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IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case numbers: LCC 2010/220

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

19 October 2020	**(Signed)**
DATE	SIGNATURE

In the matter between:

THE NYAVANA TRADITIONAL AUTHORITY	Applicant
and	
MEC FOR LIMPOPO DEPARTMENT OF AGRICAULTURE:	First Respondent
REGIONAL LAND CLAIMS COMMISSIONER; LIMPOPO	Second Respondent
THE MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM	Third Respondent
VALOYI TRADITIONAL AUTHORITY	Fourth Respondent
NWAMITWA-SHILUBANA, LWANDLAMUNI TINYIKO	Fifth Respondent
OFFICE OF THE NATIONAL DEEDS REGISTRY	Sixth Respondent
PREMIER OF THE LIMPOPO PROVINCE	Seventh Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. During December 2019 the Nyavana Traditional Authority brought an application in which it sought, among other things, to direct the second respondent, who is the Regional Land Claims Commissioner for Limpopo Province ("the RLCC") to refer, within a specified time, the dispute between the applicant ("Nyavana claimants") and the Valoyi Traditional Authority ("Valoyi claimants") concerning their overlapping land claim to this court in terms of s 14(1)(b) of the Restitution of Land Rights Act 22 of 1994 ("the Act") and in compliance with para 9 of a Court Order which had been granted almost a decade ago on 30 June 2011 by Mpshe AJ in this same matter.

   Moreover, the order of 30 June 2011 was made at the specific request of the parties pursuant to an agreement they had reached. The RLCC was one of the parties.

2. The order of 30 June 2011;

   a. included an interdict preventing the transfer of certain identified farms (the land) pending further research, negotiations and a final finding being made by the RLCC as to which parties are entitled to the land in issue *"or pending a decision of this Court finally adjudicating any dispute between the parties as to the entitlement of the parties to the said land"*;

   b. identified a number of agreed steps, including inspections *in loco* and the finalisation of archival research which the RLCC had undertaken, so that;

      i. an interim report would be finalised by 31 October 2011; and

      ii. the RLCC would hear representations on behalf of the affected parties by 30 November of that year.

c. made provision for a mediation process after the hearing of 30 November pursuant to which the RLCC would complete a final report.

3. The final substantive paragraph of the 30 June 2011 order read:

> "*In the event of any disputes pertaining to the final report, or to unresolved issues flowing from the mediation … the second respondent (i.e.* the RLCC) *shall refer the matter to this Court in terms of s 14 of the Act for adjudication"*

4. At the hearing on 23 March 2020 I had no hesitation in granting the referral order sought. The relevant part of the order (which was amended to take into account the Covid-19 lockdown) read:

> *"1. The Second Respondent is directed to refer the dispute between the Nyavana Tribal Authority and the Valoyi Tribal Authority concerning their overlapping land claims to the Land Claims Court for final determination in the matter to this court in terms of section 14(1) (b) of the Restitution of Land Rights Act and in compliance with paragraph 9 of the Court Order granted on 30 June 20-11 within one calendar month from the date of this order, as per paragraph 1 of the notice of motion.*
>
> *4. Oral argument as to costs will be made at the hearing on 24 April 2020.*

5. There were however a number of other orders sought in the present application which required determination and in respect of which further submissions were made. They are directed at:

a. Compelling the RLCC to publish a s 11(1) notice[1] in the Government Gazette which will provide a correct description of the land claimed by

[1] Section 11 (1) of the Act.

the applicant. In the alternative the applicant sought an order declaring that it made a mistake in naming the area identified in its land claim form, that it is entitled to have the error condoned, have its claim form amended to correctly reflect the land in issue and have a fresh s 11 *Gazette* Notice published.

b. Directing the RLCC to include an additional farm, Flying Club 512 LT in the *Gazette* Notice

c. Setting aside the RLCC research report of 6 July 2012 as a nullity;

d. Requesting directions from this court in respect of how the claims in relation to all the disputed farms should be dealt with;

THE ISSUES

6. The following substantive and procedural issues arise:

a. Whether the claim form sufficiently identified the land claimed and if not, what effect that may have if any.

A necessary prerequisite is to determine if there was an error and if so how it arose;

b. If the answer to the preceding question is in the affirmative, then whether the additional farm identified as Flying Club 512 LT falls to be determined on the same basis: If not, then on what basis can it be included?

c. If the answers to any of the preceding questions is in the affirmative, then it will be necessary to decide whether the existing s 11 notice is to be amended or whether a new one must be gazetted

d. Whether the second research report of 6 July 2012 can be declared a nullity

In making any of these determinations it will necessary to consider whether the interests of the affected landowners should be taken into account at this stage as they are not presently before the court.

7. For reasons that appear later, the applicant is entitled to have the merits of its land claim adjudicated on.

However the procedure once the RLCC refers a claim to this Court must involve the landowners and for that reason the court cannot at this stage direct the future course of the litigation beyond calling a pre-trial conference of all parties affected by the land claims in question.

At such a conference each party will have an opportunity to deal with issues such as the question of consolidation, the filing of outstanding papers, the identification of all the issues which are in dispute between the claimants and the landowners as well as the claimants *inter se*. The conference will also have to consider the possible separation of issues, including whether any issue should be resolved by way of alternate dispute resolution. In this manner a comprehensive litigation plan can be drawn up, hopefully through consensus, in order to resolve all the issues fairly and expeditiously.

8. The principal question to ask is how does one characterise the legal question which arises when the land described on the land claim form lodged under s 10 of the Act is not identified with specific reference to the cadastral system of deeds registration.

LEGAL CLASSIFATION OF ISSUE ARISING FROM DESCRIPTION OF LAND ON CLAIM FORM

Lodging of a Land Claim

9. Section 10 of the Act sets out the requirements for lodging a valid land claim.

The relevant portions of s 10 provide:

> *(1) Any person who or the representative of any community which is entitled to claim restitution of a right in land, may lodge such claim, which shall include a description of the land in question, the nature of the right in land of which he, she or such community was dispossessed and the nature of the right or equitable redress being claimed, on the form prescribed for this purpose by the Chief Land Claims Commissioner under section 16.*
> (emphasis added)
>
> *(2) The Commission shall make claim forms available at all its offices.*
>
> *(3) 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.*

I have included sub-section (4) because it can arise that greater insight may be obtained as to the area claimed from the explanation given regarding the basis on which a claim is being lodged on behalf of a community. Whether the clarity such information provides can be legally relied on in order to identify the land claimed will also be addressed.

10. Section 16 is an enabling provision identifying the manner in which rules regarding the Commission's procedures are made and published[2]. Section 16(1)(b) expressly confers the power to make rules in regard to the

[2] Rules are made by the Chief Land Claims Commissioner in consultation with the relevant Minister

filing of claims. Section 16(1)(g) also confers the power to make rules regarding any other matter considered necessary or expedient "*in order to achieve or promote the objects of this Act".*

I will return to consider "*the objects of the Act"*

11. In terms of s 11 the RLCC is obliged to cause a notice to be published in the *Gazette* and by other means[3], if he or she is satisfied that :

"(a) the claim has been lodged in the prescribed manner;

(b) the claim is not precluded by the provisions of section 2[4]; and

(c) the claim is not frivolous or vexatious."

12. Although the decision to publish has significant consequences, the steps taken by the RLCC in respect of a claim prior to publication are of an investigative nature- they are not adjudicative.[5]

The consequences of publication in the *Gazette* are that under s 11(7) no person may improperly obstruct the passage of the claim and, most importantly, may not alienate, rezone, sub-divide, develop or encumber "*the land in question"* without giving the RLCC one month's written notice of an intention to do so. If a person does so without giving the required notice and otherwise than in good faith then a court may set aside the transactions or may make any other order it deems fit.

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[3] Section 11(1) provides that aside from the *Gazette*, publication shall also be *"… in the media circulating nationally and in the relevant province, and shall take steps to make it known in the district in which the land in question is situated"*

[4] Section 2 is concerned with the qualification entitling a person, community or part of a community to be entitled to claim the restitution of a right in land. It also includes a limitation of such right if just and equitable consideration had been given at the time of dispossession, whether by way of ordinary expropriation or otherwise.

[5] *Transvaal Agricultural Union v Minister of Agriculture & Land Affairs* 2005 (4) SA 212 (SCA) at para 76

Other consequences which arise from the publication of a *Gazette* notice under s 11 are that no claimant may be evicted from "*the land in question"* nor may anyone cause to be removed, destroyed or damaged any improvements on the land without the RLCC's written authority.

The consequences of a s 11 publication therefore affects real rights and secures a sterilisation of the *Gazetted* land in issue subject to the RLCC.

13. Section 11A was introduced in November 1996 to afford a person affected by the publication of a *Gazette* Notice under s 11 to make representations for its withdrawal or amendment to the RLCC.

Moreover, the RLCC can withdraw the *Gazette* Notice if during the course of the Commission's investigations under s 12 he or she has reason to believe, after affording the claimant an opportunity to be heard, that the requirements of s 11 for the giving of the original *Gazette* notice have not been met

14. Before turning to the subordinate legislation dealing with the form which a land claimant is required to complete under s10 (1), it is significant that s 11(2) provides that if a claim has not been lodged in the prescribed manner then the RLCC may do so on such conditions as he or she may determine. [6]

15. The Rules which prescribe the content of the claim form and the criteria for its acceptance by an RLCC are to be found in Government Notice R703 of 12 May 1995 (as amended).

16. In terms of rule 3(1), and confined to the requirements relevant to the present enquiry, a RLCC is obliged to accept a claim for investigation where satisfied that;

    a. the claim is *"substantially"* in the form on Annexure A (R 3(1)(a)(i));

[6] Section 11(2) provides:

The regional land claims commissioner concerned may, on such conditions as he or she may determine, condone the fact that a claim has not been lodged in the prescribed manner.

b. the claimant has reasonable grounds for arguing that the claim meets the criteria set out in s 2 (R 3(1)(b))

c. the claim is not frivolous or vexatious (R 3(1)(c))

17. The claim form, which is annexure A to the Rules, commences with the following general statement applicable to the completion of all its sections:

"The following information is required for the Commission on Restitution of Land Rights to process your claim. Please supply as much information as possible. Please indicate where the information is not available. The more information you can supply, the more helpful it will be. Please note that the Commission is there to assist you, where needed.
(emphasis added)

It may at once be observed that the legislature in the clearest terms;

a. Accepts that the details provided may be incomplete;

b. Accepts that some information may be unavailable, although in such cases requires that this is to be indicted;

c. Recognises that the completed form may only contain limited information and that such information may be imparted by reference to the claimant's knowledge or such person's own perspective;

d. Acknowledges that the Commission's personnel are there to assist in the completion of the form. In other words, the engagement is facilitative not adversarial.

18. In the section requiring information regarding the land to which the claim relates the form provides:

Details of property/land being claimed in terms of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994):

1. *Property description: Rural/Urban (Delete which is not applicable)*

   1.1 *If it is rural land, the portion(s), name(s) and number(s) of the farm and district in which it is situated*

   1.2 *If it is urban land, the street address and erf no which appears on the deeds description*

8.Please attach the following documents where applicable and available to substantiate your claim(s):

8.1 If you are the original owner who lost a right in land:

- *Certified copy of your identity document.*
- *Certified copy of the deed which was held by you with regard to the land being claimed.*

8.2 If you are a descendant of the person who has lost a right in land:

- *Certified copy of your identity document and that of the person who has lost a right in land.*
- *Power of Attorney to act on his behalf or claim the land if the original person who lost a right in land is still alive.*
- *Certified copy of the deed which was held by the person who lost a right in the land being claimed.*

8.3 Please attach any other document(s) which you wish, in support of your claim.

19. At the end of the form the claimant is asked whether there is any other information which he or she would like to bring to the Commission's attention.

20. While the form requests a copy of the title deeds, if available, it is evident that the rules, including r. 3(1)(b) which deals with the other critical facets of a

claim[7], accept that the person filling out the form is not required to provide meticulous accuracy or exact detail.

21. The Act is one of the most significant pieces of post-apartheid remedial legislation. It was enacted to redress the past injustices of apartheid which stripped people of their dignity and rights by forcibly removing them from land through racially discriminatory laws and practices. [8]

22. One of the objects of the Act which is set out in the preamble is to provide for restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices, to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for related matters.

23. It would have been painfully apparent to the lawmakers that the very dispossession of land would have split communities and families, that because claims can go back to the introduction of the Land Act in June 1913 they might only be lodged by descendants of communities or families who had been dispossessed of land over three-quarters of a century earlier. Lawmakers would therefore have appreciated that the land may have been described quite differently at the time of forced removal and that those dispossessed may only have known the area by reference to its ancestral description or by reference to its topographic features but knew nothing of the cadastral system of land surveying.

24. The legislature would also have been aware that the debasement of human dignity and values wrought by apartheid brought with it a fundamental curtailment of opportunities. It would therefore have appreciated that claimants

[7] Namely, the grounds for asserting that the claimant was dispossessed as a result of past racially discriminatory laws and practices,

[8] The enormity of dispossession, its scarring and its consequences are unlikely to ever be fully comprehended. Attachment to land touches the core of our being; forced removals strike at the very psyche of a people reduced to second class citizenship and deprivation for themselves and their children by reason of the colour of their skin, ethnicity or religion.

may not have the financial resources to obtain professional assistance to complete the land claim form and that they th3emselves may not be sufficiently literate to do so.

Accordingly, in order to meaningfully redress the dispossession of land under apartheid and provide for a practical process of restoring rights to equality and dignity so as to meet the Constitutional requirements of s 25 of the Bill of Rights[9] it was essential to provide assistance to the claimants when they sought to exercise their rights.

25. It is therefore not surprising that the legislature did not insist that the title deed description be provided or that it imposed an obligation on the RLCC to accept a claim if there was substantial compliance with the requirements of the prescribed form (per r.3(1) ((a)(i)) with the *additional* rider that non-compliance with the requirements of the prescribed form may be condoned under s 11(2).[10]

26. Perhaps even more significantly, it is not surprising that the Act superimposed over this a requirement that the Commission provides direct assistance to would be claimants when completing their forms. This is an acceptance that claimants are not expected to undertake their own detailed research or convert their knowledge, or that handed down to them through a generation or more or the way they are able to express it into some other format. That is the function of the Commission's officers.

27. Section 6 of the Act sets out the general functions of the Commission. Subsection (a) requires it to receive and acknowledge claims by those who

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[9] Sections 25(7) and (8) provide that:

(7) 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.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1)

[10] Applying the interpretational construction that superfluous wording is not intended.

have the requisite personal status under s 2 and provided they did not receive just and equitable consideration at the time of dispossession.

Immediately after receiving the claim form s2(b) obliges (*"shall")* the Commission to;

> *"(b) take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims;"*

This is a positive duty imposed on the Commission's personnel to ensure that claimants are assisted in completing a claim form which has been lodged *"in the prescribed manner"* as required under s 11(1)(a) read with the Rules.

28. This is reinforced by the provisions of s 12 which deal with the Commission's power to investigate.

Not only are these powers exercisable after the acceptance of a claim for gazetting under s 11 but under s 12(3), if a claimant is unable to provide all the information necessary, an RLCC officer is required to take all reasonable steps to have this information made available.

Section 12(3) reads:

> *"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."*
> (emphasis added)

Moreover this is complimented by r. 5 (a) which provides that the RLCC or a designated person,

> "*shall*-

(a) Ensure that outstanding information required in respect of the land is obtained".

(emphasis added)

29. It will be recalled that under s 16 of the Act, the Rules are prescribed *"… in order to achieve and promote the objects of the Act"* - which in turn are those expressly identified in the Constitution as requiring attainment in terms of s 25 property clause.

30. It is evident that the provisions regarding the submission of claim forms, the forms' compliance with the requirements for publication of a *Gazette* Notice, and the assistance which the RLCC is obliged to provide a prospective claimant are consistent with the objective of ensuring that, provided the claim is *bona fide* , the RLCC is ultimately responsible for the form adequately describing the land in issue or, at the least, that after receipt of the claim form he or she undertakes sufficient investigations to identify the land which is being referred in the claim.

The Act also provides that during an investigation of the claim, after it has been gazetted, the Commissioner may amend the notice, subject to notification and representations made by affected parties under s 11A (4) read with (3). An obvious error that has been made in the *Gazette* Notice can however be unilaterally amended by the RLCC under s 11A (4)

31. I therefore comprehend that the requirement imposed on the RLCC under s 12 (3) to "*take all reasonable steps"* to obtain information is to ensure that a *bona fide* claim is not frustrated. This is reinforced by r. 5(a) which obliges the RLCC to *"ensure"* that outstanding information is obtained in respect of the claim.

It is also evident that a *Gazette* Notice which is required to inform affected landowners will have to refer to the title deeds description of the properties claimed.

32. It follows that if the claimant did not adequately describe the land then it is for the RLCC to investigate. Officers will do so, for instance, by arranging a physical inspection at which the claimants can point out the topographic features. It is then up to the RLCC, not the claimants, to correlate these with the cadastral descriptions of the land in question since it is the RLCC's task to publish the *Gazette* Notice[11]. By contrast there is no obligation on claimants to identify the land by reference to its description at the Deeds Registry when submitting their claim forms[12]. The history of the original investigation of land claims which is described in the case law mentioned later indicates that this is in fact the way conscientious Commission officers have performed their statutory responsibilities.

33. It does not appear to be necessary to formally amend the claim form if investigations prior to a s 11 *Gazette* Notice result in a correction of the description since the RLCC's investigation reports should provide the evidential paper trail while leaving it open for a landowner to challenge whether the claimant had subsequently decided to embellish the claim. Where a s 12(3) investigation conducted only after a s11 *Gazette* Notice identifies the area which is meant to be claimed or reveals an obvious error in the Notice then the process to which I referred to earlier of amending the *Gazette* notice under s 11A (4) would apply.

34. A consequence of the investigative process is that the claim form itself does not have to be amended; at least not post-publication under s 11. The process envisages an *interpretation* of the claim form. The reason, as already provided,

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[11] This appears to be reinforced by rule 5(j) which provides that See also r. 5(j) which provides that the RLCC or a person designated "*shall … see to it that the topographical or compilation map indicating the location of the land is obtained from the Government Printer or the Surveyor-General"*

[12] Section 11(a) of the Act only requires that the form is lodged in the prescribed manner and, for reasons already given, rule 3 read with Annexure A does not require an accurate description, let alone one conforming with a title deed description.

is that it is not the claimant's obligation to identify the property by reference to its cadastral description at the Deeds Registry. The obligation to do so lies squarely with the RLCCs and their designated officers who are obliged to ensure that the *Gazette* Notice identifies the land in this manner since the notice has consequences impacting on the real rights of landowners (by reason of s 11(7)).

35. For sake of completeness the duties of the RLCCs and their officers to identify the land which is being claimed;

    a. commence from the moment they are asked to assist in completing a claim form or on receiving one which does not comply with the requirements of lodgement where the *locus* of the person's right to claim is not in issue (s6 (b) and s 12(3));

    b. continue after the claim has been lodged and during any preliminary investigations prior to the RLCC being satisfied that the claim has been lodged in the prescribed manner (s 12(3));

    c. still continue if there are representations to have the *Gazette* Notice withdrawn. But even this will prompt further investigations which may reveal an error. If the error contained in the notice is an "*obvious"* one then the RLCC may correct it unilateral, otherwise affected parties may challenge a proposed amendment arising from a post-*Gazette* investigation. See ss11A (3) and (4)).

Characterisation of the legal issue

36. The issue of whether the claim form sufficiently identifies the land arises by reference to the provisions of the Act and where in doubt the objectives of the property provisions of s 25 of the Constitution. In short a purposive interpretation will be applied to ensure that *bona fide* claims (or at least those which are *prima facie bona fide*) are processed by the RLCC in order to restore

rights in land to those who were disposed or to enable them to receive equitable redress.

It is not an adversarial process. Quite the contrary; the legislation requires the RLCC to assist precisely because of the concern that claimants who personally lodge claims may be indigent or will be unable to provide sufficient detail at the lodgement stage, leaving it to the RLCCs officers to correlate the cadastral description with the land description provided on the form, and if there is uncertainty then, or later, to investigate and identify what was in fact intended to be claimed.

37. It is evident that the risk of fictitious claims is real. But one should separate the issue of whether the claimant intended to pursue a claim in respect of the land contended for on the one hand with whether the RLCC has performed his or her duties to *"take reasonable steps to ensure that claimants are assisted in the preparation and submission of their claims"* or to *"direct an officer … to take all reasonable steps to have this information made available* (i.e. the information necessary for the adequate submission or investigation of a claim)". See ss 6(1)(b) and 12(3) respectively"

38. In other words, if regard is had to;

    a. the nominal type of information which can be provided to constitute the lodging of a claim "*in the prescribed manner"* with all its latitude in respect of the way the land may be described;

    b. the responsibilities imposed on the RLCC to ensure that outstanding information required in respect of a claim is obtained;

    c. the very purpose of the legislation and nature of what it seeks to redress and why,

the question is not whether the form sufficiently describes the land but rather whether the land so described in the form was intended to mean the land which the claimants now contend for.

39. The SCA is so far the highest court to have considered issues arising from the description of land in the claim form. In *Makhuva-Mathebula Community v Regional Land Claims Commissioner, Limpopo and Another* [2019] ZASCA 157 the court approached the issue on the basis that the claimants had brought an application to review the decision not to publish an amended *Gazette* Notice for the inclusion of additional land. The issue was therefore to be determined by reference to whether the RLCC had failed to apply his mind when refusing to add these farms to the claim. [13]

40. The claimants in that case could not rely on any failure on the part of the RLCC or the officials to assist in the submission or investigation of the claim. The judgment reveals that the claimants had been represented by attorneys when they lodged the claim, that RLCC officers had directed enquiries to the attorneys for clarification in respect of the land being claimed, had conducted their own investigation and were satisfied that only the land which was identified in the *Gazette* Notice had in fact been claimed- and was intended to be claimed by the community when the form was lodged[14]. The RLCC's position is set out in the judgment at para 30. To quote an extract from the RLCC's affidavit:

> *"The claim form is unambiguous as to what the Makhuva-Mathebula Community is laying claim to. The land on which they are laying claim is Letaba Rest Camp, Lulekani, Zebra, Genoeg and Pompey.*
>
> *…*
>
> *"The Makhuva-Mathebula community are seeking to make more claims using the back door in circumstances where it has not lodged land claims as required by the Restitution of Land Rights Act. The Makhuva-Mathebula Community seem to be adding more land as and when it suits them. For*

[13] See at paras 38 and 41
[14] See at paras 20 to 23

example the letter of 5 June 2015 is a clear example that they would keep on claiming more land than is contained in their land claim."

41. In the court *a quo* Mpshe AJ had found that pursuant to an investigation conducted by the officers, the RLCC was satisfied that the land identified in the *Gazette* Notice was the land the claimants had intended to describe in the claim form. I do not believe that the judgment is authority for the proposition that an erroneous description of land cannot be altered. If the court intended the judgment to go so far as to exclude determining the intention of the claimant then with respect I believe it cannot be supported either by reference to the intention of the Act or to ordinary principles when interpreting legislation which identifies what must be reduced to writing for legal efficacy. Even in such cases the written recordal may be subject to rectification to give effect to the true intention of a party whether it be a sale agreement or a suretyship.

42. In the present case the document is not the product of a bilateral relationship, the Act itself requires the RLCC to effectively inform itself of the land which the claimant is in fact describing in the claim form.

43. In *Makhuva-Mathebula* the RLCC had, during its investigations, queried an anomaly between the land identified in the claim form and the contents of an attached map. On receiving the reply the RLCC was satisfied that the claimant had intended to claim only the land identified in the form itself. Accordingly, on the facts, neither an issue of error or rectification arose and the SCA was not called on to determine whether the claim form was lodged in the prescribed manner since it had been.

44. Even in the case of a sale of land which is required to be in writing under the Alienation of Lands Act 68 of 1981 an incorrect description can be rectified,

provided at least some description is provided[15]. A title deed which effectively confers real rights available against the whole world can also be rectified.[16] The question of what suffices is determined by reference to the requirements of the Act itself, as properly interpreted; just as the Alienation of Land Act requires interpretation to determine what will suffice, and whether the legislation itself recognises that the description must be accurate, or as in the case under the Act, the RLCC can itself undertake an investigation to establish the area of land which the claimant meant to describe in the claim form.

45. Moreover at this preparatory stage of the process in *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC) at 924B-C Dodson J confirmed that the strength of the claim is not important at the acceptance stage, provided that there is an arguable case.

In the same case Bam P said at 936G-I:

> *"However, I am firmly of the view that … total exclusion [of a claim] was intended to occur only in patently bogus claims or claims without substance or claims which on a purely mechanical or objectively determinable reasoning, fell outside the parameters of the legislation."*

See also *Mahlangu NO v Minister of Land Affairs and Others 2*005 (1) SA 451 (SCA) at 455D-E.

46. In *Minaar NO v Regional Land Claims Commissioner for Mpumalanga and Others* (LCC42/06) [2006] ZALCC 12 Gildenhuys J had occasion to deal with a case involving the description of land in a claim form. In that case the cadastral identification was used but there was no suggestion of an error in description.

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[15] See *Magwaza v Hee*nan 1979 (2) SA 1019 (AD) at 1028C-E. This case holds that rectification will be allowed where an incorrect description is provided since the necessary formality of writing is satisfied resulting in the issue being resolved on the application of principles of rectification. This differs from the case where the place for the insertion of the property sold is left entirely blank which results in it not being capable of rectification because "*on the face of it*" the requirements of the Alienation of Land Act have not been complied with (*Magwaza* at 1025-1026). Compare *Johnston v Leal* 1980 (3) SA 927 (A).

[16] See s 4(1)(b) of the Deeds Registries Act 47 of 1937 and the broader ability to rectify as determined in *Bester NO and Others v Schmidt Bou Ontwikkelings CC* 2013 (1) SA 125 (SCA)

In the subsequent case of *Bouvest 2173 CC and Others v Commission on Restitution of Land Rights and Others* (LCC68/2006) [2007] ZALCC 7 the court treated the issue as one under s 2 of the Act in relation to the identity of the true claimant. It was common cause that the parties who had lodged the original claim had never laid claim to the extended areas which were included in the *Gazette Notice.* Once again the issue was not whether the form was completed correctly but with the sufficiency of evidence presented.

THE FACTUAL DISPUTE

47. The applicant's claim form described the land claimed as "*Tarentaal/Taganashoek*" and below that was written in the same hand *"Letaba(Ritava")*

48. The form was completed with the assistance of the traditional leader.

49. Subsequently the applicant wrote to the Commissioner identifying the land claimed by reference to its cadastral description. In all, fourteen individual farms were identified and a map was provided with the parameters. The parameters are from Taganashoek along the Letaba River and up to Tarentaalrand. The word *"Ritava"* which appears as part of the description means the Letaba River in Tsonga. This is the evidence presented on the papers before me as to the meaning to be attributed to the description of the property claimed in the form.

50. Unlike the cases referred to earlier, this was never disputed by the RLCC when the applicant first brought its application which resulted in the June 2011 consent order.

On the contrary; the RLCC has not filed opposing papers in the case, nor could he because the initial research report of 19 August 2010 recorded that the RLCC's office had engaged with the applicants who had indicated the area being claimed, explained that their identification of the land claimed was in accordance with how it was known to them. They had explained that at the

time of dispossession the land had not been subdivided. Moreover the report confirmed that during the investigations the map, to which reference was made earlier, had been submitted together with the names of the families who had lived on the farms before they were dispossessed.

Most significantly the report records that the applicant's representative identified the area as *Thakana le Botlhoko.*

This has been the consistent explanation of the applicant. In short the applicant's representative had intended to describe the area as it was known to them, being Thakana le Botlhoko and which they then wrote down by reference to the topographic features since they were unaware of the cadastral description. They had believed that Taganashoek was the "A*frinkaans-isation" of Thakana Le Botlhoko"*

51. The report accepts that "*the claimants did not clearly describe the properties when lodging a claim"* but noted that although there are similarly named farms such as Tarentaal and Taganashoek it *"does not mean the claimants were lodging a claim on two farms, their claim was on the broader land of Tagaanhoek area which comprises of the above listed properties".* The properties identified in the report include those which the applicant seeks to have added in a *Gazette* notice.

52. It will be recalled that the applicant claims land some of which is also the subject of a claim by the Valoyi claimants. The report of August 2010, which the parties refer to as the "*First Research Report"* refers to previous research done in respect of Valoyi claim which "*has proven that the Nyavana people had lost rights on some of the properties the Valoyi Traditional Authority have claimed. The Valoyi claim is about to be settled and research has proven that they share boundaries with the Nyavana people on some of the farms like Jaffray 511 LT because research has proven that the Nyavana people were removed from the farm"*

53. The RLCC acted on the report by amending the applicant's *Gazette* Notice to include the Valoyi claimants "*on the counterclaims*".

54. The report concluded that the applicant's claim "*be accepted as a prima facie land claim*." It then recommended that the RLCC at the time:

> "*15.1 acknowledges and accepts the claim lodged by Nyavana Traditional Authority as complying with the requirements for entitlement under the Act*
>
> *15.2 accepts that the claim be processed on the fractions of Taganashoek 465 LT, Jaffray 511 LT, La Gratitude 513 LT and Rietbokspruit 523 LT and be settled under Nyavana Traditional Authority. The farm Tarentaalrand 524 LT be withdrawn from their claim*
>
> *15.3 facilitates negotiations between Valoyi Traditional Authority and Nyavana Traditional Authority on the settlement of their claims"*

55. After noting the recommendations, the standard research report then makes provision for the noting of support, non-support or amendment to each of the recommendations. This one is no different. Each of the recommendations was approved against the signature of both the Director of Operations and, most importantly, the then RLCC Mr Maphoto. Alongside his signature is his handwritten note "*NB Gazette to be amended"*

56. *Mr. Seneke's* reliance on cases concerned with review is therefore misplaced.

57. The issue is not about whether a form should be amended or whether condonation should or should not be granted.

As I have indicated earlier, the legislature required that the form describe the land as best as a *bona fide* claimant can. Reference may again be had to Bam JP's observations in *Farjas*.

It is up to the RLCC either when accepting the form or during any investigative phase, whether before or after acceptance under s 11 for *Gazetting*, to put cadastral flesh to the description provided and this can be done pursuant to enquiry. This is how the office of the RLCC has always functioned, as also attested to by the descriptions provided in so many claims forms.

Far from being inconsistent with the requirements of the Act, it accords fully with the object and scheme of the legislation and the underlying concerns that would have weighed with it regarding the adequacy of completing such a form where memories fade and names of places do as well. It allows claimants to describe the property from their point of reference and does not impose an obligation on the claimant to translate it into a cadastral description- that is the statutorily imposed task of the RLCC in order to facilitate land restitution under the Act.

58. Indeed the Commissioner had informed the applicant that condonation was not required as appears from the report itself. In a document dated 23 March 2010 it was noted that "*having checked the claim form I am of the view that there is no need for the Commission to condone the farms claimed, the Commissioner, in terms of the Act, had the powers only to condone the manner of lodgement, and in this case the claimants at the time of lodgement knew the properties as Taganashoek and Tarentaal and did not mention their names however research conducted by RLCC revealed that current description and the farm numbers".*

59. In my view it is necessary for the RLCC to ensure that all affected properties, as revealed after investigation of the land actually intended to be described in the claim form, are identified in a *Gazette* notice. The purposes of *Gazetting* have been set out earlier. It has significant consequences both prejudicial and advantageous. However the view taken by the RLCC that it was unnecessary

to amend does not vitiate the actual outcome of the investigation that the specific farms which were identified fall within the area to which the land claim form actually related. It is not the RLCC's argument that the view adopted by him was a decision taken which required to be reviewed – on the contrary his counter-signature to the recommendations contained in the First Research Report confirmed that he was satisfied that there had been compliance with the requirements of s 11 for the purposes of *Gazetting* the identified farms in an amended notice.

60. I am therefore satisfied that effect must be given to the acceptance of the recommendation by the RLCC who, because of the terms of the June 2011 court order, then became *functus officio* for the purpose of deciding whether or not to accept the recommendation and how to implement it for the limited purpose of s 11. His decision was to gazette an amending notice. The court will therefore give effect to that by granting the order sought in para 6 of the notice of motion.

61. I should add that the RLCC can find no lawful basis for reconsidering the decision, if only because it would have to be in accordance with s 11A and this was not done. In any event it would be contrary to the terms of the June 2011 court order to which the RLCC was bound.

THE INCLUSION OF THE FARM FLYING CLUB 512 LT

62. This farm did not form part of the land identified during the investigation, nor is the failure to include it in the *Gazette* Notice attributable to any alleged failure by the RLCC to implement a decision he had taken or in respect of which he became *functus officio*.

63. It is however evident from the map that this farm lies at the heart of the *Thakana le Botlhoko.* Once the RLCC had accepted that the land claimed was intended to constitute this area then the omission of the description of this portion was an obvious error. There therefore is no need for the RLCC to reconsider. In his determination as evidenced by the acceptance of the

recommendation this was an error of omission which in terms of the proviso to s 11((4) does not require prior notification. He can simply amend and the court can direct him to give effect to underlying reason of his predecessor as contained in the First Research Report.

Moreover the matter has been delayed for much too long with the members of two claimant communities no nearer to the resolution of their claims than almost a decade ago when the order of June 2011 was made.

64. The applicants are therefore entitled to an order in terms of para 8 of the notice of motion.

DECLARING THE RESEARCH REPORT OF 6 JULY 2012 NULL AND VOID

65. I have much sympathy with the applicant. The research report of 6 July 2012 (which is referred to in the papers as the Second Research report) sought to achieve an ulterior objective under the guise of complying with one of the terms of the June 2011 order. In effect it set about to undermine the First Research Report.

66. It is also to be noted that the RLCC was now Mr Maphuta who approved the recommendation that the First Research Report be withdrawn and substituted with the second one and that he also signs a non-compliance letter.

67. This was not competent if only because it is inconsistent with the underlying admissions inherent in the consent order of June 2011 and with the express process agreed upon for mediating any disputes that may arise, failing which that the matter would be referred to this court[17]. In any event it does not appear to comply fully with the requirements of s 11A (3). It also achieved an objective which, whether unintended or otherwise, circumvented the order of June 2011.

[17] This is consistent with s 13(1) (a) and ss 14(1) and (2) of the Act.

68. However the difficulty is that a landowner may wish to rely on some of the contents of the report. They are not parties to the present application, nor do they have to be since the issue is still at a s 11 or s 11A amendment phase (which answers another point taken by Mr. Seneke)

69. In my view the appropriate order is that the adoption of the recommendations be set aside as a nullity which leaves it open to any party in the future to rely on its contents.

LITIGATION PLAN

70. The first step is to hold a pre-trial conference of all the parties at which a litigation plan can be formulated. At this stage it may be premature to identify the issues involved, however it is necessary for the court to take steps to convene such a conference and will do so in respect of both claimants.

CONCERNS

71. Regrettably the court must express its concern with the regard to the way in which the Nyavana community's claim was sought to be processed administratively, as if some official was taking sides on an issue which requires ventilation in the Land Claims Court. I believe that it is appropriate that this judgment be referred to the Land Claims Commissioner herself for consideration.

COSTS

72. The Nyavana community was compelled to come to court pursuant to a very lengthy delay and consequent upon interventions which I find to be in conflict with the terms of the agreed order of June 2011. Accordingly the RLCC is responsible for payment of the applicant's costs.

ORDER

73. The court orders that:

1. *The Second Respondent is ordered to amend the Gazette Notice concerning the applicant's land claim by including;*

    a. *All the properties identified in para 6 of the Notice of Motion in this matter dated 5 December 2019;*

    b. *The farm Flying Club 512 LT*

2. *The purported acceptance and adoption by the Regional Land Claims Commissioner of the recommendations of the Second Research Report dated 6 July 2012 is declared null and void.*

3. *A pre-trial conference is to be held with all the litigants in the cases involving both claimant communities on a date to be determined on or before the end of February 2021 and for that purpose this court will assist to secure it being convened.*

4. *The second respondent is to pay the applicant's costs on the party and party scale.*

(SIGNED)

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SPILG, J

FOR APPLICANT:	Adv. H Rajah
	Webber Wentzel
FOR 2nd & 3rd RESPONDENTS:	Adv. T Seneke
	State Attorney