REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC46/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

31 May 2023

SIGNATURE DATE

RAMORULA COMMUNITY	First Plaintiff
RAMORULA COMMUNITY PROPERTY ASSOCIATION	Second Plaintiff
and	
REGIONAL LAND CLAIMS COMMISSIONER, LIMPOPO	Participating Party
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	First Defendant
KLIPPLAAT LANDGOED (PTY) LTD	Second Defendant
MAYDEO 33 CC	Third Defendant
JOCHEMUS RASMUS ERASMUS	Fourth Defendant
THE KOSS OPPERMAN TRUST	Fifth Defendant
MAGDALEMA ELIZABETH OPPERMAN	Sixth Defendant

CONCERNING:

FARM KLIPPLAATDRIFT 43 JR, SITUATED IN THE WATERBERG DISTRICT LIMPOPO PROVINCE AND AS DESCRIBED IN NOTICE: 1739 OF 2005 DATED 16 SEPTEMBER 2005

JUDGMENT

NCUBE J

Introduction

[1] This is a claim for the restitution of rights in land. Mr Alfred Modise ("the claimant") lodged a claim on behalf of the Ramorula community ("the first plaintiff"). The claimed land was described as the farm Klipplaatdrift 43 JR hereinafter referred to as ("Klipplaatdrift"). The dispossession mentioned in the claim form and two affidavits deposed to by the claimant and his brother Mokoke Hofni Modise ("Hofni"), occurred in 1959. It was a dispossession of a group of persons who resided on Portion 2 of Klipplaatdrift. The dispossession was carried out by a certain Mr Raymond Kerslake ("Mr Kerslake"), the son-in-law of the owner of Portion 2 of Klipplaatdrift being Mr Bezuidenhout.

[2] The evidence reveals that in 1972, after the dispossession and evictions, Portion 2 of Klipplaatdrift was subdivided to form Portion 9. Portion 9 was then sold to the State in settlement of the land claim and it was transferred to the second plaintiff ("the CPA"); which held it on behalf of the first plaintiff. The transfer occurred on 6 December 2007. According to the second and third defendants, the said sale and transfer of Portion 9, effectively settled the land claim which was lodged. The second and third defendants contend that the extension of the claim to other portions, like

Portion 1 of Klipplaatdrift constitutes vexatious litigation on the part of the plaintiffs and the State.

The Claim Form

[3] The starting point of exercise in a claim for a restitution of land rights is to interrogate the claim form which is the basic document on which the claim is premised. The claim form was signed at the end by the claimant. The mere glance at the form, makes it immediately clear that the handwriting of the person who filled in the form and the signature at the end is different. It looks like the claimant received assistance in filling in the form. However, amongst the witnesses who testified for the plaintiffs, no one testified about assisting the claimant to fill in the claim form. The description of Klipplaatdrift 43 JR in paragraph 1.1 of the claim form corresponds to the description on the Title Deed, but the portion which is being claimed is not identified. The year of dispossession is indicated as being 1959. Although the portion which is being claimed is not indicated, when regard is had to the year of dispossession, it is probable that the portion claimed is portion 9. In paragraph 2.3 of the claim form, it is indicated that the people were given only three months to vacate Klipplaatdrift.

[4] The claim form and the accompanying affidavit of the claimant indicate that the dispossession was an order that people in "the village" had to vacate the village in a month's time. In paragraph 6 of the claim form the claimant states: -

> *"We were unfairly removed and dispossessed of our land. We were turned into labour tenants on our land and thereafter forced to leave against our will."*

In paragraph 4 of the claim form, the person who lost the right in land is described as being the "Ramorula Community" on whose behalf the claimant lodged the claim. In

paragraph 7 of the claim form, the claim is required to be substantiated with evidence. In substantiation of the claim, the following is stated: -

> *"There are still graves in the area. These were raked but we can show the area where the graves are. Ruins and Kraals where we kept our cattle can still be found."*

Portion 2 of Klipplaatdrift where there are graves and ruins of kraals and homesteads, was not visited during the inspection *in loco*. In paragraph 9 of the claim form further information is added and it is stated: -

> *"In September 1959 we contacted a Magistrate in Hammanskraal to extend the periods of notice from one month to three months."*

[5] When one looks at paragraph 1 of the claimant's affidavit, it appears that the claimant was born on 31 May 1943. This means he was fifty-five (55) years old when he lodged the claim in 1998. In paragraph 2 of the affidavit, the claimant describes the dispossession in the following terms: -

> *"During September 1959 we were ordered to vacate the village within a month's time. All the residents of Klipplaatdrift (sic) then came together to decide where to go from the village. We then vacated the place and some of us went to Matibestad, others went to Makapanstad, others to Kgomo-Kgomo and others to Ga-Maubane and so forth. We had no alternative than to vacate the place as ordered to."*

The claimant's version of the date of the dispossession and the events leading there to is made clearer in the affidavit of Hofni. Hofni is said to be the claimant's brother born six (6) days later than Alfred according to his ID number he was born on 3 June 1943.

[6] The following information appears from Hofni affidavit: -

i. The Ramorula Community settled on the claimed land as far back as the 1800's, they were the first people to settle on Ramorula.

ii. The first white people arrived allegedly in 1918. Those whites were

"Hendrick Johannes Boshoff and Mr and Mrs Bezuidenhout. They immediately divided Ramorula into portions. The community was tuned into labour tenants and forced to work for the white people."

iii. The Ramorula Community with its neighbouring communities of Vaalboschbult

"managed to build a community school at Vaalbosch. The name of the school was Vaalboschbult Bantu School. Myself and others started attending the school at Vaalboschbult in 1953 up until 1959 when we passed standard 5."

This affidavit describes the dispossession which occurred in 1959. It is stated in the same affidavit that Bezuidenhout died and his son-in-law took over the operations on the farm. In September 1959, Mr Kerslake called a community meeting and explained that the three months' system had been changed to six months' system and that all family members had to work.

iv. In his affidavit, Hofni describes the dispossession in the following terms: -

"In 1960 October the 1st all community members of Ramorula were given Trekpasses to leave the farm because there (sic) refusing to work for 'more-kom' except Mr Puna Seanego and Maswakana Moabi who are still there. Potja Phaka also remained on the farm until 2002 when he passed away.

Raymond did not give the community members enough time to look for alternative accommodation but instructed them to take all their personal belongings and go. The affected community members went to the Native Commissioner in Hammanskraal for

help as the time of three months given to them to vacate the farm was not enough. The Native Commissioner extended the period from three weeks to one month."

The claim form and the claimant's affidavit give the date of dispossession as 1959. Hofni gives the date of dispossession as 1 October 1960. However, what is important is that they all describe the same event, which is the instruction by Mr Kerslake to the "*whole of the Ramorula Community*" to vacate the farm.

The Acceptance of the Claim

[7] Mr Ntiwane, the case handler, signed off "*the Ramorula Community land claim*" on 13 May 2005 and it was approved by the then Regional Land Claims Commissioner Mr Mashile Mokono ("Mr Mokono"). Mr Mokono was listed as a witness for the State but was never called to testify. Mr Richard Mulaudzi, the Legal Advisor to Mr Mokono also did not testify. The acceptance report listed the names of owners of nine (9) Portions of Klipplaatdrift at the time of the Notice. The fourth and fifth defendants are still the owners of the Remaining Extent of Portion 2 of Klipplaatdrift but they filed a Notice to Abide by the decision of the court. The then owner of Portion 3 and 4, Mr Erasmus, has since passed away. The Klipplaat Landgoed (Pty) Ltd, being the second defendant herein, purchased Portions 3 and 4 of Klipplaatdrift from Mr Erasmus's heirs. The second defendant, is therefore now the owner of Portions 3, 4, 5,6 and the Remaining Extent of Portion 7 of Klipplaatdrift. The third defendant is the owner of Portion 8 and the Remaining Extent of Portion 1 of Klipplaatdrift.

[8] Paragraph 3.2 of the acceptance report states that the community originated from the present day Mothibestad under Chief Mothibe during the 18th century. From the pleadings, it is clear that the second and third defendants dispute this date. In the

same paragraph, it is noted that there were different areas on the Klipplaatdrift farm. Those areas were "*Mama-rikwa, Matlhahane, Mototobele, Morwagakeitsiwe and Ga-Ramorula*." Therefore, according to the acceptance report, Ramorula was just one of the areas of Klipplaatdrift, which area according to the defendants, was on Portion 9 of Klipplaatdrift farm. It would appear that the "*Ramorula Community*" derives its name from the name "*Ga-Ramorula*" area of the Klipplaatdrift. The same acceptance report states in paragraph 3.4 and 3.5 that white people Hendrik Johannes Boshoff and Mr and Mrs Bezuidenhout arrived in 1918 and divided Klipplaatdrift into portions and turned people into labour tenants. This means that at the time of dispossession, in 1959 or 1960, people were no longer a community, but labour tenants.

The Deeds History of Klipplaatdrift

[9] The Deeds history of the Klipplaatdrift farm is contained in the bundle of documents submitted by the second and third defendants. Part "A" of bundle contains the original register of this particular farm. According to the farm register, the first registered owner of the whole Klipplaatdrift, 221, later 266 and now 43 JR, was Johannes Hendrik Boshoff. He became the owner on 5 November 1861. Four years later, the farm was subdivided into portions. The Portion South of Pienaars River became known as Mullersdrift and the Portion North of Pienaars River became Portion 1. Mullersdrift (Portion 2) was later sold by Mr Boshoff to FJ Bezuidenhout and transferred to him on 4 April 1865. At some stage, Portion 2 had co-owners but on 19 September, Mr Bezuidenhout became the sole owner of Portion 2 Klipplaatdrift. Mr Bezuidenhout's son-in-law Mr Kerslake then evicted people from Portion 2 in 1959 after the death of Mr Bezuidenhout.

The Evidence

[10] All parties were ordered to file lists of their witnesses by no later than 5 October 2022. The second and third defendants complied. The plaintiffs and State Defendants did not. The State Defendants filed their lists of witnesses on 20 October 2022. The plaintiffs filed their summary later and supplemented it after the inspection *in loco* which took place on 4 November 2022.

i. The Plaintiffs' Witnesses

The first witness called by the plaintiffs was Mulua Marcus Mputla ("Mr Mputla"). Mr Mputla testified that he was born in 1959 at Priska. He testified that his mother was born at Ramorula, born of Solomon Moremi who is his grandfather who was also born at Ramorula, born of a man called Marico Marcus. Mr Mputla is the chairperson of the Ramorula Community Property Association ("the CPA"). He testified that he was told, all seventy-two (72) families represented by the CPA lived together at one area known as Ramorula. In 1960, the last group was chased away from the farm. His grandfather was still alive when people moved. He did not know where exactly on Klipplaatdrift his parents lived. His parents also did not tell him. During cross examination, Mr Mputla could not say as to why his parents were evicted from Klipplaatdrift. He confirmed that according to plaintiffs' witnesses, there were no fences in Kipplaatdrift until 1960. When Mr Mputla was confronted with an aerial photograph, dating back from 1939, he said those were photographs taken by whites who then removed all evidence showing that there were black people on the farm. Although Mr Mputla did not know where on Klipplaatdrift his parents lived, he took a leading role at the inspection *in loco* and he pointed out a gravestone with the name of John Moremi as the grave of his great grandfather.

Second Witness: Solomon Phaka

[11] The second witness for the plaintiffs was Solomon Phaka ("Mr Phaka"). Mr Phaka testified that he was born on 7 October 1936, in Ramorula. His father was Jacob Phaka and his mother was Amanda Phaka. Both his parents were residing in Ramorula at the time of his birth. He did not remember the date on which his father was born but his mother was born in 1918 at Ramorula. Mr Phaka confirmed that there were different areas in Ramorula, just like Pretoria which has various areas but it remains Pretoria. They were evicted from Ramorula in 1960. The person who evicted them was Mr Kerslake. The reason for the eviction is that they refused to abide by the rules given by Mr Kerslake. Mr Phaka confirmed that Mr Bezuidenhout was a very strict person, who was given the nick-name "*Manotzi*" which means stinging like a bee. Under cross examination, Mr Phaka confirmed that when he grew up, his father was working for Mr Bezuidenhout on his other farm which was in Greylingstad. After the death of his father, Mr Phaka started working for Mr Bezuidenhout replacing his father. They would work for three months a year and then go home to do their own farming.

[12] Mr Phaka was the only witness who was part of the group of people who were evicted by Mr Kerslake. His parents also erected fences for Mr Bezuidenhout as the whole of Klipplaatdrift was fenced. When they went home after working for three months, they did not just sit at home but were expected to repair the fence and look after the cattle. Although Mr Phaka's family was evicted from Portion 2, at the inspection *in loco*, he and his brother pointed out a grave on Portion 3 of Kilpplaatdrift in the area known as Matlabane. The gravestone he pointed out was written "*Ntshetla Jacob Phaka*" who died on 27 March 1951, as the grave of his father. He never

explained after the inspection *in loco* why his father's grave was on Portion 3 of Klipplaatdrift.

Third Witness: Rose Dibe

[13] The third witness for the plaintiffs was Rose Dibe ("Ms Dibe"). She was born on 8 October 1935 in Ramorula. Her parents were also born there and they worked on Ramorula but not for Mr Bezuidenhout. Her parents were working for Mr Pretorius who shared the farm with Mr Bezuidenhout. She also worked on that farm, working for Nicolaas Pretorius. She worked for only one year and was paid one thousand rand (R1000,00). Her parents worked as labour tenants, three months at a time. Ms Dibe's evidence was very contradictory. At some stage, she said her father was working in a mine in Springs, and herself was at one stage working at 115 Valley, Road Sunnyside Pretoria, and also worked in Johannesburg before her parents were evicted. She was asked in cross examination if the place where she lived in was not called Mathabane, she denied and said it was called Ramorula. When she was asked about other names, in addition to Ramorula, she mentioned Matlabane and Mariching.

Fourth Witness: Rosina Manaiwa

[14] The fourth witness was Mrs Rosina Manaiwa ("Mrs Manaiwa"). She testified that she was born on 6 June 1938 at Ramorula. Her father was France Manaiwa born in 1913 and her mother was Linah Manaiwa, born in 1918. Both her parents were born in Ramorula. Mrs Manaiwa attended Wolfhuiskraal school and she went to Ethopia church. They shopped from Maniek's shop. Her parents were cropping potatoes, beans and peanuts. She could not remember the year in which land dispossession took place. The parents were working for a certain Mr Pretorius. Mr Pretorius forced

everyone to work, parents with their children. Her father then decided to move out of the farm and go to Mathibestad. It was in 1960 when they left the farm.

[15] Mrs Manaiwa proved herself to be a very unsatisfactory witness. Under cross-examination by Mr Havenga, Counsel for the second and third defendants, she said her forefathers referred to the place as Matlabane but children called it Ramorula. She contradicted the witness who testified before her, who said the place where they were staying was called Matlabane. She tried to justify the contradiction by saying the other witness is old whereas she is still young. It was clear that Mrs Manaiwa, just like other witnesses, had been couched to say the whole Klipplaatdrift was called Ramorula. However, the witness confirmed that her parents worked for Mr Pretorius as labour tenants. When asked in cross-examination as to why her father left the employ of Mr Pretorius, she said her father was working too hard. On her evidence, her father was not evicted, but left on his own.

[16] Although Mrs Manaiwa claimed that Ramorula covered both sides of the Pienaar's River, in cross-examination she conceded that she never went South of the river because Mr Bezuidenhout assaulted people who crossed the river and came to his side. This also shows that people living North and South of the river, did not form part of one community with shared rules giving them access to land held in common.

Fifth Witness: Jan Shirinda

[17] Mr Shirinda testified after the inspection *in loco* which will be dealt with later in this judgment. Mr Shirinda is one of three witnesses listed by the plaintiffs to be called after the inspection *in loco*. The other two witnesses were never called. When Mr

Shirinda started his testimony, he said he had come to give evidence to say that they were staying in Ramorula. He testified that he was born in Ramorula in 1948. His father was a Tsonga. He did not know that people who settled in Ramorula originated from Mathibestad. Mr Shirinda testified that the place had different sections and he was staying at a section called Mariching.

[18] Mr Shirinda confirmed that people were working for Mr Pretorius as labour tenants. Mr Pretorius made rules on his farm for people staying and working there and Mr Bezuidenhout also made rules on his side. He was staying on the northern side of the river. He could not remember the name of the section south of the river. However, in cross-examination, Mr Shirinda remembered that the name of the section south of the river, was called Ramorula. He testified that at times his cattle crossed the river, but he would turn them away since the farm on the other side was owned by another person. He confirmed that he attended the inspection *in loco* with the court and pointed out the graves of their forefathers and pointed out the cattle Kraal sites. With regard to the graves, Mr Shirinda confirmed that people were buried where they were living.

Inspection *in loco*

[19] The inspection *in loco*, was conducted on 4 November 2022. The pointings out at the inspection *in loco* were recorded in exhibit "D". The plaintiff's witnesses pointed out the following:

i. Stop 1: This was the first stop. Point 1 is where parties stopped for orientation. This stop is on the eastern boundary of the farm. At this point, Mr Maluleke,

Attorney for the plaintiffs, requested that the inspection in loco should start on Portion 3 of the farm.

ii. Stop 2: Portion 3 this is point 2 where a grave site was indicated. There were four graves. Solomnon Phaka indicated that grave 1 was that of his father Jacob Phaka who was born on 19 March 1896 and died on 21 March 1931. He further pointed at two graves, five metres away from the first one and said one was for Alpheos Kekana, born 17 March 1901 and died 27 June 1934, he is the father of Mpetu Kekana who is a beneficiary of the CPA. John Moremi stated that the third grave was that of Mr Mputla which according to his mother was the grave of his great grandfather. Mary Mamafuku indicated that grave number four, made of concrete and shaped like a cross, was a family member of one of the CPA members. The graveyard was near a dilapidated piggery; which was pointed out by the owner of Portion 3.

iii. Stop 3: The parties then proceeded to the western border of the farm in Portion 3 which was point 3 where it was stated that on the other side of the western border fence, there was a school.

iv. Stop 4: Parties then proceeded to Portion 6 of the farm- point 4. The parties were shown a tree. According to Jan Shirinda, Rosina Manaiwa, Simon Sibaka and George Mabua in close proximity of the tree, was a kraal. The parties then moved to point 5, indicated on the map where Jan Shirinda supplemented his evidence and said there were houses in that area where his fore-fathers resided, still in Portion 6, the parties moved to point 6, to a grave site with two

graves, one was identified and the other one was unidentified. Jan Shirinda and others identified the one as that of Andries Shivambu born 1834 and died in 1941.

The parties then moved to Portion 1, indicated as point 6 on the map. It was a grave site with three graves of the previous owner and his family members. The first grave was that of Din G.M, born 14 January 1890 and died 26 December 1969. The second grave was that of Mr Martinus Wessel Herbst, born 28 December 1879 and died 23 May 1938. The last grave was that of Hendrik Herbst born 12 October 1894 and died 8 September 1972.

In summary, the plaintiffs' witnesses were able to point out on Portion 6 of Klipplaatdrift. They indicated that there was a cattle kraal at that spot. They also indicated that towards the east of Portion 6, there were houses, including the home of Mrs Manaiwa and Mr Shirinda the witnesses.

v. Stop 7: At this point, claimants pointed out a grave yard on Portion 7 of Klipplaatdrift. At this spot, some years ago, certain families exhumed the bones of their departed members and re-buried them somewhere. The evidence revealed that the people buried in that grave yard were from labour tenant settlements in Portions 6 and 7 of Klipplaatdrift which in 1940's, was owned by N.J Pretorius.

Expert Evidence

[20] The second and third defendants called two expert witnesses. The first such witness was Sielwalt Udo Küsel ("Mr Küsel"). Mr Küsel was called to give evidence about aerial photographs which were contained in his expert report. The purpose of the report was to establish the nature and extent of historical occupation of land tenure over Portion 1 to 9 of the farm Klipplaatdrift 43 JR. Mr Küsel is a landscape architect, specializing in the environmental landscape architecture dealing with, transformation of natural areas, rehabilitation, investing areas, looking at how the area has been transformed and how to restore the land. In this case, Mr Küsel had to investigated the farm history of Klipplaatdrift 43 JR. The first information he obtained was contained in the farm book which is kept at the Surveyor General's office.

[21] Apart from the farm book, Mr Küsel also produced aerial photographs of the Klipplaatdrift showing settlements by labour tenants on the two sections of Klipplaatdrift. The two sections are north and south of the Pienaar's river. The most important part of Mr Küsel's testimony is that the dispossession complained of in the claim form in 1959 or 1960, by Mr Kerslake was only in respect of Portion 2 of Klipplaatdrift, that portion of Portion 2 which later became Portion 9 in 1972. Mr Küsel testified that the maps indicate that there was no occupation on the rest of Portion 2 of Klipplaatdrift before 1959. Mr Küsel's evidence puts to rest the plaintiff's claim that the whole Ramorula community was removed and dispossessed of its land in 1960.

[22] The analysis of the aerial photographs by Mr Küsel, taken in May 1961 showed that the easterly settlement of Portion 9 was abandoned first in about 1959 and the westerly settlement later. The photographs showed no evidence of evictions on

Portion 1 north of the river, life there continued as normal. That is the Portion on which Mr Shirinda and Mrs Manaiwa were living according to their evidence. The photograph showed no sign of houses having been broken down as the witnesses wanted the court to believe that they were evicted from the whole of the Klipplaatdrift and their houses were broken down.

[23] Professor Bonzaaier also testified. He is an anthropologist. He was instructed by the second and third defendants in 2006 to investigate the Ramorula Land Claim. He recorded his findings in his expert report. Professor Bonzaaier recorded that the farm Klipplaatdrift was first granted in ownership to Johannes Hendrik Boshoff on 5 November 1861. On 4 April 1865 Mr Boshoff transferred the portion of Klipplaatdrift called Mullersdrift to Frederick Jacobus Bezuidenhout. After the 1892 survey Mullersdrift became known as Portion 2 of Klipplaatdrift. The other portion north of the Pienaar's river became known as Portion 1 after 1892 survey. On 5 December 1871 Mr Boshoff sold Portion 1 to Nicolaas Jacobus Pretorius.

[24] Professor Bonzaaier recorded that the first plaintiff forms part of the Hwaduba people who resided at Mathibestad in the early 1900's. On 22 September 1922, Hazael Mathibe was appointed a Chief. This caused friction in the community causing some residents to leave the area. The ancestors of the first plaintiff arrived in Klipplaatdrift in 1922 and settled as labour tenants on white owned farms. What is clear is that the evidence of Professor Bonzaaier tallies squarely with the evidence of Mr Küsel with regard to the history of Kilpplaatdrift and the period with regard to which labour tenants settled on Klipplaatdrift which was in the year 1920 and not 1860's as alleged by the first plaintiff's witnesses.

[25] Jan Joubert ("Jan") testified. Jan is an attorney and the brother of the Director of the second defendant Francois Joubert. Jan testified that his interest in this case started when he read about the claim which was published on 16 December 2005. Francois brought the letter received from the commission to Jan. The letter was giving notice of the claim lodged against the Klipplaatdrift farm. Jan then started corresponding with the commission on the issue of the claim. The commission did not accept the outcome of investigations by the landowners. The commission did not even accept the landowners' representations.

[26] At the meeting between the commission and the landowners' representatives held on 22 August 2007 the commission refused to withdraw the Gazette in respect of other portions, other than Portion 9. Jan testified that at the meeting, Mr Mulaudzi the commission's legal advisor, was rude and threatened to invoke section 42E of the Act and expropriate the land. The same threat of expropriation was repeated by the commission in their letter to the landowners' attorney dated 18 September 2007. The commission even opposed the landowners' application to force the commission to refer the matter to court.

Discussion

[27] The claim was lodged as a community claim. It was lodged on behalf of the Ramorula community. The plaintiff, therefore in order to succeed, must prove all the requirements for a community claim as defined in section 2 of the Restitution of Land Rights Act, 22of 1994 ("the Act"). The plaintiff must establish that it was a community that had a right in land. Secondly that it was dispossessed after 19 June 1913, as a result of past racially discriminatory laws or practices, and thirdly that no just and

equitable compensation was received for that dispossession. It is therefore important to see if the plaintiff satisfies all the requirements.

Is the plaintiff a community as defined in the Act?

[28] Section 1 of the Act defines the community thus: -

> "**Community**- means any group of persons 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…"

[29] In *Re Kranspoort Community*[1] Dodson J, as he then was, expressed himself in the following terms:

> "….it is clear that there must be a community in existence at the time of the claim. Moreover, it must be the same community or part of the same community which was deprived of rights in the relevant land…This seems to me to require that there must be, at the time of the claim,
> (1) a sufficiently cohesive group of persons to show that there is still a community or part of a community, taking into account the impact which the original removal of the community would have had;
> (2) some element of commonality with the community as it was at the time of the dispossession to show that it is the same community or part of the same community that is claiming." (Footnotes are omitted)

[30] The finding expressed in *Kranspoort*[2] was confirmed by the Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*[3] where Moseneke DCJ (as he then was) said:

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[1] 2000 (2) SA 124 (LCC) para 34.
[2] Supra (n1).
[3] 2007 (6) SA 199 (CC) para 39.

"In the case of *In Re Kranspoort Community*, Dodson J correctly construes s2(1)(d) of the Restitution Act to require that there must be a community or part of a community that exists at the time the claim is lodged and that the community must have existed some time after 19 June 1913 and must have been victim of racial dispossession of rights in land."

[31] In the same case[4], Moseneke DCJ gave further context to the definition of community and said:

"There is no justification in seeking to limit the meaning of the word 'community' in s2(1)(d) by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy...what must be kept in mind is that the legislation has set a low threshold as to what constitutes a 'community' or any 'part of a community.' It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a community...The threshold set by s2(1)(d) is well met if the right or interest in land of the group is derived from shared rules determining access to land that is held in common."

[32] In *Salem Party Club and Others v Salem Community and Others,*[5] Cameron J said: -

"The landowners invoked this court's statement in Goedgelegen that the 'acid test remains' whether a community 'derived their possession and use of the land from common rules.' That is correct. It is what the statute requires, namely a group of persons whose rights in land are derived from standard rules determining access to land held in common by the group. Whether the 'acid test' is fulfilled is a question of fact."

Again still commenting on *Goedgelegen*[6] Cameron J said:

[4] Goedgelegen pars 40 to 42.
[5] 2018 (3) SA 1 (CC) at para 112.
[6] At para 113.

> "There, dispossession occurred because common rules determining access to land were supplanted by labour tenancy rules. These, this court concluded that, when the dispossession in question occurred, 'no rights in land remained vested in the labour-tenants as a community.'"

[33] It is clear that for the community to succeed in a restitution claim, it must prove that it existed as a community after 19 June 1913, that it derived its possession and use of the land from common rules, and that it existed as the same community at the time that the claim was lodged.

[34] In *casu*, there is not even a shred of evidence led on behalf of the plaintiffs to establish the existence of a community at the time of dispossession by Mr Kerslake on Portion 9. In fact, Portion 9 has been restored to the plaintiffs. I am afraid, had the owner of Portion 9 not agreed to settle the claim, the plaintiffs could not have succeeded to prove its claim on Portion 9. The objective evidence from Professor Bonzaaier, supported by aerial photographs produced by Mr Küsel establish that black people settled in Klipplaatdrift in 1920 and they settled on white owned farms as labour tenants. The evidence show that evictions took place from the section of Klipplaatdrift known as Ga-Ramorula, not from the whole of Klipplaatdrift.

[35] The presence of graves on other Portions of Kilpplaatdrift, only proves that people might have settled there, not as a community as defined in the Act, but as labour tenants. The rights of labour tenants to possess and use the land are not derived from shared rules determining access to such land. The rules determining access to land in a labour tenancy scenario, are set by the owner of the land as Mr Bezuidenhout did on his farm. The evidence is that Mr Bezuidenhout was strict with regard to access to his portion of the farm to the extent of assaulting people who

unlawfully entered his farm. This shows that there was no community whose right to land was derived from the shared rules determining access to land held in common.

[36] It is a pity that Mr Maluleke, counsel for the plaintiffs, did not see the need to lead evidence on whether these people were a community or not. The evidence further establishes that people were only evicted from Ga-Ramorula, which was but just one section of the Klipplaatdrift farm. It was also the finding of the comminssion in its acceptance report that "Klipplaatdrift was by then, formed by areas such as Mmarikwa, Matlhabane, Mototobele, Mowrwagakeitsiwe and Ga-Ramorula." Ramorula has been restored to the plaintiffs but they now want to extend their claim to the whole of the Klipplaatdrift farm. In wanting to take the whole farm, the plaintiffs are driven, in my view, by greed and avarice.

[37] I say greed and avarice because in his evidence-in-chief Mr Mputla the chairperson of the second plaintiff, said: -

> *"The bigger portion of land was not given back to the rightful owners that is why even today we brought in the elders who are still crying furiously to get their land back. They are not satisfied with that piece of land and unfortunately I am sorry even if you did not ask, it does cost (sic) to them because they are still fighting to retain their fatherland, which is the larger portion unlike the one they received."*

[38] I am therefore not in a position to find that plaintiff or claimants or its forebears were a community as defined in the Act. I also do not find that there was a community which existed at the time the claim was lodged and that such a community must have existed at the time of the alleged dispossession.

Costs

[39] The second and third defendants seek punitive costs against the commission based on the manner in which the commission dealt with the claim. The commission went to the extent of appointing Counsel Mr Moosa to defend the claim at the trial. The commission supported the plaintiff's claim to the whole of the Klipplaatdrift, notwithstanding the commission's own acceptance report which acknowledged that Klipplaatdrift was divided into sections and Ga-Ramorula was one of those sections. It was evident from the claim form paragraph 5.1, that the claim was directed to that portion of the Klipplaatdrift farm known as Ramorula not the whole of Klipplaatdrift. Affidavits filed in support of the claim referring to Bezuidenhout was also an indication that people were evicted from one section of Klipplaatdrift, which was Ramorula.

[40] The commission was made aware of the grounds of defence by second and third defendants in 2007 already, but nothing was done about it. In 2010, the second and third defendants filed their plea. That is twelve (12) years before the trial date. At the mediation meeting, Mr Mulaudzi, the commission's legal advisor, declined to consider the reports compiled by experts like Professor Bonzaaier. Mr Mulaudzi threatened the land owners with expropriation in case they did not sell their properties to the State.

[41] The attitude displayed by the commission in this case, is similar to the one displayed in In *Re Kusile Land Claim Committee*[7]. In that case, this court stated that the commission was an organ of state which manages the restitution process on behalf of the State. At paragraph 35, the court held that where the position taken by the

[7] 2010 (5) SA 57 (LCC) para 32.

Regional Land Claims Commission ("RLCC") was shown to be untenable, costs should be awarded against the commission. In *Biowatch Trust v Registrars, Genetics Resources, and Others*[8] the Constitutional Court held that, in constitutional litigation, if the landowners' defence against the State is good, the State should bear the costs, unless there were particularly powerful reasons for the court not to award costs against the State.

[42] In *Biowatch,*[9] Sachs J said:-

> "[24] At the same time, however, the general approach of this court to costs in litigation between private parties and the State, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunize it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for the court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it."

[43] Considering the manner in which the commission handled this case, in my view, punitive costs are justified. At least the commission should have considered the representations made on behalf of the landowners. Expert reports made it clear that the land claim should have been lodged in respect of Portion 9 only, not the entire Klipplaatdrift farm. Had Mr Mulaudzi read the expert reports, he could have advised the commission to withdraw the claim. There was no need for Mr Mulaudzi to threaten the landowners with expropriation if they did not sell to the State. In future this court

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[8] 2009 (6) SA 232 (CC).
[9] Supra, para 24.

will be forced to make cost orders against the responsible officials of the commission and not against the commission as such.

Order

[44] In the result, I make the following order:

1. The first plaintiff's claim to the farm Klipplaatdrift 43 JR, save for the claim to Portion 9 (a portion of Portion 2) which had been settled, is dismissed.

2. The first defendant and the participating party, namely the Regional Land Claims Commissioner, Limpopo are ordered, jointly and severally, the one paying, the other to be absolved, to pay the costs incurred by the second and third defendants on the scale as between attorney and client, such costs to include the following:

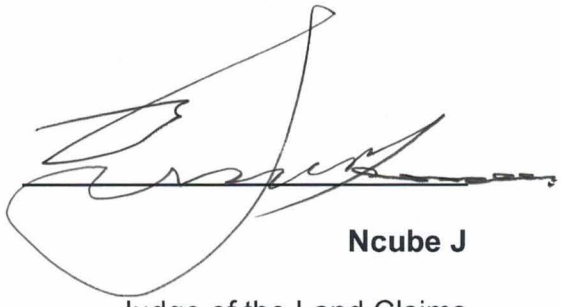
   2.1 The employment of senior counsel and attorney and a correspondent where employed.

   2.2 The costs of senior counsel and attorney incurred in respect of consultations with the second and third defendants and their witnesses as well as the expert witnesses, Mr SU Küsel and Professor CC Boonzaaier, including all travelling expenses and costs in respect of travelling time as determined by the Taxing Master in respect of such consultation and inspection *in loco*.

2.3 The qualifying fees and expenses of the said expert witnesses Mr SU Kusel and Professor CC Boonzaaier, such costs to include the costs of visiting the various archives, obtaining and copying of discovered documents, maps and aerial photographs, inspections in loco conducted by them, the consultations by them with the second and third defendants and their legal team and witnesses to obtain relevant information and documentation to compile their reports and updated schedules to the reports, the drafting of the reports, consultation time with the counsel and the attorney, and the attendance fees for the trial.

2.4 All costs incurred by the second and third defendants' attorney and correspondent attorney, where applicable, in preparing, collating, copying, indexing and paginating all court documents, the courier costs of such documents to the Registrar and the court and the making of copies of the bundles and files for use in the court.

2.5 The costs of the *mandamus* application under case number 207/2009.



Ncube J

Judge of the Land Claims

Court of South Africa

I agree

Prof. Luthuli, S

Assessor

Date judgment reserved: 1 December 2022

Date judgment delivered: 31 May 2023

Appearances

For the Plaintiffs: Mr Maluleke, S

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For First Defendant and Participating Party: Mr Moosa

Instructed by: State Attorney

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For Second and Third Defendants: Adv HS Havenga, SC

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