THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1203/2021, 1334/2021 & 261/2022

In the matter between:

MLULEKI MARTIN CHITHI	**FIRST APPELLANT**
DLUDLU ATTORNEYS	**SECOND APPELLANT**
MC NTSHALINTSHALI ATTORNEYS	**THIRD APPELANT**

IN RE:

MAVUNDULU COMMUNITY	**CLAIMANT**

and

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**FIRST RESPONDENT**
REGIONAL LAND CLAIMS COMMISSIONER	**SECOND RESPONDENT**
DJ SCHEUER FARMING CC	**THIRD RESPONDENT**
LOUIS MEYER MANFRED FAMILY TRUST	**FOURTH RESPONDENT**
MANFRED MARTIN HILLERMAN	**FIFTH RESPONDENT**
HERMAN THEODOR MEYER	**SIXTH RESPONDENT**
EVANGELICAL LUTHERAN CHURCH-NEW HANOVER	**SEVENTH RESPONDENT**
HOPEWELL TRUST	**EIGHTH RESPONDENT**

ROLF MATTHEW SCHRODER	**NINTH RESPONDENT**
UHLMANN FAMILY TRUST	**TENTH RESPONDENT**
PEGMA TWENTY-SIX INVESTMENTS (PTY) LIMITED	**ELEVENTH RESPONDENT**
MANFRED VICTOR SCHRODER	**TWELFTH RESPONDENT**
WOERNER TRUST	**THIRTEENTH RESPONDENT**
WHITE THORN TRUST	**FOURTEENTH RESPONDENT**
RM MARK FAMILY TRUST	**FIFTHTEENTH RESPONDENT**
WITTENMOUTAIN TRUST	**SIXTHTEENTH RESPONDENT**
MANFRED MEYER FAMILY TRUST	**SEVENTEENTH RESPONDENT**
WERNER MEYER FAMILY TRUST	**EIGHTEENTH RESPONDENT**
WERNER MARK REDINGER	**NINENTEETH RESPONDENT**
AMBLESIDE MEATS CC	**TWENTIETH RESPONDENT**
BRIAN BASIL MITROPOULUS	**TWENTY-FIRST RESPONDENT**
TMJ INVESTMENTS 15 CC	**TWENTY-SECOND RESPONDENT**
DROGEMOLLER LIFE & SHORT-TERM BROKERS CC	**TWENTY-THIRD RESPONDENT**
ROLAND GERHARD FRENZEL	**TWENTY-FOURTH RESPONDENT**
COCOHAVEN 1057 CC	**TWENTY-FIFTH RESPONDENT**
ROYHEATH RAMDEWU AND REETHA RAMDEWU	**TWENTY-SIXTH RESPONDENT**
UCL CO-OPERATIVE LTD	**TWENTY-SEVENTH RESPONDENT**
MOOIZICHT TRUST	**TWENTY-EIGHTH RESPONDENT**

Neutral citation: *Mluleki Martin Chithi and Others v Minister of Rural Development and Land Reform and Others* (1203/2021, 1334/2021 & 261/2022) [2024] ZASCA 149 (4 November 2024)

Coram: ZONDI, HUGHES and MATOJANE JJA and SEEGOBIN and KEIGHTLEY AJJA

Heard: 19 February 2024

Delivered: 4 November 2024

Summary: Land claims – restitution of land – Restitution of Land Rights Act 22 of 1994 – claim for restitution of land on grounds of being a 'community' as defined in the Restitution Act – question decided separately from other issues in terms of rule 57(1) of the Land Claims Court Rules – allegation of lack of judicial independence in the conduct of the trial proceedings. Application for recusal of presiding judge unfounded.

Civil procedure – costs – adverse costs order – disallowed fees of legal practitioners – whether conduct of legal practitioners in the trial was vexatious, frivolous and an abuse of court process for persisting with claim in light of precedent contrary to success thereof.

ORDER

On appeal from: Land Claims Court, Randburg (Canca AJ, sitting as court of first instance):

1 The appeal under case number 1203/2021 against the order of the Land Claims Court dismissing the Mavundulu Community's land claim is dismissed with no order as to costs.

2 The appeal under case number 1334/2021 against the order of the Land Claims Court disallowing the fees of the first to third appellants in the matter and directing them to repay the fees they had already received from the state is upheld with no order as to costs.

3 The appeal against the costs order in respect of the recusal application under case number 261/2022 is dismissed with costs.

JUDGMENT

Zondi JA (Hughes and Matojane JJA and Seegobin and Keightley AJJA concurring):

[1] These three consolidated appeals are against the following orders of the Land Claims Court, Randburg (LCC) issued by Canca AJ:

(a) The appeal under case number 1203/2021 is against the judgment delivered on 25 May 2020, dismissing the Mavundulu Community appellants' claim for the restitution of rights in land on the grounds that they were not a 'community' as defined in the Restitution of Land Rights Act, No 22 of 1994 (Restitution Act).[1] In dismissing the claim, the learned Acting Judge disallowed, in full, the first to third appellants' fees in the entire matter and ordered them to repay the fees that had already been paid to them by the relevant entity

[1] Leave to appeal was granted by this Court on 11 November 2021.

that funded the litigation on behalf of the State. This forms the subject of the second appeal under case number 1334/202.[2]

(b) Dissatisfied with the costs order against them, the first to third appellants (the legal practitioner appellants) applied for leave to appeal against it. Before the application for leave was argued, the legal practitioner appellants brought an application for the recusal of Canca AJ. He dismissed the application for his recusal and ordered the legal practitioner appellants to pay the third to twenty seventh respondents' (landowner respondents) costs. This forms the subject of the third appeal under case number 261/2022.[3]

Background

[2] The appeals concern a claim that was lodged by the Mavundulu Community (Community appellants/claimants) for the restitution of rights in land of which they were allegedly dispossessed in terms of the Restitution Act (land claim). The land claim was lodged on behalf of the Community claimants on 30 December 1998 by Mr Sipho Cebekhulu. He was authorized to do so by the Community claimants in terms of a resolution dated 9 August 1998. The claimed land comprises certain portions/sub-divisions of the farm Spitzkop No. 1129 (Spitzkop) and Mooiplaats No. 1315 (Mooiplaats), situated in the Magisterial District of New Hanover, KwaZulu-Natal. The Regional Land Claims Commissioner: KwaZulu-Natal accepted and investigated the claim as a community claim. The claim was accepted in terms of s 11 of the Restitution Act by publication in the Government Gazettes of 29 November 1996 and 1 August 2001.

[3] During October 2017, the Community claimants, whilst the determination of the community claim was underway, added individual claims as an alternative to the community claim. On 31 March 2020, the LCC dismissed the individual claims on the basis that they were not lodged by 31 December 1998 and were not supported by evidence. The dismissal of the alternative claims was correct as an individual claim

[2] Leave to appeal was granted by Canca AJ on 16 August 2021.
[3] Leave to appeal was granted by this Court on 2 March 2022.

cannot be introduced by way of amendment.[4] So, what remained was the Community claim which had been duly accepted, published and investigated.

[4] As already mentioned, the claimed land relates to some portions of the two farms, namely farm Mooiplaats No 1315, which was granted to a Mr Cornelius J Laas in March 1853, and the farm Spitzkop No 1129, which was granted to a Mr Cornelius J G Vermaak in May 1851. The farms were granted to them by the British government following its annexation of the then Natal in 1842. The farms underwent certain sub-divisions and changed ownership over the years, in particular, prior to 1913 and thereafter.

[5] The third to twenty-eighth respondents are the landowner respondents. The first and second respondents (the State respondents) are the Minister of Agriculture, Rural Development and Land Reform (the Minister) and the Regional Land Claims Commissioner, KwaZulu-Natal (RLCC), respectively. The State respondents did not appeal against the finding of the LCC that the existence of a community had not been proved and the associated costs order.

[6] Mr Mluleki Martin Chithi (the first appellant) (Mr Chithi), Dludlu Attorneys (the second appellant) and MC Ntshalintshali Attorneys (the third appellant) were the legal representatives of the Community claimants. The second and third legal practitioner appellants were appointed to represent the Community claimants in terms of s 29(4) of the Restitution Act[5] and they instructed the first appellant as counsel.

[7] During the hearing in the LCC in March 2020, at the close of the Community claimants' case (and that of the State respondents), Canca AJ ordered the separation of

---

[4] *Minister of Agriculture, Land Reform and Rural Development and Others v Ndumo (obo Emdwebu Community)* [2023] ZASCA 136.

[5] Section 29(4) of the Restitution Act provided as follows:
'Where a party cannot afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the State legal aid system or, if necessary, at the expense of the Commission.'

issues in terms of rule 57(1)(c) of the Land Claims Court Rules.[6] He directed that the issue whether Mavundulu is a community, as envisaged in the Restitution Act, be determined separately before any other issues. To that end Canca AJ directed the parties to file heads of argument to address the separated issue. In addition, he directed Mr Chithi to address him on why legal costs or the costs of the legal team for the claimants should not be disallowed. The parties filed heads of argument as directed.

[8] On 25 May 2020, Canca AJ delivered the judgment in respect of the main case, in which he found that the Community claimants had failed to prove the existence of a community as defined in s 1(iv) of the Restitution Act. The judgment, in the main case, included an order that the legal fees of the legal practitioner appellants were to be disallowed and that any fees already paid to them had to be repaid, as well as ordering the State respondents to pay the costs of the landowner respondents.

[9] An application for leave to appeal was instituted by the legal practitioner appellants against the disallowance of their fees. Prior to the hearing of the application for leave to appeal by the legal practitioner appellants and after heads of argument had been filed by the parties, the legal practitioner appellants brought an application for the recusal of Canca AJ from hearing the application for leave to appeal. The landowner respondents did not oppose the application for leave to appeal and the order pertaining to the disallowance of the legal practitioner appellants' fees. The landowner respondents opposed the application for the recusal of Canca AJ.

[10] On 16 August 2021, Canca AJ dismissed the recusal application with costs. No appeal was lodged against the dismissal of the recusal application. However, the legal practitioner appellants sought leave to appeal against the costs order in the recusal

---

[6] Rule 57(1)*(c)* provides as follows:
'57. Prior Adjudication upon Issues of Law or Fact
(1) Should the Court, upon application by any party or of its own accord, be of the opinion that there is an issue of law or fact in a case which may conveniently be decided —
. . .
(c) separately from some other issue,
the Court may order a separate hearing of that issue and grant any extensions of time periods prescribed in the rules which may be desirable because of the separate hearing.'

application (in favour of the landowner respondents), which leave to appeal was dismissed by the LCC on 22 November 2021. On 2 March 2022, this Court granted leave to the legal practitioner appellants to appeal the recusal costs order.

[11] On 16 August 2021, in a separate judgment, the LCC granted an application for leave to appeal against the disallowance of the legal practitioner appellants' fees. It dismissed the Community claimants' application for leave to appeal against the dismissal of their claim for restitution of land on the ground that they had failed to prove that they were a community as defined in the Restitution Act. On 11 November 2021, this Court granted leave to the Community claimants to appeal against the LCC's order dismissing their community claim. Having set out the background facts I turn to consider each appeal.

Whether the LCC was correct to decide the 'community issue' separately in terms of rule 57(1)(c)

[12] As already stated, the LCC dismissed the land claim because the Community claimants had failed to establish that they are a community as defined in s 1 of the Restitution Act. That issue was decided on a separated basis in terms of rule 57(1) (c) of the LCC's Rules. The two issues therefore are whether the LCC's finding that the Community claimants was not a community, was correct and whether in the circumstance of the case using rule 57(1)(c) to determine the community issue was appropriate.

[13] Counsel for the Community claimants submitted that the LCC's application of rule 57(1) constituted a misdirection in that it failed to give the parties an opportunity to address it before it made the separation order, and this failure offended the principles of natural justice and violated the Community claimants' right to access to court under s 34 of the Constitution. The issue of whether the Community claimants constituted a community, proceeded the argument, is not a discrete legal issue capable of being determined separately from other issues in proceedings under the Restitution Act. Rather, it forms the bedrock of the claim for restitution of land and can only be determined once all the evidence in the trial has been heard and assessed. Therefore, factual evidence had to be led and, by abruptly stopping the proceedings midway and not allowing the full

trial to unfold, the LCC violated the Community claimant's right to have a fair hearing and to have their case fully ventilated before a court of law.

[14] Rule 57(1)(c) of the LCC Rules provides that the Court may of its own accord order a hearing of an issue, separately from other issues if 'an issue of law or fact in a case may conveniently be decided separately'. Nugent JA, in *Denel (Pty) Ltd v Vorster* had this to say regarding the purpose of rule 33(4) (the equivalent of rule 57(1)(c)) and how it is to be applied:

'Rule 33(4) of the Uniform Rules – which entitles a court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though at first sight they might appear to be discrete. And even where the issues are discrete the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But where the trial court is satisfied that it is proper to make such an order – and in all cases it must be so satisfied before it does so – it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion'.[7]

[15] In *Luhlwini Mchunu Community v Hancock and Others (Luhlwini)*,[8] the LCC dismissed a similar argument which was raised by counsel for the claimants in those proceedings, namely that the invocation of rule 57(1)(c) could deprive the claimant of a full hearing. It held that:

'The order granted in terms of Rule 57(1)(c) is clearly permitted and Mr Chithi conceded as much. His contention that the Plaintiff would be deprived of a full hearing by the determination of the separated issue, is without merit. The Plaintiff has adduced all its evidence and was thus not constitutionally deprived of a full hearing. It is ludicrous to suggest, as the Plaintiff does, that it

---

[7] *Denel (Pty) Ltd v Vorster* [2004] ZASCA 4; [2005] 4 BLLR 313 (SCA); 2004 (4) SA 481 (SCA); (2004) 25 ILJ 659 (SCA) para 3.
[8] *Luhlwini Mchunu Community v Hancock and Others* [2020] ZALCC 2.

would be unjust to consider if the Plaintiff has discharged its onus after it has delivered all its evidence.'[9]

The LCC explained that this was so because 'the Plaintiff [bears] the onus of establishing at the close of its case, *prima facie* at the very least, that it [is] a community as defined in the Act'.[10]

[16] In my view, Canca AJ was entitled to invoke the provisions of rule 57(1)(c) in determining whether the Community claimants had made out a case on the evidence at that stage of the hearing (after the close of the claimant's case, including the submissions of the State respondents). The question whether or not the Community claimants were a 'community' as defined in the Restitution Act is a discrete legal point that is capable of being disposed of separately from other issues. It is a statutory requirement that must be met by a claimant seeking a restitution of a right in land which it lost as a result of past discriminatory practices. Undoubtedly, the claimant will have to present evidence – both oral and documentary - to substantiate its claim. Oral evidence will be from the lay witnesses and expert witnesses. But once all the evidence has been presented there appears to be no reason for not deciding some of the issues on a separated basis. In this matter the claimants had had ample time to present their case, some 30 court days, excluding inspections, which lasted two days. After the claimants closed their case, witnesses were called on behalf of the State respondents, and the parties were given ample time to prepare heads of argument and to argue the issue.

[17] Moreover, s 32 of the Restitution Act clothes judges with the power to, inter alia, manage the procedure and manner of conducting a trial and, thus, permits a judge to curtail the proceedings to ensure that resources, both public and private, are not wasted. The LCC is vested with inquisitorial powers in terms of s 32(3)*(b)* of the Restitution Act,[11] to conduct any part of any of its proceedings on an informal or inquisitorial basis and to

---

[9] Ibid para 11.
[10] Ibid para 12.
[11] Section 32(3)*(b)* of the Restitution Act provides:
'(3) Notwithstanding anything to the contrary in this Act or in the rules contemplated in subsection (1) —
. . .
(b) the Court may conduct any part of any proceedings on an informal or inquisitorial basis.'

identify issues to be determined separately, which power may be invoked at any stage of the proceedings by the presiding judge. I therefore find that the contention that the Community claimants were in any way prejudiced through the invocation of rule 57(1), has no merit.

Whether Mavundulu was a 'community'

[18] The next question is whether the finding of the LCC that the Community claimants did not constitute a community, was correct. Section 2(1)*(d)* of the Restitution Act provides that a 'person shall be entitled to restitution of a right in land if 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'. The claim for such restitution must have been lodged with one of the offices of the Land Claims Commission, by not later than 31 December 1998.

[19] A 'community' is defined in s 1 of the Restitution 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 and includes part of any such group.'

[20] Section 1 defines 'right in land' as:

'. . . any right in land whether registered or unregistered, and may include the interests 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; . . .'

[21] In *In re Kranspoort Community*,[12] Dodson J explained what the statutory definition entails:

'… 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

[12] *In re Kranspoort Community* 2000 (2) SA 124 (LCC) para 34.

a 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 omitted.)

[22] The Constitutional Court, in *Department of Land Affairs and Others v Goedelegen Tropical Fruits (Pty) Ltd*, was also concerned with the question as to what constitutes a community. It had this to say in this regard:

'At the heart of this enquiry is whether the occupational rights in the land were derived from shared rules determining access to land held in common. At its core, the question is whether the labour tenants, through shared rules, held the land rights jointly. The community and individual applicants contend that they did. They support this contention by pointing to the history of their use and occupation of the land and to the attendant social arrangements. Their forebears lived on the farm since the mid-1800s, before the first registered owner Mr Hattingh in 1889, and the claimants continue to do so despite successive registered ownership of the land.'[13]

[23] At paragraphs 37 and 38 of the judgment the Constitutional Court went on to state:

'However, what is clear on all the evidence is that the indigenous ownership of land in the original Boomplaats farm was lost before 1913. Once they had lost ownership, they were compelled to work for the owner. Their relationship with the owner was coercive. The Land Claims Court found, correctly in my view, that "the white owners took possession of the land, and compelled the inhabitants to become labour tenants" -

Although they had lost indigenous ownership, they continued to exercise the right to occupy the land, to raise crops and to graze their livestock. Successive registered owners did not terminate these rights. By 1969, the collective indigenous title to land of the Popela Community had succumbed to settler dispossession and subsequent land laws on ownership and occupation of land by black people. Members of the community had been successfully coerced into being farm labourers whose occupational interest in the land had become subject to the overriding sway of the registered owner. They had to work the lands of the owner without wages in order to live there.

---

[13] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) para 35. See also *Elambini Community v Minister of Rural Development and Land Reform and Others* [2018] ZALCC 11 para 141 (*Elambini*).

Mr Altenroxel makes the point that, whilst there was a supervisor who was also regarded by the workers as Kgoshi, as well as a community, they derived their right to live there, plant crops and keep livestock from him, the white registered owner, at whose whim and fancy they lived.'

[24] The Land Claims Court held in *Elambini Community and Others v Minister of Rural Development and Land Reform and Others* that:

'Thus it is settled law that for a community litigant 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. If at the time of dispossession, the possession and use of the land did not derive from common rules, but were supplanted by labour tenancy rules, the rights in land were not held by a community at the time of dispossession.'[14]

[25] It was submitted on behalf of the Community claimants that the LCC misdirected itself by finding that they did not constitute a community. It was argued that the evidence presented on their behalf established that that they existed as a community at the time of dispossession. In support of this submission, the Community claimants relied on the evidence of lay witnesses; expert testimony of Mr Hennie Schoeman, the aerial photography expert, Dr Ndukuyakhe Ndlovu, an anthropologist and the witnesses who testified for the State respondents, Mr Lionel Joubert and Mr Adolph Gerber and documentary evidence.

[26] The question is whether the members of the Mavundulu community derived their possession and use of the land from common rules. This requires the analysis of the pleadings including the Notice of Referral in terms of s 14 of the Restitution Act, the Community claimants' response thereto and the evidence presented in support of the pleaded case.

---

[14] *Elambini* para 141.

[27] The following allegations are made by the Regional Land Claims Commission KZN in the Referral Report in support of the Notice of Referral in terms of s 14 of the Restitution Act:

'The claimant community had beneficial occupation of the claimed land. They resided on the claimed land by virtue of historical right of occupation; alternatively, they had historically beneficial occupation for a continuous period in excess of ten (10) years prior to their dispossession. They practised subsistence farming on the claimed land until the arrival of English and German speaking settlers, when the process of systematic colonial occupation and dispossession of the indigenous people from the land commenced in earnest.

In this regard, the State's design to forcibly dispossess indigenous population from the land, was facilitated by a barrage of legislation such as the Masters & Servant Amendment Act, 1926, giving effect to the Native Land Act, 1913, Native Service Control Act of 1932 and the Group Areas Act of 1966, and which legislation contributed directly to the claimant community's dispossession from the claimed land.'

[28] As regards the status of the claimants, the Report records that:

'1.2 The Mavundulu Community comprises of individuals and all descendants of individuals of a community who were dispossessed of their rights in the land after 19 June 1913 as a result of a deliberate and enforced system of segregation and racial discrimination. Their rights in the claimed land are derived from shared rules determining access to land, held in common by the community, and they used the land for their own benefit and subsistence.

…

1.4 The claimed land in Natal at the time of dispossession was occupied under the enforced land tenure system, incorporating indigenous traditional practices, as imposed by the colonial authority. This system provided that traditional leaders would administer and allocate land (chieftainship) as agents of the State, to members of the community. In essence, the traditional leaders held the land in trust for its community members.

1.5 By virtue of the above system, the claimant community enjoyed beneficial occupational rights under an implied trust arrangement, which was derived from being members of a "traditional community" and subscribing to the cultural values and norms of that community. Such traditional communities were defined by its members' subscription to a common cultural value and norm system. In this regard, the claimant community, a traditional community, as defined above,

acquired its rights, to the claimed land, by reason of its beneficial use and occupation of the land, bestowed as trust beneficiaries, prior to 1913.

…

4.4 The claimant community and/or their predecessors lived on the land and used the claimed land for cultivation of crops, as shared access to communal grazing and as shared access to available water and firewood and other resources from the land, for example medicinal plants.'

Community claimants' response to the referral in terms of rule 38(7)(b)

[29] In their response to the referral in terms of rule 38(7)*(b)* of the LCC Rules, the Community appellants alleged that the Mavundulu Community members were in occupation of the claimed land since time immemorial prior to the arrival of the white people who later came to the land. They surveyed and subdivided the land and thereafter registered title deeds. The Community claimants alleged further that the problem started with the arrival of the white people of English and German descent, on their land, between 1850 and 1860. Upon their arrival, they approached Chief Mavundulu for a piece of land to be allocated to them. They, however, started to build their own dwellings before Chief Mavundulu granted them authority to do so. When questioned about their behaviour, the white people said that they had been granted authority and permission to use the land by the government of the day and later displayed and presented the title deeds which had been issued to them. The white people started tilling the land and rearing livestock. Mavundulu Community members were then compelled to live side by side with the white people.

[30] The Community appellants explained how the dispossession occurred:

'7.16 The Mavundulu community were dispossessed of their land between 1914 and 1920. The dispossession did not comprise in one singular and isolated act akin to an event which happens once and for all but it occurred over a period of time which extended over a number of years. This includes the period extending from 1920 to 1994 wherein a number of people were removed and evicted from their ancestral land.'

[31] In paragraphs 8 and 9 of the response the Community claimants pointed out that as a precursor to the dispossession, the white people:

‘8.1 in 1903 dismantled the chieftaincy of Chief Cebekhulu Mavundulu by kidnapping him and throwing him in a deep ditch (*odibini*). . . and left him to die there.
8.2 in 1912 they started a big fire which destroyed the Claimant Community’s homesteads and other valuable belongings and annihilated various natural landmarks after which they substantially and significantly increased the land which they occupied.
9.1 The Customary rights held by the claimant community to the land were reduced to those of labour tenants overtime and…, the rights were gradually reduced to those of farm labourers over a period of time. The claimant community members were forced to work for various white landowners on their land and those who were not willing to be subjected to the labour tenancy and farm labourer system were forced to seek residence in the black townships and black rural areas in the greater KwaZulu-Natal Province including Greytown, Pietermaritzburg, Hammersdale and in Zululand.
. . .
9.3 Those that elected to remain on the farms they were allowed to [live] on the farms and in exchange for their rights to live on the farms they provided labour to the farm owners as labour tenants and/or alternatively they were obliged to work for minimum wages. At the end of six months, those were under labour tenant contracts were forced to seek work elsewhere.’

Lay witnesses’ testimony

[32] The Community claimants led the evidence of following lay witnesses. Mr Umbross Absalom Ndlovu testified that after the arrival of the white people, black people encountered quite a lot of problems. They started losing their rights of utilising the land as it was utilised customarily. They lost their traditional way of utilisation of the land.

[33] Mr Ndlovu further testified that his father and mother worked for ‘Jubela’ (Mr Joubert). Critically, he conceded during cross-examination that the people lost the use of land during Nkosi Mavundulu’s time. From when the white people arrived in the 1800s, they restricted the grazing grounds, the number of cattle, the number of houses the community could have, their movement and rights to bury their dead. He conceded that the Mavundulu as a community disappeared in 1903.

[34] Mr Sipho Wilson Cebekhulu, who was 72 years old when he gave evidence, testified that his great grandfather was Chief Mavundulu of Cebekhulu clan from KwaMavundulu area. His family lived at Kwa-Jubela until it was forcibly removed by the police. This must have been between 1961 and 1966. Their neighbours were the Zondi's, Ndlovu's, Sithole's, Kunene's and Dlamini's. After the eviction his family trekked to Pietermaritzburg and settled at Kwa-Dambuza and thereafter relocated to Kwa-Mpumuza.

[35] Mr Cebekhulu testified that before the arrival of the white people at their land the community occupied the land in terms of the rules established by the chief. All that changed after the arrival of the white people. They undermined the traditional leadership. They replaced Chief Cebekhulu with Malinga who ruled the community according to the rules set by the white people.

[36] Mr Cebekhulu conceded, under cross-examination, that blacks had no control over the land, and they lived there with the permission of the landowner. The landowner made the rules where they could live, how many houses they could build, how many cattle they could keep. He further conceded that 'he worked for 6 months looking after the cattle and ploughing the fields.' Mr Cebekhulu represented and acted on behalf of the community.

[37] Mr Makhonda Albert Ntanzi testified that his father and mother worked for the landowner. He testified that his father worked full time. He testified that when his father got ill, his mother had to work for the landowner in order for them to be resident on the farm. They were evicted because his mother got ill and could no longer work. He also conceded under cross-examination that when he lived on the farm, they were under the authority of the landowner. They needed permission to bury the dead and the landowner allocated places where they could graze their cattle.

[38] Mr Dludla conceded under cross-examination that after the arrival of whites the community that existed was disestablished and by 1960 it no longer existed. Mr Ngubane

testified that ‘he was removed from the farm Welverdient, which was degazetted. He testified that his grandfather, uncles and aunties worked on the farm Mooiplaas.

[39] It is clear from the statements of the lay witnesses that from the time of the arrival of white farmers in the 1800s, their forebears lived on the claimed land under the rules of the farmers, and they set the terms on which they could occupy and use the designated portions of a particular farm.

[40] Additionally, the common cause facts undermine the Community claimants’ claim that they existed as a community. No reference is made in any historical records of the existence of Nkosi Mavundulu or any other Cebekhulu Inkosi or a community of African people living on the farms Mooiplaats or Spitzkop. No reference is made in any historical maps to Inkosi Mavundulu or any chiefs of the Mavundulu or a community of African people living in the area or on the farms Mooiplaats or Spitzkop.

[41] Mr Schoeman testified that numerous farmsteads were present already in 1937 on the various sub-divisions of the farms Mooiplaats and Spitzkop and, already in 1937, these farms commercially farmed with agricultural products linked to a commercial farming enterprise instead of it being farmed by subsistence farming. By 1937, fences had been erected on the various sub-divisions of the farms Mooiplaats and Spitzkop.

[42] According to Mr Gerber, in 1937, there were already established timber plantations in various stages of growth on the farms Mooiplaats and Spitzkop and that no cattle kraals, manufactured in a rudimentary fashion with branches were situated near any of the homestead areas on both the farms Mooiplaats and Spitzkop. He further testified that there were clearly demarcated paths between the homesteads and the farmsteads indicating a link between the homesteads and the farmsteads, such as would indicate employees visiting the farmsteads.

[43] The only two references to the Cebekhulu clan are in the HSRC report which covers an area that is situated a substantial distance away from Mooiplaats and Spitzkop

and by Dr Bleek in 1849 and 1853. According to Dr Bleek, Cebekhulu was found between the Umtyezi and Umsuluzi rivers being a reference to the Bushmansriver and the Bloukransriver in the area of Estcourt.

[44] Further, a report of a survey done by Dr NJ Van Warmelo, in 1934, in the New Hanover area, records the tribe in the area as Gwamanda and no reference is made to Cebekhulu. Instead, the survey refers to other chiefs in the New Hanover district.

[45] Dr Ndlovu admitted that no reference is made in the Blue Books of 1896 and 1907 of Cebekhulu's in the area on the farms Mooiplaats and Spitzkop. No reference to the Cebekhulu is made in the New Hanover district but reference is made to other chiefs. Finally, there is no evidence of officially sanctioned removals after 1913 in the New Hanover district, from the farms Mooiplaats and Spitzkop.

Expert witnesses' evidence

[46] The Community claimants called Dr Ndlovu to testify on its behalf to give expert evidence. His expertise was placed in issue. The LCC concluded that Dr Ndlovu did not qualify as an expert and for that reason placed no weight on his evidence.

[47] Section 30(2)*(b)* of the Restitution Act provides that it is competent for evidence to be adduced by 'expert evidence regarding the historical and anthropological facts relevant to any particular claim'. Dr Ndlovu has an MA degree in anthropology from Rhodes University and a PhD in rock art. He is not an historian. He testified that he is a heritage expert and, according to him, the land is part of heritage.

[48] Dr Ndlovu's evidence was correctly disregarded. He conceded under cross-examination that he did not conduct independent archival research but merely relied on the report of Dr Whelan, the landowner respondents' expert witness. He stated that he neither verified the archival documents of Dr Whelan nor looked at the aerial photography in respect of the claimed land. Dr Ndlovu did not profess to have any skill or knowledge to analyse oral evidence and/or archival documents to determine whether there was in

existence a community and/or a person and/or persons who lost rights in land, subsequent to 19 June 1913.

[49] Besides these shortcomings in Dr Ndlovu's evidence, it is clear from the evidence of various witnesses who testified for the Community claimants, including those who testified for the State respondents, that although the claimants' forebears may have existed as a community before the arrival of the white people, that community disintegrated before June 1913. Individual members of what may historically have been a community prior to the arrival of white farmers continued to occupy the land as labour tenants subject to the rules and policies of the white landowners and later as farm workers post-1913. For instance, each household in terms of the labour tenancy regime was restricted to a certain number of livestock and if they failed to obey the rules they could be evicted from the farm. However, what the evidence establishes in this case is that whatever rights individual occupiers may have enjoyed as labour tenants and later as farm workers they were no longer derived from shared rules determining access to land held in common by a group in 1913. Their occupation and use of the land did not meet the acid test referred to by the Constitutional Court in *Goedgelegen.*

Disallowance of fees

[50] The next issue is whether the LCC misdirected itself in ordering that the legal practitioner appellants were not entitled to fees in the matter and ordering them to repay the fees they had already received from the state. This was because, reasoned the LCC, they had pursued the claim which they knew had no merit. It described such conduct as vexatious, frivolous and an abuse of the process of the court.

[51] In *Multi Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*, the court remarked:

'. . . [A]ttorneys and counsel are expected to pursue their clients' rights and interest fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated by their opponent or even, I may add, by the Court. Legal practitioners must present

their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them. . ..'[15]

[52] In *Jazz Spirit 12 (Pty) Limited and Others v Regional Land Claims Commissioner: Western Cape and Others*, this Court made it clear that:

'It is crucial for the promotion and maintenance of the rule of law that parties who approach the courts to resolve their land disputes should not be mulcted with costs, particularly where there are no allegations of wilfulness or vexatiousness as is in this case. Undoubtedly s 6 of the Restitution Act places an onerous duty on the office of the Land Claims Commission to take all reasonable steps to ensure that claims that are lodged are well investigated and properly prepared. Evidently, this is intended to ensure that all facts relevant to a particular claim are considered. In addition, it has as its rationale the fact that many of the people dispossessed of land have also been systematically disadvantaged in many other ways and may well be unlikely to be in a position to fund any adverse costs order. Such people might be dissuaded from pursuing the very rights provided for in the Restitution Act if costs orders were made in the ordinary course. If this was their response, it would defeat the very object of the Restitution Act. This is, perhaps, an additional reason for the exceptional circumstances envisaged in s 21A(3) [of the Supreme Court Act 59 of 1959] to be required to meet an even higher standard in matters concerning costs arising from the Restitution Act.'[16]

[53] Where there is an unresolved dispute, the Commission is obliged to refer such dispute to the LCC for adjudication. The investigation and reports by the Commission play a pivotal role in the ultimate resolution of any ensuing dispute. Self-evidently, costs orders might be subversive of the spirit of social justice underlying the Restitution Act.

[54] The approach followed by Canca AJ in disallowing the fees for the legal practitioner appellants in the entire matter and directing them to repay the fees they had already received for the work they had done, fails to appreciate the *sui generis* nature of the

---

[15] *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* [2013] ZAGPPHC 261; [2013] 4 All SA 346 (GNP); 2014 (3) SA 265 (GP) para 34.

[16] *Jazz Spirit 12 (Pty) Limited and Others v Regional Land Claims Commissioner: Western Cape and Others* [2014] ZASCA 127 (SCA) para 27.

Restitution Act.[17] Unlike in any other litigation, litigation in terms of the Restitution Act is instituted at the instance of the Commission on Restitution of Land Rights. Although the claimants are cited as plaintiffs, they are not the ones who have a right to initiate and stop proceedings. Once an arguable case has been shown to exist the Commission must accept the claim, even if the arguments are relatively weak. Once a land claim has been accepted as valid claim and published in the Government Gazette by the Regional Land Claims Commission, it can only be withdrawn by the Commission in terms of s 11A (1) of the Restitution Act. Having regard to the evidence of the witnesses called by the State respondents who testified that the claimants were a community as defined in the Restitution Act, there was no basis for the finding that the claim was frivolous and that its prosecution amounted to an abuse of court process. In fact, it is stated in the Report filed by the Regional Land Claim Commission in terms of s 14 of the Restitution Act that 'the claim as submitted is neither frivolous nor vexatious' and that it had merit.

[55] The LCC committed a material misdirection in disallowing the legal practitioner appellants to recover their fees for the work they had performed and also in directing them to refund the fees they had already received from the State for representing the Community claimants. This is a land claim and, once a claim has gone through the internal vetting mechanisms contained in the Restitution Act, it would generally be reasonable for a legal practitioner appointed in terms of s 29(4) of the Restitution Act to rely on the decision of the Regional Land Claims Commissioner to accept the claim as a valid claim and to refer it to court for adjudication. Thereafter, the appointed legal practitioner is expected to put forward the best case as is reasonably possible on behalf of the claimants at the hearing of the matter.

[56] It is clear from the evidence that the LCC misdirected itself in imposing a punitive costs order. Its decision was influenced by irrelevant considerations and that being so, this Court is entitled to interfere in the exercise of its discretion. There is evidence to suggest that Canca AJ's judgment was improperly influenced by the *Luhlwini* case, as

---

[17] *Salem Party Club and Others v Salem Community and Others* 2018(3) SA 1 (CC) para 72.

reflected in the striking similarities between the two judgments, particularly regarding the costs order. This reliance on an external case raises concerns about his impartiality and independence in deciding the punitive costs issue. Judicial independence requires that each case be considered on its own merits, and his failure to independently assess the facts and evidence in this case undermines confidence in the exercise of his discretion.

[57] It follows, therefore, that the order made by the LCC disallowing the legal practitioner appellants to recover their fees in the matter and directing them to repay the fees they already received from the state should be set aside. There was no legal basis for such order.

Recusal application

[58] The application for Canca AJ's recusal was brought by the legal practitioner appellants. It sprang from the costs order made by Canca AJ depriving the legal practitioner appellants of their fees (both already earned and those still to be paid). The recusal application was in respect of the presiding judge hearing the application for leave to appeal the 25 May 2020 judgment.

[59] The objection to Canca AJ's continued involvement in this matter was based on his alleged extensive reliance on the *Luhlwini* judgment, handed down shortly before the conclusion of the trial, by Meer AJP. In support of this objection, attention was drawn to the similarity in terms and language of the costs order and the amendment judgment. The manner in which judgment was written, it was contended, would leave any reasonable person, in the position of the affected parties, with a reasonable perception of bias and a reasonable apprehension that Canca AJ 'did not have a mind open to persuasion in particular the pertinent and germane arguments which were raised by the first appellant'.

[60] It is so that *Luhlwini* was the authority on which Canca AJ heavily relied for depriving the legal practitioner appellants of their fees. In that case, like in the present one, the Community claimants failed in their claim because they were unable to prove that they were a community when the claim was lodged. The legal practitioners were

deprived of their fees for having unsuccessfully contended, contrary to the established legal principle, that persons who were at best labour tenants or farm workers on privately owned land constituted a community as defined in the Restitution Act. The legal practitioner appellants were said to have abused the court process in pursuing a community claim that was bound to fail. *Luhlwini* has since been overturned by this Court on appeal[18] which means that the whole basis on which the costs order in the present matter was made, has ceased to exist.

[61] A further allegation levelled at Canca AJ was that he was a participant in a virtual meeting and/or tele-conference held with certain officials of the Department during which Acting Judge President Meer allegedly, 'complained about the incompetence of the first appellant [Mr. Chithi] herein'. He denied having been a participant in that meeting.

[62] The allegations of bias based on the adverse remarks concerning the first appellant allegedly made at the virtual meeting to which the first appellant had not been invited were totally unfounded and the grounds upon which they were based were unfortunately unsubstantiated. The legal practitioner appellants had ample opportunity to support their allegations with affidavits from any of the participants at that meeting, in view of the gravity of the allegation, they failed to do so. The recusal application on this ground was properly dismissed.

[63] The legal practitioner appellants further submitted that Canca AJ erred in deviating from the LCC's usual practice of not awarding costs unless special circumstances exist. For the reasons that will follow, Canca AJ was justified in dismissing the recusal application with costs. In *Le Car Auto Traders v Degswa 10138 CC and Others*,[19] Sutherland J dealt with a similar situation where leave to appeal was sought against a judgment and, before the application could be heard, an application for recusal from hearing the application for leave to appeal was instituted. He commented as follows:

---

[18] *Chithi and Others: In re: Luhlwini Mchunu Community v Hancock and Others* (Case no.423/2020) [ZASCA] 123 (23 September 2021).
[19] *Le Car Auto Traders v Degswa 10138 CC and Others* [2012] ZAGPJHC 286.

‘These propositions have only to be stated to be revealed as nonsense. The effect of a recusal can only be in respect of a prospective or current proceeding. Asking a judge to recuse himself after judgment is given is silly. Even if he chose to recuse himself, the judgment is not thereby nullified. A judgment once given stands until an appeal sets it aside. The judge who gave the judgment is *functus officio*.’[20]

[64] Spilg J, in *Bennett and Another v S; In Re: S v Porritt and Another,* expressed the disapproval of recusal applications as follows:

‘More and more recusal application are brought as a tactical device or simply because the litigant does not like the outcome of an interim order made during the course of the trial. The seeming alacrity with which legal practitioners bring or threaten to bring recusal applications is a cause for concern.’[21]

[65] There is therefore no merit in the contention that Canca AJ erred in awarding costs against the legal practitioner appellants. Canca AJ considered the application for his recusal. He determined that it had no legal basis, and he dismissed it with costs. In awarding costs against the legal practitioner appellants, he was exercising his discretion and there is no suggestion that he had in any way misdirected himself in the manner in which he did so. That being the case, there is no basis for this Court to interfere with his costs order.

[66] It was further contended by the legal practitioner appellants that the landowners did not have a direct and substantial interest in the recusal application and therefore a costs order in their favour was not warranted. In response, it was argued on behalf of the landowner respondents that the contention that the landowners had no interest in the application for the recusal is without merit. Since the recusal application was grounded in the disallowance of fees, the allegations of judicial bias, and the improper influence of the *Luhlwini* judgment, the facts underlying the principal case (the community claim) and the conduct of the legal practitioners and that of the presiding officer would, of necessity, be

---

[20] Ibid para 36.
[21] *Bennett and Another v S; In Re: S v Porritt and Another* [2020] ZAGPJHC 275; [2021] 1 All SA 165 (GJ); 2021 (1) SACR 195 (GJ); 2021 (2) SA 439 (GJ) para 113.

brought into issue in the recusal application. The landowner respondents therefore indeed had a direct and substantial interest in such matters. Further, any submissions by the landowner respondents in regard to the aforementioned issues, can only assist the court in bringing to the court's attention facts and legal authority to assist it in arriving at a considered decision with regard to the recusal application, whether or not this is ultimately in favour or against the recusal *per se*.

[67] I agree with the landowner respondents' submissions. The landowners were parties to the case and their land was the subject of the case. In terms of the *audi alterem partem* rule they were entitled to oppose the application and to make their views known in response to an ill-conceived application which was bad in law and on the facts. The landowners made no issue about the disallowance of the fees of the legal practitioner appellants but considered themselves obliged to counter the attack on the factual and legal findings of the LCC on which the disallowance of fees order was dependent. The landowners had a substantial interest in the application for recusal in that the granting of it would have resulted in the entire evidence having to be re-run before another presiding officer, resulting in enormous costs to the landowners. Thus, the landowner respondents had a direct and substantial interest in the recusal application and the landowner respondents' legal representatives, as officers of the court, were duty bound to put the record straight when scurrilous and uncalled for allegations are made attacking the integrity of a Judge.

[68] In conclusion, the appeal against the dismissal of the land claim is dismissed. The Community claimants failed to prove that they constituted a 'community' as envisaged in the Restitution Act. The appeal against the order disallowing the legal practitioner appellants from recovering their fees on the matter is upheld. The LCC misdirected itself in depriving the legal practitioner appellants of their fees and in directing them to repay the fees they had already received from the State. The conclusion that the legal practitioner appellants had pursued a hopeless case in circumstances where they should not have done so, is wrong for the simple reason that it is the State respondents who accept and refer the claim after investigation. It is therefore unfair to punish the legal

practitioner appellants by depriving them of their fees and ordering them to repay the fees they had received simply because the land claim was at the end of trial found to have no merit. The appeal against the order directing the legal practitioner appellants to pay the landowner respondents' costs of opposing the recusal application should fail.

Order

[69] The following order is made:

1 The appeal under case number 1203/2021 against the order of the Land Claims Court dismissing the Mavundulu Community's land claim is dismissed with no order as to costs.

2 The appeal under case number 1334/2021 against the order of the Land Claims Court disallowing the fees of the first to third appellants in the matter and directing them to repay the fees they had already received from the state is upheld with no order as to costs.

3 The appeal against the costs order in respect of the recusal application under case number 261/2022 is dismissed with costs.

_____

D H ZONDI

JUDGE OF APPEAL

Appearances

Case number: 1334/2021 & 261/2022	
For the appellants:	C J Pammenter SC and C Nqala
Instructed by:	Dludlu Attorneys, Durban
	Maduba Attorneys, Bloemfontein
For the third to twenty-seventh respondents	
in case number 261/2022:	M G Roberts SC and E Roberts
Instructed by:	Cox & Partners Attorneys, Vryheid
	Symington De Kok, Bloemfontein.
Case number: 1203/2021	
For the appellants:	S Poswa-Lerotudi and K Shazi
Instructed by:	Dludlu Attorneys, Durban
	Maduba Attorneys, Bloemfontein
For the third to twenty-seventh respondents:	M G Roberts SC and E Roberts
Instructed by:	Cox & Partners Attorneys, Vryheid
	Symington De Kok, Bloemfontein.