subdivision. He would therefore have related to his son what he himself had heard from other people. Mr David Mullins' evidence is relevant on two aspects: firstly, that the farm Avondale was virgin land when his family acquired it. The landowner' contention was that the land could not have been inhabited and cultivated by the claimants' forebears. However, Mr Mullins' evidence cannot detract from the value of the archival evidence on the presence of African people on the commonage from the 1870s to the 1940s. Moreover, it had not been the Commission's case that every inch of the commonage had been cultivated.

[478] The second relevant aspect of Mr Mullins' evidence was that Mr Nondzube's father, Jamani Sukula, had told him (Mullins) that prior to working for Mr Mullins' father he (Sukula) had come from the 'Seven Fountains area',[169] and that he had first worked for the Kings family on the Kingston farm. The suggestion from this assertion was that Mr Nondzube's evidence on what his father had told him as the history of his people, particularly that they had lived on the Salem Commonage, was false. However, there was no indication in Mr Mullins' evidence as to when and where exactly Mr Sukula would have lived in the 'Seven Fountains area' or worked for the Kings, and where the 'Seven Fountains Area' he was referring to was, relative to the Salem Commonage. Again, it is important to note that the Mullins family arrived in South Africa from Zimbabwe in 1952. His assertion that before subdivision the residents of the commonage were a handful of people employed on the erven must be considered together with the objective evidence on record.

[169] Which does not form part of the claim.

[479] The evidence of Mr Spencer Hill is also significant. In relation to Mr Nondzube's evidence that his family lived on a certain portion of the commonage in the vicinity of a Milkwood tree where he had pointed out the graves of his relatives. According to Mr Hill that portion of land is part of the Rippley Farm on which he was raised. His father bought it as part of Pleasant Prospect in 1949. It was common cause that the Ripley Farm used to be part of the commonage. It was awarded to Mr Hill's grandfather as one of the owners of the erven upon the subdivision. According to Mr Hill his family had ploughed the land 'from boundary to boundary' and had never uncovered any graves thereon. We have already referred to the remarks made by the archaeologists in respect Mr Nondzube's identification of the alleged gravesite. There is no indication in the archaeologists' report that the gravesite had been ploughed over. Instead the only comment made to them to refute the version that the land around the milkwood tree was a gravesite was that the stones found under the tree had been removed from land that was being ploughed. It is striking that the claimants' witnesses and those interviewed during the investigation of the claim appeared to be familiar with this part of the commonage, referring to it as eMqwashini, uMqwashu being the IsiXhosa name for a milkwood tree. It must be said, for the sake of completeness, that by the time the matter came before the LCC, the farm Ripley had been 'returned to the community'. Mr Dyakala presently lives on it.

[480] Mrs Ethel Page was 87 years old when she gave evidence in the LCC. She was born in Grahamstown in 1926 and moved to Salem in 1934 when she was about eight years old. Her father had bought the Residency farm from the magistrate, Mr

Mathews. When the commonage was subdivided her father was allocated a further farm thereon, the Philemon's Hoek by virtue of his ownership of the Residency.

[481] In our view the evidence of Mrs Page was the most inconsistent. Particularly considering that she was testifying about her personal experience and observations. She initially testified that she did not know where the two African employees who worked for her family lived. She insisted that they did not live at her home. Later she admitted that they lived on her father's farm. She denied that there ever was a 'black residential area' where the commonage used to be. This cannot be correct given the independent body of the archival evidence referred to above.

[482] She testified that as a young girl she used to ride her bicycle throughout the Village and she never saw any African person living on the commonage. However, during cross-examination she admitted that 'they might have been there, but we did not notice them'.

[483] It seems that Mrs Page never took interest even in the African people that were part of her daily life and lived in her home. She could not recall their names and did not know where they lived. It was unrealistic therefore to expect that she would know of the existence of Chief Dayile or any traditional leadership structure on the commonage about whom she was asked. Her evidence could not form a credible foundation to refute Chief Dayile's existence. Moreover, there was no reason for her

to make a mental note of this since at the time, there could not have been any reason for her to do so.

[484] The evidence of Mr Cuan Alwyn King did not take the matter any further, except for the admission that one of the African families that worked for his father's aunts lived on the commonage. His evidence was that his father's aunts, from whom his father acquired the farm Kingston, employed four Africans, three of whom lived with their families on the farm and one who lived on the commonage. He asserted that his father had told him that his aunts had obtained permission from the board for this family to live on the commonage. But his evidence in this regard was uncertain. He initially testified that 'the family probably had permission'. Later, under cross-examination, he testified that his father had told him that 'there was permission'. As expressed earlier this is inconsistent with the board's express disavowal of any authority over the huts built by the African people on the commonage. On the other hand, the evidence shows that the landowners considered the board as having had such authority.

[485] Mrs Bradfield had married into the Bradfield family in 1974. Her evidence related to affairs on her father-in-law's farm (Donald Bradfield) as in 1945, based on her interpretation of entries made in Mr Bradfield's diary. The high water mark of her evidence related to an entry in that diary, dated 30 April 1945, that Mr Bradfield bought a bicycle for his employee, Mr Dyakala. Mrs Bradfield's opinion was that Mr Bradfield must have bought the bicycle because Mr Dyakala 'came from a distance away' from the farm. But she later testified that Mr Dyakala lived on Mr Bradfield's

farm and not on the commonage as Mr Dyakala's descendants claimed. Again, this evidence takes the matter no further. It neither contradicts nor supports the versions put forward by the parties. It was common cause that after the court order authorised the subdivision, from the 1940s, some of the occupants of the commonage moved onto the farms where they were employed, others went to live in nearby communities, including Grahamstown.

[486] Mr van Rensburg, is a brother to Mrs Page. He was also adamant that he never saw any African people living on the commonage as he grew up in Salem. He testified that his father's two employees lived on his father's farm and received food rations as part of their wages. But, in striking contradiction to Mrs Page, according to Mr Van Rensburg the employees each had eight cattle, including oxen with which they ploughed their garden patches and their employer's land. It appears that Mr van Rensburg (the father) did not have any oxen. Mr van Rensburg did not know whether the employees were sharecroppers, but 'they were allowed to have and to keep these oxen on the farm, on the property, and because of that they never got paid, but they were given land, a big piece of ground, to plough and plant for themselves'.

[487] In summary, the extensive evidence led before the LCC related to occupation of the Zuurveld Region, firstly by the indigenous people of South Africa,[170] the arrival of the Dutch during the seventeenth century and the British settlers in the 19th century, the wars and battles waged between the AmaXhosa and both the Dutch and

[170] In this case comprising of the AmaXhosa and the Khoi people.

British colonists, the ultimate defeat of the AmaXhosa, their colonisation and reduction to farm workers, their occupation of the commonage and finally, their expulsion therefrom in the 1940s. Notably some of the landowners accepted in their evidence that there was some form of leadership amidst the community of African people. According to the landowners, however, each farm had its own group of elderly men who were tasked with facilitating the resolution of disputes and also cultural and traditional practices. We do not understand how the allegation can be sustained in light of the fact that, at least in so far as Ms Page is concerned, they only had two male workers on their farm and there were only two or three employee families on most farms.

[488] We have already set out the basis for our conclusion that the evidence proves that a community of indigenous people lived on the commonage as asserted by the Commission and the claimants. The contention, by the claimants, that the occupants of the commonage were their ancestors, AmaXhosa of the Jwara clan, accords with the history alluded to. Their shared traditional rules, customs and principles determined their way of life within the commonage and their rules for accessing the land for their livelihood. This, coupled with the fact that the African community, alluded to above, had been on the commonage over time, and seen in certain quarters to be of nuisance by the 1940s, lends credence to their claim.

[489] We next consider whether the perpetual quitrent grant and the subsequent freehold title issued to the British Settlers in respect of the commonage, are a bar to the land claim or restitution of the land to the claimants. The landowners' argument is

that no claim can validly lie in respect of the commonage because, even if occupation is proved, the land was already privately owned and held by a freehold title when the Africans settled thereon.

[490] In respect of the commonage, both the Quitrent Title and the Deed of Grant accorded to the British settlers' shares which allowed them *access* to the commonage, in proportion to the size of their allotments, for purposes of pasturage and water, wood, reeds and thatch grass collection. The shares were described as relating to:

'A piece of land measuring 2 333 morgen, situate in the district of Albany on the Bushman's River, *granted as Commonage* to the Salem Party of Settlers on 15th December 1836'; and

'A piece of land constituting 5355 morgen 555 square roods, situate in the District of Albany, *granted to the present and future proprietors of Locations* in the Salem Party, on 23rd November 1847, *being the grazing ground or common land of the said Party*.' (My emphasis.)

[491] Essentially the shares were granted to enable access to the commonage land for the enjoyment of a common benefit available to the then present and future Salem landowners. Interestingly, there is evidence that 22 of the original (50) members Sephton party of settlers that had settled in Salem had abandoned their allotments by 1931 due to hardships of farming activities. They therefore must have also abandoned their shares to access the commonage. In a letter dated 14 January 1936 attorneys Whiteside and Stapleton (representing the landowners, it would seem) wrote as follows to the Cape Provincial Secretary:

‘The rights to the commonage are held by 25 erfholders who have from time to time held meetings to discuss the situation owing to intense dissatisfaction that arises from the fact that such huge land cannot be farmed satisfactorily on a communal basis . . .

. . . The present commonage is of absurd size for a small community of about 100 inhabitants and of these only 25 owning commonage rights. These erfholders holding such rights will be quite prepared to agree that a portion of the commonage be retained by the Board for general use of the public as there is always more than sufficient land for all purposes.’

Clearly about half of the original landowners had abandoned their rights to access the commonage.

[492] Further, the Cape Administration also abandoned its right to claim transfer to it of a portion of the commonage based on its ownership of the village school property. It considered that the attendant transfer and maintenance costs of an additional property would be prohibitive; and the school was, in any event, unlikely to require additional space in the foreseeable future. On the evidence before us, those portions of the commonage which were abandoned were, without any legal basis, subsumed by the remaining landowners on subdivision.

[493] Our view that the commonage served as a public resource is fortified by the following remarks made by Gane J in the Grahamstown High Court when considering the application for subdivision of the commonage. The learned judge remarked that it was most unusual for members of a local authority (the board) to hand over all their rights to the commonage to private owners. In addition, the

Administrator of the Cape Colony considered the subdivision to be particularly 'unusual' as it would result in the board being left without 'common land'.

[494] The following remarks by the Administrator in a letter written to the board are also telling:

'7. It might be as well at this stage to point out that the question of the subdivision of this commonage was taken to court at the instance of the Administration and of the Registrar of Deeds entirely through a misapprehension. Originally the applicants approached this office and alleged that they were the owners, in community of property, of the so called commonage of Salem, and they asked for your consent to the division of these common lands amongst the applicants so that each might have individual ownership of a portion of the lands. The Administration advised the applicants that it had no power to direct the Registrar of Deeds to give them transfer of portions of the land, and in this the Registrar of Deeds concurred, stating that an order of court would be necessary to effect transfer of the land. When the matter came to court the judge pointed out that this was not the correct legal position, but that the Administrator had full power to act in terms of s 49 of Ordinance No 10 of 1921, ie the ordinary provision under which the village management Boards are authorized to dispose of land…

8. In view of the considerable amount of money spent by the applicants in approaching the Court, and in order to expedite settlement of the matter as much as possible, the Judge allowed the issue of the Rule Nisi previously referred to. The position is, however, that apart from the fact that the applicants have been to court, this matter comes before you as an ordinary application by a Village Management Board to dispose of its lands.

9. Provision is made in s 49 for the leasing of commonage lands, and had this matter been submitted to the Administration correctly in the first instance, it would have been suggested

to the Board that the best way to meet this position would be to grant long leases of portions of the commonage, subject to conditions to be approved by you, In this way each of the applicants would enjoy practical ownership of a portion of the ownership for say 25 or 30 years, *but at the end of that period the position could be reviewed in the light of the circumstances then existing and the Board would have the land as an asset for the benefit of the community of Salem.* In view of the expense which has been incurred by the applicants, however, there is little likelihood that they would agree to such a solution for the matter. In the circumstances I consider that, taking into account the opinion that has been expressed by the Magistrate of Grahamstown … it would be as we to agree to the subdivision of the whole commonage subject to the conditions such as those following being registered against the transfer deed of each of the subdivided portions:

(i) that the portion sold shall remain as commonage for the lot to which it is allocated and shall not be sold apart therefrom;

(ii) that the right of access to the various portions should be safeguarded.'

[495] Indeed the consent of the Administrator was granted under these conditions. And on subdivision of the commonage, the proposed conditions were incorporated into the title deeds relating to the subdivided portions.

[496] Despite these sentiments expressed by both the Learned Judge and the Administrator, the subdivision was allowed and the African occupants of the Commonage were forced off it. It is this event which serves as a conclusive bridge by which the claimants must succeed in asserting their rights in the land.

[497] All this, in our view, shows that the understanding of those in authority was that the commonage served a public interest and that this position should continue. The contents of the letter from Whiteside and Stapleton show a recognition of the fact that the commonage served as a public resource.

[498] Not so long after the subdivision, in about 1950 the landowners wanted permission to sell their portions of the commonage separately from their original erven. This, of course, was contrary to the conditions in their title deeds which were intended to ensure that the land remained available for public benefit. The Administrator refused stating that the Commonage remained necessary and that he anticipated that if the farmers were allowed to sell their portions of the commonage as they sought ‘after a while the owners of the village plots [would] again start agitating for commonage rights’. However, despite the opposition, the landowners eventually got their way, and sold the commonage portions.

[499] The evidence demonstrates that the commonage land was always intended to serve as a public resource. The private ownership contended for cannot was contrived. In our view a finding that ignores this background defeats the core purpose of the Act.

[500] Turning to our colleague’s finding that the dispossession of the commonage community was not a result of a racially discriminatory law or practice, we disagree. The dispossession was patently racially discriminatory. The failure to consult or in

any way take the interests of the community into account, and the process which forced hundreds of African people away from their homes on the commonage for the benefit of 25 white farmers was crude and racially discriminatory conduct. The court order could not cleanse the dispossession of its racially discriminatory nature.

[501] Our colleague finds that the claimants' land claim was invalidly lodged and that the claim must fail for this reason alone. We disagree. The importance of the requirement set in s 10 (3) is not to be undermined. However, the question of compliance should not be approached as a mechanical exercise. Recently, this court has held that when interpreting specific provisions in contracts or legislation regard must be had to the document as a whole, and that 'whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known at the time of its production'. See *Natal Joint Pension Fund v Endumeni Municipality*.[171]

[502] Further, an examination of comparable legislation shows that similar provisions have not been rigidly interpreted by courts. For example Rule 7(1) of the Uniform Rules of Court provides that:

'**Power of Attorney**

(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party, may within 10 days after it

[171] (920/2010) [2012] ZASCA 13 at para 18.

has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at anytime before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application'

[503] in *Tattersall and Another v Nedcor Bank Ltd* [172]in which the authority of a bank manager to launch court proceedings on behalf of the bank was challenged the court accepted the averment in the founding affidavit that the bank manager was 'duly authorised' to launch the proceedings At 228G-H the court held that:

'A copy of the resolution of a company authorising the bringing of an application need not always be annexed. Nor does s 242(4) of the Companies Act 61 of 1973 (to the effect that a minute of the meeting of directors which purports to be signed by the chairman of that meeting as evidence of the proceedings at that meeting) provide the exclusive method of proving a company's resolution … There may be sufficient *alliunde* evidence'.

[504] In this case, when considering this issue, the LCC stated as follows:

'The provisions of this section must be read in context, it [s 10(3)] was clearly designed to give ample leeway to a claimant who is often not acquainted with the legalities of a process and simply wishes to lodge a claim in a representative capacity unlike other legislation such as Companies Act which is specific and peremptory on the question of resolutions and authority to act. It is unfortunate that the claim form does not specifically require to be filed at the time of lodgement but simply requests 'capacity'. It is wishful thinking to expect an ordinary Community representative to assume that his capacity must be supported by a

[172] [1995]] ZASCA 30; 1995(3) SA 222 (A); See also *Corrplo 358 Close Corporation v Charters* (844/2011) [2011] ZAECGHC 27 (1 July 2011).

resolution. Mr Paul in his evidence testified that the constitution of the claimant community was accepted by the Regional Land Claims Commissioner and the claim was validated. The claim form was lodged on 24 December 1998 and it was conceded by the Land-Owner Defendants after being placed in dispute. The Land-Owner Defendants did not question the Plaintiff's (sic) witnesses or Mr Paul regarding Mr Madinda's (Madlavu's) authority to lodge the claim'.

[505] Although the provisions of s10(3) of the Act are, in fact, couched in more peremptory terms than those of Rule 7(1) of the Uniform Rules of Court we are of the view that the LCC adopted the correct approach on the issue. Courts cannot adopt a more rigid approach to proof of authority from a community such as the claimants in this case than it does in the case of sophisticated and legally represented directors of companies. This would be too formalistic. In fact it is clear that this community had structured itself into a group in order to claim their rights in land and the smaller group of listed representatives acted on its behalf. Particularly in light of the fact that the Commission, for whose benefit the requirement is set, will still conduct investigations into the merits of the claim. The constitution of the 'claimant committee' sets out as its objective the return of the land of [their] forebears to the Salem community. (It is headed, in IsiXhosa: 'Abantu okanye inzala yabantu base Salem banqwenela ukubuyiselwa kwilizwe loo Khokho babo nelilifa kubo'). Mr Madlavu's name is listed in the claim form as one of the community representatives. We do not dispute that more explicit proof of authority would better serve the purposes of the Act. And, perhaps the Commission could have structured the claim form more comprehensibly. But there is no evidence that the claimants failed to

furnish any information required from them by the Commission. To non-suit them in these circumstances would be insensible and would defeat the purpose of the Act.

[506] Finally, we agree with our colleague that the submission, on behalf of the claimants, that the challenge to the decision of the Commision on the claim should have been made by way of a review, is without merit. Section 14 (1) of the Act is clear as to the procedure following the investigation of the claim by the Commissioner. The section provides that:

'If upon completion of an investigation by the Commission in respect of specific claim-

(a) The parties to any dispute arising from the claim agree in writing that it is not possible to settle the claim by mediation and negotiation;

(b) The regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation; or

(c) . . .

(d) The regional land claims commissioner is of the opinion that the claim is ready for hearing by the Court,

The regional land claims commissioner having jurisdiction shall certify accordingly and refer the matter to court.'

This claim was therefore properly referred the LCC.

[507] All in all, we are satisfied that the evidence showed not only that an African community inhabited the commonage from the 1870s to the 1940s when it was dispossessed of beneficial rights deriving from such occupation, but also that it is just

and equitable for an order of restitution of the rights in land to be granted. In the circumstances the appeal falls to be dismissed.

[508] For these reasons, the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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R Pillay

Judge of Appeal

_____

N Dambuza

Judge of Appeal

APPEARANCES

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