



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NO: LCC206/2010

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED. YES <i>7/5/2025</i>
5 May 2025  SIGNATURE	

In the matter between:

THE MOLETELE COMMUNITY

First Claimant

HEIR PRINCE-MAEKANE TRIBAL COMMUNITY

Second Claimant

KGOSI LACKSON ABUTHI CHILOANE

on behalf of **MOLETELE TRIBE**

Third Claimant

MOLETELE-BLYDEPOORT COMMUNITY

Fourth Claimant

concerning

**CERTAIN FARMS IN THE MARULENG REGION
AS LISTED IN ANNEXURE "NR1"**

JUDGMENT

CONDONATION APPLICATION AND COUNTER-APPLICATION

SPILG, J

INTRODUCTION

1. In October 2010 the Regional Land Claims Commissioner ("RLCC") referred the land claim of the first to fourth claimants to this court. It is filed under case no LCC 206/2010. These claims are generally referred to as the Moletele Land Claim and the persons who brought the claim as the *main claimants*. In this judgment the court will refer to them either as the Moletele or the main claimants.
2. By agreement with the Moletele, represented by its legal team, its claims were split into two separate components.

The one component concerns land identified in the referral report as white owned land and includes some land acquired by Telkom and Eskom, either by way of expropriation or direct purchase from white farmers.¹

3. The balance of the Moletele claims, forming the other component, comprise land which was purchased in terms of the Native Trust and Land Act 18 of 1936. This land had been incorporated into the so-called Lebowa and Gazankulu homelands which, as the referral report mentions " *is now substantially occupied by persons of African descent*" (*"the Trust lands"*). The referral report makes plain that, because there are significant factual and legal differences, the Trust lands do not

¹ In July 2020 a comprehensive set of orders, rulings and directions were given dealing with a number of issues. Para 3 of the order concerns Telkom and reads:

"In terms of rule 30(9):

- a. *Telkom shall state in writing delivered to all the parties by 27 July 2020 as to whether it acquired registered title to the Grovedale property by way of expropriation or ordinary purchase and sale, and if by expropriation to identify the applicable legislation;*
- b. *Irrespective of the response, the Main Claimants shall state in writing within 15 court days of receipt of Telkom's response to para 2(a) hereof;*
 - i. *whether or not the Grovedale property is restorable*
 - ii. *whether they admit that the Grovedale property is approximately 625 sq. metres in size as alleged by Telkom, failing which they are to state its approximate size;*
 - iii. *whether they admit or deny how Telkom claims to have acquired title to the property, and if they deny then they are to state the grounds for such denial;*
 - iv. *separately in respect of each of the contents of paras 2, 4 and 19 of Telkom's plea, whether the allegation contained therein is admitted or denied.*

form part of the referral but will be dealt with at a later stage by way of a separate referral under s 14 "*if necessary*".²

4. Accordingly only the land to which the Gazette Notices referred, and which were identified in annexures NR1A and NR1B of the Referral Report forms the subject matter of the referral to this court under the provisions of s14(1) of the Restitution of Land Rights Act 22 of 1994 (*"the Act"*) and to which the present case number in relation to that referral was allocated (i.e. LCC 206/2010).
5. In other words, the only land which is presently subject to this court's jurisdiction is that identified in the aforesaid referral and a referral, by reason of the provisions of s11(1) through to s12³, can only deal with land that has been specifically Gazetted in accordance with the Act and in the manner set out in the Commission's Rules (see below).

This is highly relevant when considering the events which have resulted in the applications before the court; the one by the main claimants for condonation for their failure to comply with court directions and orders of 16 May and 12 August 2024 and the other being a counter-application by the Commission on Restitution of Land Rights (*"the Commission"*) declaring that the referral under case number LCC206/2010 shall be confined to the farms that were identified in the attachment to the Referral Report as annexures NR1A and NR1B, these being all the farms that were Gazetted other than the Trust land farms.

6. The Trust land farms related to a not inconsiderable area of land owned by the State which was settled and has already been restored to the Moletete. The relevance of this will become apparent later.
7. The claim then became bogged down with a large number of disputes between the main claimants and a large number of individual and corporate landowners. The disputes range from challenging the competency of the claim to non-restorability in respect of specific property. The defendants to the claim have also relied on a

² See paras 4 and 8 of the Referral

³ All references to sections is the Act unless otherwise stated

referral report of Prof. Delius which has been challenged in generalised terms by the main claimants.

8. In the latter part of 2015 a number of other claimants delivered their statement of claim. Their claim had been referred to this court some years earlier under case no LCC 20/2012. It is generally identified as the Mnisi Land Claims. These claims cover a portion of the land in respect of which the main claimants seek restitution. The group bringing the Mnisi Land Claims are referred to as the *competing claimants*.
9. The effective consolidation of these two sets of land claims added a further series of major disputes to an already burgeoning list of issues requiring court adjudication.

.As a result the case became bogged down with not only substantive issues but also a large number of procedural and technical issues. Numerous pre-trial conferences have been held both prior to and since 2015. Indeed Gildenhuys J was brought in to assist in finalising the gazetting of the claims so that the referral could proceed.

10. In order to bring the matter to trial, the parties were directed to prepare a litigation plan. This was done by 7 February 2020 . I do not recall when I took over the matter from Sardiwalla J, but it is evident that I have presided over pre-trial conferences since the litigation plan was presented.
11. At the conference of 28 February 2020 the following of relevance is noted in the approved minutes;

- the adoption of the minutes of the litigation planning meeting held on 21 November 2019;
- the main claimant had failed to furnish the Commissioner with information regarding financial statements despite previously undertaking to do so, including at the meeting on 16 September 2019. This related to issues concerning the continued funding of the Moletele's legal fees by the Commission. Mr. Notshe, on behalf of the

main claimants, stated that they refused to provide any information. In the result the court made an order requiring them to provide audited financial statements, failing which provisional financial statements and certain supporting documents, of the Moletele Community Property Association (*“the Moletele CPA”*) up to January 2020;

- many of the landowner defendants sought a separation of hearings. Generally this was based on the sheer magnitude of the areas involved and what were contended to be quite different and unrelated geographical areas as well as the “waiting time” involved while testimony unrelated to their land was being presented. One of the aspects sought to be separated was whether claims had been properly lodged.
- In responding to the question of a separate hearing, Mr. Notshe said that the Moletele had a serious issue with the question of whether claims had been properly lodged in respect of some of the farms. His view as recorded in the minute was that;

“... the decision made by the Regional Land Claims Commissioner to Gazette the claims still stands, unless it is taken on review.”

This will be contrasted later with the position the Moletele now wish to take.

- Mr. Dodson for the Commission placed on record the case of a judgment of Carelse J (at that time) (*Emantanjeni Community* [2019] ZALCC 31) where the judge precluded legal representatives from recovering fees in terms of section 29(4) because they had pursued unwarranted litigation. Mr. Dodson stated that this judgment would be applied in the event that unwarranted litigation was pursued by any party whose legal costs were funded under that section. At that time both claimants were being so funded.

- The issue of the Minister filing a plea was raised, Mr. Dodson contending that Mr. Notshe had agreed not to persist with that at a pre-trial held on 16 September 2019.⁴

When Mr. Notshe disputed that he had abandoned the request for a plea from the Minister, he was referred to para 29 of the pretrial minute where Sardiwalla J had adjourned the matter for 30 minutes to allow the parties to discuss *inter alia* the issue of the Minister's plea. The court also raised the concern that it appeared that on three occasions statements were made by the main claimants' counsel at previous pretrial conferences which the claimant community failed to comply with;

- The main claimants had previously obtained a report from Prof. Delius. It subsequently expressed reservations with the report and had been requested to identify what aspects of the report were in issue.
- The stated position of the Commission at the conference was that the dispute over funding should not delay the progress of the litigation. As will appear later, the contention was that the Moletale could well afford engaging an expert and would be reimbursed if it was entitled to continued funding.

12. The court subsequently heard the parties on the separation issue, the necessity of the Minister pleading and the continued funding of the main claimant's legal costs by the Commission. On 3 July 2020 the court ordered a separation, but only in respect of Telkom and directed that it was unnecessary for the Minister to file a plea.

13. Also on 3 July 2020 the court issued the following ruling and directions which are relevant to the present application and counter application.

⁴ Pre-Trial Bundle p24 para 31

- “ 7. The Main Claimants are required to state in writing by 31 August 2020 which cadastral units that have been Gazetted fall within “the area between Klaserie river and Olifants river and Blyd river encashment area and all the areas bordering the Drakensberg mountain escarpment”
8. Each of the claimants is required to state in writing by 31 August 2020 which of the cadastral units that have been Gazetted

a. are not subject to any claim;

b. are no longer being claimed

c. are accepted as non-restorable;

9. Each of the witness statements of each of the claimants must contain a clear and concise statement, in chronological order where applicable, of the following;

..... “

(emphasis added)

14. Among the issues to be dealt with in the witness statements referred to in para 9 of the 3 July ruling and directions were:

- “ 2. In respect of each element the witness statement shall identify the specific claimed property to which the material fact relates, such property or fact being identified by reference to:

a. the cadastral information registered at the relevant Deed Registry office;

b. the portions of the claimed farm to which the witness’ statement relates, according to the cadastral portions as they existed at the time

of dispossession and also their present descriptions; the specific paragraph in the report of Professor Delius;

.....

4. *In relation to the properties published in the Gazette but which either were not mentioned in the claim form to which the witness's statement relates or were not verified in the referral report;*

- a. *The material facts on which a claim in respect of such property is persisted with;*

- b. *The material facts to support a claim to the property in question*
(emphasis added)

15. It will be evident from these extracts of the ruling and directions of 3 July 2020 that the main claimants were required by 31 August 2020 to have dealt in their witness statements with all the land that had been gazetted even if it had been omitted from the referral and to limit the issues in respect of the land gazetted in respect of both the main claimants and the competing claimants by identifying if any of the land gazetted is either not subject to any claim, is no longer being claimed and equally importantly is accepted as non-restorable. The latter is important as any land which is accepted as not restorable releases the landowner from the litigation and from the restrictions imposed by s11(7) over the land, the issues being solely between the claimants and the Minister.

16. It will also be evident from the 3 July rulings and directions that once complied with, the case would be well on the way to trial readiness. Even the aerial photographs had been obtained while outstanding expert reports would still have to be provided and meetings between the experts arranged.

17. The court then heard the application to review the refusal of the Commissioner to continue funding the litigation costs of the main claimants. Of relevance is that the main claimants had also sought a stay of the entire proceedings until the final

outcome of their review through appeals, which, if permitted, would have delayed the finalisation of the pre-hearing further.

18. On 1 February 2021 the court dismissed the review application and made the following order:

- "1. *The application brought by the first claimant, being the Moletele Community, to stay the proceedings under the above case numbers pending the outcome of its review application is dismissed.*

2. *The application to review the decision of the Land Claims Commissioner of 9 July 2020 withdrawing the arranging of legal representation for the first claimant at the expense of the Commission on Restitution of Land Rights under section 29 (4) of the Restitution of Land Rights Act 222 of 1994 is dismissed.*

3. *The first claimant is to pay the opposed party and party costs of the Land Claims Commissioner and the Steyn Group of landowners, and in the case of the Land Claims Commissioner such costs shall include the costs of two counsel.*

19. A number of oversight pretrial conferences were held to deal with issues raised by the parties regarding extending times and the inadequacy of responses. However on 30 September 2023 the main claimant's attorneys filed a "*Notice of a Land Surveyors Report*" which the main group of landowners contended (subsequently in a practice note in April 2024) enlarges the Moletele claim by almost 50%. The main claimant's attorneys had also requested confirmation from the Commission that "*all the owners of properties falling within the boundaries of the land claim have been given formal notice of the claim*".

20. The pretrial conferences of 16 May and 12 August 2024 dealt with the issues raised by the main claimants' notice of September 2023 initially by way of directions and, when not complied with, by way of the order given on 12 August.

21. Mr Notshe for the main claimants accepts that they had not complied with the direction of 16 May but contends that the order of 12 August was complied with. The Commission challenges that the order of 12 August has been complied with and opposes the application for condonation as to both the adequacy of the explanation for the failure to comply with the direction and the merits of their case for not being obliged to respond to the directions (of 16 May) or the order (of 12 August) in a manner other than that contained in their Notice of 12 September 2024.
22. The terms of the directions and order which the main claimants were to comply with and their response by way of the Notice of 12 September will now be set out.

THE COURT DIRECTIONS AND ORDER AND THE MOLETELE NOTICE

23. The directions of 16 May 2024 were that:

By 30 May 2024 the main claimants will indicate whether they wish to add additional land to their claim, and should they wish to do so all such additional land will be identified in the process.

The main claimants were to identify all such additional pieces of land in an application or process they intended to take by 30 June 2024

Unless there are special circumstances no additional land may be included or sought to be included after 30 June 2024.

24. The order made at the pretrial conference on 12 August provided that:

"By Friday, 13 September 2024, the main claimant will identify if there are any additional pieces of land claimed to those that have been gazetted.

A failure to do so will preclude the main claimant from contending that there is any other additional piece of land that ought to be claimed, and that if they

do so they will have to bring a substantive application, including an application for condonation."

25. On 12 September the main claimants sent the following notice;

"... be pleased to take notice that the main claimants in the above mentioned matter are unable to comply with the directives given by Judge Spilg on 16 May 2024 and 12 August 2024 because the aforesaid directives are invalid for the following reasons:

- 1. The aforesaid directives were issued at a case management meeting presided over by Judge Spilg.*
- 2. Judge Spilg gave directives to the effect that the main claimants should give notice to indicate whether they intend to extend their claim to include areas covered by the land surveyors report. In the event that the aforesaid claimants wished to extend their claim they should institute an application to that effect.*
- 3. The Judge further directed that in the event that the aforesaid claimants do not institute such an application they will be prevented from leading their expert evidence of the land surveyor.*
- 4. The directives given by Judge Spilg go to the substance of the dispute between the parties,*
- 5. The powers of a Judge presiding over a case management meeting are limited to procedural issues in the case. They do not extend to substantive issues. The substantive issues are dealt with in the form of pleadings so that an order of court can be granted or refused.*
- 6. In the circumstances the directions issued by Judge Spilg are ultra vires his powers as a Judge presiding in a case management meeting.*

7. *Accordingly Judge Spilg issued the directives ultra virus his powers, and the directives are invalid."*

26. At this stage it is necessary to point out that the notice does not comply with any of the operative parts of the respective directions and order which, as will be demonstrated, followed an undertaking by Mr. Madlanga in the presence of his attorney (via remote hearings);

23.1. firstly on 16 May, that the main claimant would identify whether it wished to add additional land to its claim by 30 May 2024; and

23.2. subsequently on 12 August, that the main claimant would identify by 13 September 2024 any additional pieces of land claimed to those that have been gazetted

27. It is also necessary to point out that the notice in its terms seeks to attack the validity of the directions and orders but does not constitute an application to declare them or any part of them invalid.

This raises the issue of whether it is competent to ignore a court order on grounds of invalidity absent a successful application to declare it invalid. This court understood it to be a trite proposition that a court order must first be set aside if a party believes that it is ultra vires, for otherwise it undermines court processes and is no different than taking the law into one's own hands⁵.

28. In putting the notice in context, the court again refers to the sections of the Act, and now their counterparts in the Land Court Act 6 of 2023, as well as the court rules in relation to the holding of conferences.

APPLICATIONS BEFORE THE COURT

Main Claimants' Condonation Application

⁵ This forms the underlying principle for spoliation orders

29. On 17 January 2025 the main claimants brought an application seeking condonation. This related only to their noncompliance with the 16 May directions, claiming that they had complied with the 12 August order.
30. In their application the main claimants aver that at the conference held on 16 May 2024 they were directed to indicate by 31 May 2024 whether they persisted to claim land as indicated in the boundary lines marked on their land surveyor's map and that, if so, they should institute application proceedings to that effect by 30 June 2024.
31. In their founding affidavit the main claimants also referred to the subsequent conference of 12 August. They said that at this meeting, it was explained that non-compliance with the directive of 16 May was because their legal representatives were unable to take instructions since they had not received the minutes of the earlier meeting. They add that the land claimed "*was described in the historical names and not the current description of the properties*"⁶.
32. The main claimants also averred that at the 16 May case management meeting they had adopted the position that any party who wished to raise an objection to the admission of their land surveyor report, which they intended using at the trial (to determine the extent of the land claimed) should do so in the form of a notice and that the issue would be dealt with by the trial court.
33. While this may have been the position initially taken by the main claimants, certainly after Mr. Dodson on behalf of the Commission had indicated at the 16 May meeting why it believed that such a course was impermissible and that there were cost risks if persisted with⁷, Mr. Madlanga on behalf of the main claimants (and as stated earlier, with his attorney on-line) when asked to respond to Mr. Dodson said:

⁶ FA p5 para 6

⁷ Prior to Mr Madlanga responding, both Mr Maluleke for the competing claimants and Mr van der Merwe for a main body of landowners supported Mr Dodson's position regarding the impermissibility of the then position taken up to then by the Moletete legal representatives on behalf of their client.

"Thank you, Judge. Judge, what I should say is that I am in your lordship's hand on this one now. After having heard advocate Dodson submissions, I am in your Lordship's hands. Thank you.

The court then responded:

" No, no. Advocate Dodson is saying that your client must either say that they are not pursuing these additional claims, or they are. So, by when do you want to respond to that? Advocate Dodson and Advocate van der Merwe have referred to case law which they say indicates that it is not permissible. So I would like to give you an opportunity and your client an opportunity, to consider whether or not these are going to be retracted or not, and if not, to provide a time by when you will bring an application to have them introduced, clearly identified, but that is going to be the last opportunity so that everything needs to be sorted out one way or another. Either there is an acceptance of the position as contended for by the other parties, and if not, then an application needs to be made to introduce these claims before a court, or whatever the process is, but we need timelines....

... So, you can identify, and if on consideration of case law ... that it is not possible, well, then that ends that. But if you believe that ... these should be pursued, then they have got to be pursued by a particular time after that."

Mr. Madlanga replied:

" Can I then request ... that the date for the indication, whether this is pursued or not, be 30 May."

34. The court was amenable to the request and added, that if the alleged extended area was being pursued, the main claimants were to indicate the steps they needed to take to introduce them into the claim; whether they needed to direct the Commissioner to Gazette such land or whether it is to be done by way of an

application for direct access or by way of any other appropriate application or process to enable any additional pieces of land to form part of the referral and that this was to be done by 30 June.

Mr. Madlanga said that he was happy with that date.

35. The court then summed up that the main claimants were to identify all such additional pieces of land in such application or process as it intended to take by 30 June, failing which, unless special circumstances existed, no additional land may be included or sought to be included after that date. The court adding *"everyone needs clarity and we need a cutoff."*⁸

36. The main claimants contend that, what they refer to as the case management meeting of 12 August, the court was informed that the surveyor report did not extend the extent of the claim lodged by it and that the report on the description of the claim was based on *"the historical names of the land and not the registered names."*

37. The founding affidavit in the condonation application then purports to records that the court directed the main claimants to indicate by 13 September 2024 *"whether or not there were any additional pieces of land added to the claimed land."*

This is incorrect. The transcript reads as follows in relation to the direction and order made at the case management meeting of 12 August :

"That by Friday, 13 September, the main claimant will identify if there are any additional pieces of land claimed to those that have been gazetted. A failure to do so, and I am making that as an order. A failure to do so will preclude the main claimant from contending that there is any other additional piece of land that ought to be claimed. And that if they do so, they will have to bring a substantive application, including an application for

⁸ Transcript of 16 May 2024 pp 18 to 20

condonation."

Immediately after this was read out, the transcript records the following exchange between the court and the main claimants' counsel:

" COURT: Mr Madlanga, have you got that?

MR MADLANGA: Yes, Judge, I got it. Thank you.

COURT: Right, no waiting for minutes. This is my order. It has now been given. It is a direction and an order. Okay. So, now we have covered that.

The court then moved onto other items on the agenda.

38. It is evident from the exchanges on 12 August that the court wished to ensure that the main claimants' legal representatives acknowledged that the terms of the direction and order had been noted.

39. It is equally clear that the court was not concerned with how the claim form described the land, which may lead to an obfuscation of the issues then before the court, but whether the main claimants were contending for any land in addition to that described in the Gazette notice.

The point being; however land is described in a claim form, it is the responsibility of the RLCC ⁹, to identify the claimed land by reference to each of its cadastre recordings (i.e. the title deed description at the relevant Deeds Registry) and the identity of its registered owner in each case so that the Gazette notice required under s 11(1) of the Restitution of Land Rights Act 22 of 1994 (*"the Act"*) can be published.

⁹ See the reference to the RLCC in s 11(1) and to the Commission in s 12 read with rules 3, 5 and 6 of the Rules Regarding Procedure of the Commission (GN 703 of 13 May 1995). See also *The Nyavana Traditional Authority v MEC for Limpopo Department of Agriculture and another* [2020] ZALCC 12; [2021] 1 All SA 237 (LCC)

40. This is expressly provided for in Commission Rule 13(1) which requires that the s 11(1) notice sets out, amongst others, the title deed description, its extent, the title deed number, the name of the current registered owner and any other detail that would help interested parties in the identification and location of the property that forms the subject matter of the claim.

Section 11(6) also requires the RLCC to give written notice to every landowner, and any other party who may have an interest in the claim, of the publication of the notice and refer that person to the restrictions on disposal, development (including rezoning) or encumbering the land, and those affecting the *status quo*, including the continued occupation by a land claimant or the improvements on the land.

41. The scheme of the Act in so far as it concerns the extent of this court's jurisdiction in restitution claims is straight forward.

Firstly, the court exercises jurisdiction only in respect of land claims which were lodged no later than 31 December 1998, subject to the provisions of the Restitution of Land Rights Amendment Act 15 of 2014 (*"the Amendment Act"*) should it be reenacted (which extends that date to 30 June 2019).

Secondly, in relation to referrals by the Commission under s 14 of the Act, which is the process by which the present claims are before the court, the court enjoys jurisdiction to determine restitution matters in respect of land which has been identified in a Gazette notice published under s 11(1). The RLCC has the power to withdraw or amend the s 11 (1) Gazette notice by including or deleting land provided it was described in the claim form lodged before the December 1998 cut-off date (again subject to the 30 June 2019 provisions of Amendment Act if it is reenacted).

42. This can only be lawfully effected under the Act through s 11A and provided its provisions are complied with. This includes giving any affected party an opportunity to be make representations¹⁰. In the case of additional land being gazetted, the

¹⁰ See ss 11A(2) and (3)

RLCC may do so without giving notice if there was an obvious error in the original s11(1) notice or in every other case by giving notice and calling on affected parties to make representation before publishing a notice to include additional land in a gazette notice.

43. All these steps by the RLCC to give notice under s 11(1) or to subsequently include additional land under s11A is without prejudice to any competing claimant or landowner's rights to challenge the claim on any competent ground, including that the land claim never included the land which was gazetted.

44. *Makhuva-Mathebula Community v Regional Land Claims Commissioner, Limpopo and Another* [2019] ZASCA 157 is directly in point on the question of the land description contained in the claim form. In that case the RLCC had, during its investigations, queried an anomaly between the land identified in the claim form and the contents of an attached map. On receiving the reply, the RLCC was satisfied that the claimant had intended to claim only the land identified in the form itself. The Supreme Court of Appeal held that the claimant was bound by its description of the land as set out in its claim form and the answers given by it to the RLCC during the latter's investigation of the claim; it could not add to the land that had been so identified *and* then gazetted.

In the present case the main claimants do not dispute that there was a process of investigation which preceded the gazetting. In their condonation application Mr Chiloane, who is a member of the land claims sub-committee of the Moletete CPA, which authorised bringing the application by resolution of the CPA, said that;

*"the land claim was described in the historical names and not by their current description of properties"*¹¹

45. In its answering affidavit the RLCC, Mr Maphutha, stated that the claim forms comprised a number of documents. These were provided to the court. They

¹¹ See paras 1, 3 and 6 of the FA in the Condonation Application

comprised annexes RR1 to RR4 of the Referral Report. The RLCC submitted that the;

"farms were claimed with express reference to particular farm names as reflected in the cadastre. This then formed the basis upon which farms were published in the Gazette notices. A generous approach favouring the applicant and competing claimants was adopted, so that the Commission erred on the side of inclusion of farms where the name of a farm in a claim form was unclear. I am therefore confident that all land which may be subject to the claims has already been included in the Government Gazette notices. Farms not included in the Gazette notices do not therefore fall within the claim."

This statement is found in para 17 of the answering affidavit.

46. Furthermore, the RLCC referred to the process of gazetting and referring the claim to court. After the initial referral, which was bad and withdrawn due to challenges by landowners, a process was adopted which extended over a period of years where all the parties were represented by attorneys and counsel and they all sat down and agreed exactly which farms would be published in the Gazette. The gazetting itself was done in phases.

47. It was also averred that this process was conducted on the basis of complete transparency and co-operation between the parties *"including the applicant (i.e. the present main claimants), which was legally represented by attorneys and counsel throughout"*

48. Three relevant Gazette notices were published identifying the land subject to the claim. They were the Gazette notices of 1 August 2008, 28 January 2010 and 24 December 2010.

This is dealt with in paras 16 to 19 of the answering affidavit

49. In its answering affidavit the RLCC also referred to an analysis done of the farms identified in the Moletete surveyor's report. The most important aspect is that there are a large number of new farms which have not been gazetted at all and therefore

could not form part of any referral to this court. This is set out clearly in paras 18,19 and 22 of the answering affidavit with the analysis set out in annexure LHM11.

50. Another aspect pointed out by the RLCC is that the parties, including the main claimants, through their legal representatives at the meetings mentioned earlier, had agreed not to include all the farms that are identified in the Gazette notices and that these would form the subject matter of a later referral. An explanation for this has been provided earlier in the judgment. In short, the referral before the court concerns farms which essentially constitute white owned land and exclude farms which were designated for occupation under the then Trust and Land Act. This is set out in para 21 of the answering affidavit.

51. It also bears mentioning that during the pretrial conference of 16 May, which is relevant to the issues now before me, Mr. Dodson expressly referred the main claimants to what he contended were a number of problems facing them if they sought to extend the claim.

Among the difficulties mentioned was that none of the Gazette notices included the farms which appear in the Moletele surveyor's report and that there are judgments which prevent the main claimants from doing so. The other was that the main claimants were impermissibly going behind agreements that were reached at binding pretrial conferences; reference being made to the process where over a period of years the legal representatives of the parties had agreed on exactly which farms would be included in the Gazette notices after the original referral was withdrawn.

52. The court has set out in some detail the relevant paragraphs in the answering affidavit where the issue regarding the identification of the land in the claim forms was set out and the circumstances surrounding the identification of the land and the extent of the present referral, with the RLCC concluding that if any piece of land now appearing in the Moletele surveyor's report was not contained in any Gazette then it could not be the subject matter of a referral and therefore could not be subject to the jurisdiction of this court.

53. These material allegations contained in paras 16 to 22 of the answering affidavit, and for which adequate chapter and verse was provided to enable the main claimant to respond, were all dealt with in six lines by the main claimants. Their reply reads as follows¹²:

"11.2 AD PARAGRAPHS 16 TO 22 THEREOF

I do not wish to deal with the allegations made in these paragraphs until the issue of the regularity of the counter application has been dealt with. I however state that the allegations made in these paragraphs are denied. The claimed land was described in general and historic terms. This is an issue that can only be resolved through oral evidence."

54. In addition the claim forms have been produced to court. It is evident from them that land was described by reference to the farm names and in most cases their cadastral reference. Para 1 of each claim form required the main claimants to identify if the land claimed was rural or urban and if rural (as confirmed by them it was) para 1.1 required them to insert *"If it is rural land, the portion(s), name(s) and number(s) of the farm and district"*.

The main claimants replied in the claim form of 3 July 1995 by identifying farms by name and generally added a number (e.g. Buffelshoek 216 or Camdebon).

In another claim form also dated 3 July 1995, para 1.1 was answered by referring to an attachment marked annexure B. The attachment referred to some 32 farms listed by name and divided into farms occupied by other tribes and farms occupied by whites.

In the subsequent claim form of 8 November 1995, the main claimants identified farms by name and number (e.g. Eden-Fleur de Lys.194, Moriah.83KU) and then ended with *"Epsom-189, all (14) farms, others for negotiation"*.

¹² Para 11.2 of the Replying Affidavit

Finally in a claim form dated 22 July 1998 an additional farm was identified being Blyderivierpoort 595 (possibly 545) KT.

55. To these must be added two sets of correspondence which are included in the claims forms set .

The first is from Mrs D Gilfillan on behalf of Legal Resources Centre (then representing the main claimants), to the Chairperson of the Advisory Committee on Land Allocation dated 30 July 1992. It states the following:

"The land involved in the claim comprises the following farms:"

The list consists of 25 farms which appear to be included in the subsequent claim forms. In the Legal Resources Centre letter, the farms are identified and save on three occasions the identity of the registered owners are included. Attached to the letter is an historic background which identifies 29 farms by name. It appears that these were cross-referenced into the body of the main letter.

The other is a letter from the Moletele Local Government Authority to the Minister of Land Affairs dated 9 September 1994.

It commences in general terms by stating:

"The areas affected the area between Klaserie river and Olifants river and Blyd river encatchment area and all the areas bordering the Drakensberg mountain escarpment.

It then states:

" The following are the names of farms which previously belonged to us and please the fact that there might be name changes to these farms need be mentioned."

(emphasis added)

Then follows a list of 30 farms, all of which appear to have been included in the subsequent claim forms. In any event, the main claimants do not dispute the averments contained in the answering affidavit that the land as identified in the correspondence and claim forms have been duly gazetted pursuant to a process of agreement with the main claimants and their legal representatives and that this had taken place over a number of years.

56. The replying affidavit was delivered on 7 February 2025 and the matter heard on 14 February.

The allegations made in the answering affidavit are self-evidently germane to whether or not a case has been made out for condonation.

57. It is trite that a condonation application must traverse the failure to comply with the court order timeously, including the failure to comply with an undertaking given to the court to provide the necessary responses on time, and also must deal with the merits of its defence, which in this case is its challenge the orders made; namely that the directions and orders of 16 May and 12 August 2024 are *ultra vires* the courts powers as set out in the main claimants' notice of 12 September 2024.

58. It is also trite that whatever a party's view of the competency of a procedure, it must plead over.

59. The main claimants have sought to provide the court with an explanation for their failure to comply with the court direction of 16 May, claims to have complied with that part of the court order of 12 August which required it to identify by 13 September 2024 any additional pieces of land claimed to those that were gazetted, and have offered no defence to the merits as to why they are not bound either by the directions or the orders of 16 May and 12 August save to contend that these are *ultra vires* the court's powers.¹³

¹³ This in itself is a *non sequitur* because the directions of 16 May also precluded the Moletele from introducing ungazetted land after 30 June 2024 absent special circumstances being shown after that

60. As already stated, it is trite that a party in application proceedings must plead over. It is also trite that a failure to engage in the merits amounts to an acceptance of the allegations of the other party where final relief is sought (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 to 635 ¹⁴) and that a bald denial is inadequate, save in cases where the information is not within that person's knowledge or in the other circumstances set out in *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T), which is a case that does not involve the seeking of final relief..
61. The reason is obvious as to why the court required to know, before the matter could be ripe for trial, if there was any land which the main claimant intends to claim in addition to that already gazetted.
62. In terms of the Act the court can only exercise jurisdiction in respect of land which has been gazetted.
- If any substantive rights are affected by allowing a matter to proceed to trial before such land has been gazetted and notice given, it is those of every person who has an interest in the land in question and who has not prior to the trial been given adequate notice¹⁵.
- And a failure to give notice by way of application to court for direct access or otherwise in good time *before* the trial date will result in a postponement of the trial to the prejudice of the other parties in relation to costs. It is necessary to point out that costs will be substantial if the trial is postponed after the first day.
63. Firstly, the parties have estimated that the trial will run for three to six months. There are some nine teams of lawyers¹⁶ which often include senior and junior

¹⁴ In terms of *Plascon-Evans* the evidence on which a court is entitled to base its findings, where final relief is sought on motion and there is not a referral to evidence, comprises the averments alleged "in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent" unless circumstances exist where a denial by the respondent does not "raise a real, genuine or bona fide dispute of fact ... and the court is satisfied as to the inherent credibility of the applicant's factual averment (or) where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers".

¹⁵ This is an aspect of the substantive right to a fair trial under s 34 of the Constitution

¹⁶ This excludes the team representing Telkom in the separated matter

counsel. Accordingly the trial sessions will have to run for several weeks at a time and accommodate the diaries of a large contingent of legal representatives and court personnel, paid experts have to be available and paid as do counsel and their attorneys, transport and accommodation must be provided for most if not all.

Moreover court resources will be wasted and unnecessary costs incurred, in particular if the case is to commence in the area of the claim where the communities reside. This includes the Hoedspruit, Blyde River and Thornybush areas. Those costs, as pointed out by Mr. Dodson at the 16 May 2024 pretrial will be sought from the main claimants. This risk in fact precipitated the main claimants to agree to provide the information by 30 May.

64. In addition there is the further delay which an application at the commencement of the trial would occasion in a matter that should have long since been trial ready.¹⁷

In this regard the court cannot ignore the complaint formally lodged by the competing claimants, the Mnisi Community represented by Mr. Maluleke, who already at the 16 May 2024 conference expressed opposition to any issue which could delay the matter coming to trial. He indicated that their witnesses were old and some had already died and that whereas the main claimants had already received large and valuable tracts of land, the competing claimants had yet to have any land claim determined despite the years that have intervened since their claim was gazetted.

The court also cannot simply ignore the complaints of the various legal teams who between them represent over 500 landowners. They say that after all these years since the matter was gazette and then referred to court they are entitled to have finality without unnecessarily incurring costs.

¹⁷ At the pretrial conference of 29 March 2022 the provisional dates agreed upon by the parties envisaged the filing of expert reports by 20 June 2022 and that the inspection in loco would be held during August 2022. Despite more than two and a half years passing since then, none of these milestones have been reached.

65. The only way in which the matter can properly proceed if a claimant wishes to add land not gazetted after a s 14 referral appears to be by way of direct access. That is a process which, if the land is only identified for the first time on the first day of trial, will result in a postponement to enable due process to be initiated under the direct access to court provisions which are contained in Chapter IIIA of the Act.

And the first days of trial are likely to involve the inspection in loco which the parties anticipated would stretch over a period of more than two weeks. This would mean that all the legal teams with all their experts would have to be in attendance and would have been required to set aside the full period, the fees for which would presumably have been negotiated upfront. The claimants' members¹⁸ involved in the trial and at the inspection as well as individual defendants would also have to attend court.

66. In short; the matter can therefore never be ripe for hearing if there is still land which is sought to be claimed in these proceedings and which has not been gazetted.

This court can therefore not permit the matter to be set down for trial if that is the case. However, due to the lengthy delays in this matter, the court also can no longer delay setting the matter down for trial if a party fails to comply with its own undertakings, or court's own directions and orders.

67. In this case, the first direction affecting the land which is subject to the present referral was given almost five years ago at the pretrial conference held in July 2020 (the court dealt earlier with relevant aspects of that conference). It is also difficult to appreciate how the witness statements required in terms of the directions and rulings given at that conference can fulfil their intended purpose unless they deal with only gazetted land before the case can be trial ready.

68. All this must be known to the main claimants' legal team who practice in this court. If the land was always subject to the claim as contended for, then either it is included in the Gazette notices that have already been published or the main

¹⁸ That is both the main claimants and the competing claimants

claimants would have been expected to raise the issue of outstanding land either during the cursory investigative phase which preceded the s 11(1) gazetting or during the s 11A or s 12 investigation phases prior to re-publication of the Gazette Notices. Furthermore the main claimants would have had the opportunity to do so during the case management process conducted by Gildenhuis J, if not during the discussions between the parties and the Commission themselves.

If land was sought to be introduced at the pre-gazetting stage then the RLCC would be entitled to gazette it as land falling in the claim provided the s 11(1) threshold was met, or if the RLCC had considered the claim to an area of land to be frivolous or vexatious then he or she would have dismissed the claim (see s 11(3)), or if the criteria of 11(1) were not met then the RLCC would not gazette it and would advise the claimant accordingly.

69. An attempt to approach a court on the first day of trial (which it is now clear the main claimants intended to do at least after 12 August after submitting at the one of 16 May to the position taken by the Commission, the competing claimants and the landowners¹⁹) to include land which was not previously Gazetted as part of the claim therefore by-passes all the checks and balances that the Act has put in place to ensure that land claims are only referred to court after a proper investigation phase, placing it in the hands of the RLCC to decide whether the required threshold has been met before a court is seized with the matter and allowing for an investigation by the Commission before that occurs. This too would be known to the main claimants' legal representatives during the years when the land to be gazetted and the referral itself was ironed out during meetings with them and with their agreement.

70. On the basis of the uncontested statements by the RLCC in the answering affidavits, supported by similar statements at the pretrial conference of 16 May 2024 which went unchallenged²⁰, the land identified in the claim was gazetted and

¹⁹ See the earlier cited extracts from the conference of 16 May where the risk of cost orders should the Moletele persist with the position they had taken on the ground that it was impermissible was put squarely on the table prior to Moletele's legal representatives responding as they did. See also para 80 below

²⁰ Especially at para 13

this was pursuant to a process of investigation and agreement by the parties, including the main claimants who were at all relevant times represented by their legal team.

REQUIREMENTS FOR CONDONATION AND EFFECT OF NON-COMPLIANCE WITH AN ORDER OR DIRECTION

71. In *eThekweni Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC) at para 28 the Constitutional Court repeated the two requirements which must be satisfied for the grant of condonation. It said that: "*Two factors assumed importance in determining condonation applications: The explanation furnished for the delay and the prospects of success.*". The court also explained that where the failure is over a period of time an explanation is required to cover the entire period of default.

72. Although a court appears to be entitled to end the enquiry and refuse condonation when the explanation for the failure to comply is unacceptable, in *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at para 41 Cloete JA on behalf of the court, after finding the explanation for the failure to comply with the time limit unsatisfactory said that "*In all the circumstances, a demonstrably good case on the merits would be required before condonation could be considered.*"

73. Under s 25(5) of the Land Court Act 6 of 2023, which came into effect on 5 April 2024, the court at a conference may issue such orders and directions as to the procedure to be followed before and during the trial as it deems appropriate. In terms of Rule 30 which deals with conferences the presiding judge at a conference may make any interlocutory order or give any direction which the court may make or give under any provision of the rules and may investigate any non-compliance with the rules or with any order or direction previously given in the matter and give such orders or directions in relation thereto as may be just, including an order for

costs or a postponement of any hearing. In addition, if any party is present at a conference where an interlocutory order or direction is applied for informally, no further notice of the application needs to be given to that party, unless the court directs otherwise.

74. The types of orders or directions which a court can give under the rules in relation to non-compliance with an order or direction is to *inter alia* strike out the claim, defence or response of the defaulting party, whereupon that party will no longer be entitled to exercise the rights to deliver or file documents, participate in or be represented at the hearing, apply for leave to appeal or participate in any appeal against any order of the court unless the court orders otherwise. This is provided for in rule 32(7) read with subrule (5) and rule 26(2) which deal with the right to participate in a case.

Accordingly the Rules themselves, as do all rules of Court provide that a party may be deprived of a right to proceed if in default of the rules themselves, or of an order (or as with the Land Court a direction) of the court.

THE DIRECTIONS OF 16 MAY and ORDER OF 12 AUGUST 2024

75. The main claimants have only dealt with the failure to comply with the direction issued at the pretrial conference of 16 May which required them to identify all such additional pieces of land by 30 May and pursue such application or process as they intended to take in that regard by 30 June, failing which, unless special circumstances existed, no additional land may be included or sought to be included after that date.
76. It is common cause that the main claimants did not identify all such additional pieces of land either by 30 May, 30 June or at all. This notwithstanding being given a further opportunity on 12 August to expressly identify by 30 September if there are any additional pieces of land claimed to those that have been gazetted, and despite the conversion of the direction into a clear order of court which, also on 12

August, the claimant's counsel acknowledged had been noted by him, this being all done with the main claimants' attorney in attendance.

77. In addition the time limit to provide the information was not imposed on the main claimants- and this was not the first time the main claimants were asked to make it clear whether they intended to add land which had not been gazetted to the claim.

78. The history of the court's direct involvement in the identification of the land in issue arose in April 2024 when attorneys for one of the main groups of landowners, CHM Steyn, compiled a practice note (which was in effect their addendum to a practice note prepared by Mr Dodson on behalf of the Commission).

I take the note up from after Gildenhuys J had been brought in to case manage the matter by giving guidance after a court order had been brought by the landowners in about 2005.

"One of the important issues which was addressed at the early pretrial conferences was to establish the extent of the claim.

The matter was thoroughly debated and considered, and the parties came to a clear and binding agreement as to what extent the claim would be, and to what extent it will be limited with reference to the area claimed.

For the last circa 16 years everyone involved in the Maruleng land claim honoured the agreement referred to above.

On 29 September 2023, out of the blue, Ngoepe attorneys on behalf of the Moletele's filed a " Notice of a Land Surveyors Report" containing a map which enlarges the Moletele claim by almost 50%.

Mr. Ngoepe further requests confirmation from the Commission that" all the owners of properties falling within the(new?) Boundaries of the land claim have been given formal notice of the claim"

it is our submission that the claim cannot be extended now- and it is obvious that the new judge should clarify the situation as a matter of urgency."

79. By this stage the matter had been handed over due to my imminent retirement. In view of these developments I was amenable to continuing running pretrial conferences due to my knowledge of the matter.
80. At the pretrial of 16 May, Mr. Du Plessis, who is counsel for one of the main groups of landowners, raised the issue of whether the main claimants were extending their claim beyond that identified in the Gazette and the Referral Report. Mr. Dodson contended for the Commissioner that any attempt at this late stage to incorporate a huge swathe of new land must be stopped on at least three bases. He claimed that although he had only dealt with a portion of the main claimants' land survey report, a large number of new farms had been introduced.
81. Among the grounds raised by Mr. Dodson is that it was unfair to expand the claim, particularly in relation to the competing claimants who are sitting waiting patiently to have their claims adjudicated and have not obtained any land in the way that the main claimants have. He said it was unfair too to the landowners who have been waiting for 20 odd years to get the matter resolved. It was also unfair to the Commission who have spent hours basically in the middle trying to make the claim manageable.

Mr Dodson then set out the grounds mentioned earlier which included the *Makuwa-Matebula* judgment of the Supreme Court of Appeal. He also contended that the farms which had been gazetted and to which the referral related did not include all the farms identified in the survey report sought to be introduced by the main claimants and then referred to the impermissibility of breaching agreements reached at pretrial conferences which were binding.

This was supported by Mr. Maluleke for the competing claimants. Mr. van der Merwe, for other land claimants, also took the point that by reason of section 14(6) of the Act the court's jurisdiction is effectively precluded unless the Commission has referred the matter to it. He also expressed concern that the additional land now identified may already have been the subject of other restitution claims and could therefore also be impacted by s 35(1).

82. Earlier I mentioned the exchange where Mr. Dotson referred to the cost risk which the main claimants faced in bringing any proceedings to introduce additional ungazetted land later.

83. In view of the position taken opposing any attempt to introduce additional land to the claims, the court engaged Mr. Madlanga as follows:

" ... I would like to give you an opportunity and your client and opportunity, to consider whether or not these are going to be retracted ..., and if not, to provide a time by when you bring an application to have them introduced, clearly identified, but that is going to be the last opportunity so that everything needs to be sorted out one way or another. Either there is an acceptance of the position contended for by the other parties, and if not, then an application needs to be made to introduce these claims before a court, or whatever the process is, but we need timelines.

Mr. MADLANGA; "Just to be clear ... is the question that we should come up with a date as to when the claimants will indicate whether they are proceeding with the claim as allegedly extended, or they are taking out the impugned extension, And then the application, if the claimants decide to proceed with it, it is another date?"

When the court agreed, Mr. Madlanga then requested that the date when the main claimants would indicate whether they were pursuing an extended claim could be 30 May.

84. After both Mr. Dodson and Mr. du Plessis address the court, it added that should the land claimed extend to include land not previously gazetted and not subject to the Referral Report then the main claimants would be obliged to bring an application or appropriate process to enable these additional pieces of land to form part of the referral and that this was to be done by 30 June.

85. The court then added that unless there were special circumstances, no additional land may be included or sought to be included after 30 June. This was to ensure clarity and the need for a cutoff.
86. The court is unable to accept that the main claimants were unaware of the obligation they had expressly undertaken through their legal team to provide the information by 30 May or bring some form of proceedings by 30 June, despite the extent of exchanges on the subject during the 16 May conference, despite the presence of both counsel and the attorney there representing the main claimants, and more particularly the active engagement by counsel who was responsible for requesting that the main claimants be allowed to indicate by 30 May whether or not they intend pursuing any additional land. The court is also unable to accept that despite notes being taken, as asserted was done²¹, they failed to comply.
87. In correspondence the main claimants attorney belatedly called on the court to provide the minute of the 16 May conference. The court confirmed that it was not responsible for drafting the minutes and never previously undertook that responsibility. This is due to resources and time constraints.

However the notes which the legal representatives of the main claimants said they had taken would have confirmed that Mr. van der Merwe had undertaken responsibility for drafting the minutes. If the main claimants had any difficulty in trying to recall what they had undertaken to do by 30 May, then they only had to ask Mr. van der Merwe or, for that matter, any other counsel or attorney who had attended. It is evident that the main claimants did not take either the pretrial process seriously or, at least since the 12 August conference, had decided to ignore the direction.

88. Whether the main claimants, through their representatives had not taken the 16 May pretrial and its directions seriously or were deliberately disrupting the process through non-compliance was a concern which required attention at the subsequent conference called on 12 August.

²¹ This appears from the transcript of the 12 August conference

89. At the 12 August conference Mr. Madlanga offered the following explanation for failing to provide the information by 30 May, let alone bring appropriate proceedings by 30 June.

Judge, on that point, on that issue, we could not take proper instructions because we also needed to first get to the minutes of the previous meeting of the previous pretrial conference.

COURT: Why? Don't you make notes during the course of a pretrial?

MR MADLANGA: We do.

COURT: I do. So, you knew what had to be done.

MR MADLANGA: We do, Judge. But our view is that we should get to the minutes so that we are sure that we properly convey what transpired in the meeting without just giving us, giving clients what we captured, which may not be.

90. But the issue of noncompliance in relation to providing the necessary information or bringing appropriate proceedings does not end on 30 May.

The extract provided earlier of the 12 August conference reflects that the court now insisted that the main claimants make their position clear as to whether or not they sought to include land which had not previously been Gazette. It also expressly asked Mr. Madlanga to confirm that he understood what was required. The court also made it clear that this was no longer a direction but an order.

91. At the meeting of 12 August the exchanges regarding the notification about any additional land was as follows

*"MR MADLANGA: ... to say that **our preliminary view, without having taken proper instructions, as I have just mentioned, is that the report is not extending the claim at all.** Therefore, in fact, the expert who prepared the report for the main claimants prepared it based on the description, on the property description that was given to him by the claimants. It must be borne in mind that the claimants gave the historical property description and*

boundaries in some or most of the instances in which they gave the property description of the claimed land, which may have caused the problems or the confusion that the claim is being extended. Otherwise ...[intervenes]

COURT: Okay. So we are hopeful that the land that has been gazetted is the full extent of land. Is that what we are hoping will be the result of a further discussion with the community, but you cannot bind yourself to it?

*MR MADLANGA: As I say, Judge, **our view is that the land claimed as gazetted is the same land as reflected in the report.** The only confusion that may be there may be as a result of the historical description which has been given to the expert for him to prepare the report. And our submission is that whoever or whichever party that is opposed to the report as it stands, may just raise an objection to the admission of the report as evidence insofar as those impugned parts of the report are concerned.*

COURT: No, no, it cannot work that way because we need, I need, the Court needs to have absolute clarity before we go further as to whether the land gazetted is the land that is being claimed in these proceedings.

(emphasis added)

92. The court then asked the other parties whether they would be agreeable to the main claimants being given until 13 September to report back on whether or not there is any additional piece of land to those that have been gazetted.

Mr Maluleke voiced his objection as follows:

: You should have started with me because this delay affects my clients heavy and because each and every time we come here, there is the delay which is caused by the main claimant, and they have got the chunk of the properties transferred to them. I have nothing. And it is very worrying that they get postponement after postponement, and it is not warranted

The court then agreed to note Mr. Maluleke's concern should there be any further delays on the part of the main claimants.

93. In all the circumstances the main claimants must have understood that it was now to take the court's order seriously and that they had exhausted the patience of at least the competing claimant.
94. Instead of complying with the order informing the court whether they wished to include land that had not been gazetted, the Moletele gave notice that they would not comply with the court order because of their view that it was *ultra vires* the courts powers.
95. It is not possible for any reasonable litigant represented by a capable legal team to believe, having regard to the relevant circumstances, that the operative part of the order which required the main claimants to in effect comply with the undertaking that had been given by their counsel as far back as 16 May could be ignored or that the court had not, as far back as 16 May assisted the main claimants, if they were entitled to add the land to do so formally despite the objections of the other parties and the Commissioner that it was *per se* incompetent to do so.
96. In short, the main claimants were given every opportunity and opening to inform the parties and the court in good time if they were claiming in the referral, which was to be set down for trial dates, any land which had not been gazetted and then to bring appropriate proceedings in good time.
97. The main claimants have given excuses for their failure, which are unacceptable. The answer is simply that the main claimant have since at least 12 August refused to supply the information and still refuse to do so. And they offer no explanation for their continued refusal. They, through their legal team, would also know that the trial cannot proceed if they intend to include land not yet gazetted and that delaying a trial once set down for hearing would be at significant cost and delay to all the other parties.

98. The court concludes that the failure to provide the basic information requested (and earlier I highlighted in bold counsel's statements at the 12 August conference), and then to contend that the court acted *ultra vires* in calling for the information when their counsel had undertaken to provide it (let alone bring the necessary proceedings by dates suitable to them), can only be explained as deliberately frustrating the court's functioning and disrupting the expeditious bringing of the claims to finality in the least costly and most effective way as required by the Act and now by s 25 of the Land Court Act.²²
99. It is now apparent that the main claimants consciously chose after further reflection to revert to their initial position prior to the Commissioner's counsel indicating the costs risks of pursuing what was contended by him and other parties at the 12 May pretrial to be impermissible under the Act.
100. These findings therefore make it incumbent on the main claimants to show, in the words of Cloete JA "*a demonstrably good case on the merits ... before condonation could be considered.*"²³
101. The only defence raised is that the direction of 16 May and the order of 12 August were *ultra vires*.
102. It is clear that the court has the power in terms of the Act, and now the Land Court Act, and also the court Rules to direct and order a party to provide information or bring appropriate proceedings in order to expedite and bring to trial readiness a matter in the least costly manner. The parties were heard on the matter of providing the information which is the subject of the 16 May and 12 August directions and order, and the court exercised its discretion which a litigant cannot unilaterally choose to ignore, let alone second guess.

²² These are the express requirements of s 25(1)(e) which provides that at a conference
 "(1) The Court may at any stage on its own accord or upon the request in writing of either party direct the parties or their representatives to appear before it in chambers for a conference to consider—
 (e) such other matters as may aid in the disposal of the action in the most expeditious and least costly manner.

²³ See the *Wevell Trust* case *supra*

More so where there are other claimants and over 500 landowners who have waited already twenty or so years for finality and at the eleventh hour are to be confronted, as a clear stratagem for whatever reason, by the main claimants with the reality of further delay and unnecessary costs which the court, in the exercise of its judicial discretion, is entitled avoid being incurred.

103. In regard to the sanction if there is non-compliance; simply put the court must be able to make effective orders. It is no use continually requiring a party to comply unless there is an effective sanction. It is a sanction which only took effect because the claimant refused to take certain necessary steps, which in this case it had agreed to at two conferences which were held three months apart from each other.

104. The sanctioning part of the directions and order were not final in effect. Both provided that the main claimants could still show cause for non-compliance and of the merits of introducing any additional land to that already gazetted. It was their election, and in their own hands, as to whether the sanction would be imposed. They only had to comply with their undertaking to avoid such consequences-consequences which the court Rules permit.²⁴

This appears from the general rules of court which preclude a party from pursuing a claim or raising a defence if it fails to comply with court rules, orders or directions. The provisions of rule 32(7) read with subrule (5) and rule 26(2), which have already been dealt with, are to this effect. The direction of 16 May and the court order of 12 August fall within the application of these rules and their purpose.

105. It is clear also that the parties had agreed to separate the referrals. There is nothing to preclude the main claimants from pursuing any other claims for land which has not been gazetted; just not in the present proceedings under the

²⁴ Compare AG v DG [2016] ZAGP JHC 234 ; 2017 (2) SA 409 (GJ) . There the respondent petitioned the Supreme Court for Appeal *inter alia* on the grounds that the trial court could not order his incarceration if he failed to comply with its order to pay the outstanding maintenance within the further time afforded. The petition was refused. In refusing leave to appeal at the earlier stage I held that it was the respondent's election to submit to the sanction imposed if he failed to pay. He was to "*Pay with funds that are clearly accessible to him or face imprisonment. It is his election*".

Referral Report to which it relates, and which must now be brought to trial readiness and have trial dates allocated.

106. Accordingly there were no grounds for contending that the court directions and order were ultra vires and the defences raised for not complying with the operative part and the subject matter of the directions and of the order of 16 May and 12 August fail.

107. The condonation application is therefore refused.

COUNTER-APPLICATION

108. The counter-application is brought by the Commission for an order declaring that the referral and the case number LCC 206/2010 shall be confined to the farms listed in annexures NR1A and NR1B to the notice of referral.²⁵

109. The main claimants object to the counterclaim on the grounds that it is incompetent. It is not.

Save by reason of common law exceptions, a respondent is always entitled to bring a counterapplication, particularly if it concerns the same subject matter and evidence or point of law which requires traversing. The rules of this court, which refer back to the Uniform Rules of Court where there is a lacuna say as much. The only exception that comes to mind is in relation to spoliation orders where the requirement that no one may take the law into their own hands overrides all other considerations.

110. No such exception arises here, nor has Mr Notshe been able to refer me to one. I therefore find that the opposition to the counter-application has no merit.

²⁵ Although the notice of counter-application is signed by the State Attorney on behalf of both the Commission and the Minister of Land Reform (the State Attorney representing both at this stage of the proceedings), the body of the application only seeks orders on behalf of the Commission.

111. Secondly, the main claimants were obliged to plead over. A litigant is not entitled to take the risk that its objection is sound or that its objection must first be heard before it is obliged to plead over. This is well established, for otherwise it may feed into the hands of those who seek delay when they have no defence to the merits.

112. In the main proceedings for condonation the main claimants could produce no argument or case law to support a submission that this court has jurisdiction to hear a restitution claim in respect of land which has not been gazetted. However the claim form may have been worded, the point remains that this court is seized with a matter which must be brought to trial in respect of only a claim to land which has been gazetted.

And there is no application or other procedure brought before this court to bring any other piece of land within the jurisdiction of the court other than the land identified in the Gazettes, despite the main claimants being given ample opportunity to do so, whether during the case management meetings held all those years ago before Gildenhuys J or even up to a year ago.

113. The main claimants have been well aware for a number of years that the competing claimants are entitled to bring their claim before the court, and they can only do so within the same referral which is presently before it and to which the main claimants are also a party. The main claimants are also aware that all landowners are entitled to finality and that, but for them holding up the proceedings now for almost a year since 16 May 2024, this case could have been trial ready.

114. Any attempt by the Moletele to bring an application or other proceedings that will introduce other pieces of land not yet gazetted into the present referral will result in unwarranted and extended delay. They were given enough opportunity to regularise their position but instead took a decision not to and wait until the trial actually commences.

115. It is also apparent from submissions made by other parties that, including land not previously identified by agreement between the parties (which included the

main claimants properly represented) to be the subject matter of the present referral, can lead to interminable delay and incur unnecessary costs.²⁶

116. It is clear from this court's findings that the main claimants intend to bring the issue forward only at the eleventh hour, having been given ample opportunity to do so, despite being appraised of the other parties' positions²⁷.

117. In all the circumstances the court must cut the gordian knot. And this brings me to those parts of the directions and the order which may still be considered extant to the extent that they still afford the main claimants an opportunity to approach a court to include ungazetted land if special circumstances are shown or a substantive application is brought which includes an application for condonation (the latter being contained in the order of 12 August in respect of which the main claimants did not seek condonation, claiming that they did not have to).

118. It is therefore clear that this court's directions and the order of 12 August 2024 have not achieved the objective of the Land Court Act, the Act itself and the court rules. Only the order sought by the Commission its counter-application will.

The reasons to summarise are; the court was unsuccessful in issuing the directions and making the orders it did in May and August last year. The only effective way of bringing this matter to trial expeditiously and in the least costly manner, after the main claimants had been given every opportunity to get their house in order, if they could, is to accede to the counter-application. In doing so the court accedes to the trite proposition stated earlier, that only land which has been gazetted can be subject to a court order for restitution. It will also enable the trial in respect of land which has been gazetted in respect of both the main claimants and the competing claimants to proceed as it now must.

²⁶ These costs are not only those of the several hundred landowners but also a number of sets of costs which would be borne ultimately by the *fiscus*. These costs would include those in respect of the Commission as the participating party, the competing claimants as it receives State funded legal aid, and the Minister of Land Reform and Eskom as defendants remaining in the main proceedings.

²⁷ If all the land claimed has been gazetted (as was the possibility mentioned by Mr Madlanga in one of the highlighted extracts from the transcript of the 12 August conference) then the legal representatives of the main claimants would have been obligated to say so by now

119. It is necessary to add that the *locus* of the Commission has not been challenged. I believe that as the body responsible for giving effect to the Act generally and for bringing land restitution matters to finality it has a sufficient interest in opposing the condonation application.

120. For reasons which are dealt with under the costs heading, the court considers that the main claimants have abused its processes and have unduly delayed this matter proceeding to trial to a sufficient degree to warrant granting the counterapplication in favour of the Commission, as it will enable the trial itself to proceed in the most expeditious and least costly manner as required by our law.

COSTS

121. Earlier in this judgment the court mentioned that the main claimants themselves took the position that any decision of the RLCC stood until taken on review. A litigant should maintain a consistent principled position. The main claimants have not.

Mention was also made earlier that as far back as three July 2020 the main claimants agreed to prepare statements of witnesses that would be provided by 31 August 2020 dealing with all the land claimed. These statements were due four and a half years ago. Their surveyor's report surfaced almost one and a half years ago, yet they wish to wait until the first day of trial and disrupt the proceedings. This in the face of the statements made by their council at the conference of 12 August which have been highlighted.

122. On 28 July 2021 I was obliged to give a judgment in respect of the provision of continued funding for litigation out of State resources that was insisted upon by the main claimants by way of an application for review against the Commissioner and a stay of proceedings pending the final outcome of that review.

123. In that judgment the court mentioned that the Commissioner had given full reasons for refusing to continue funding, yet the Moletele had persisted. The court also indicated that however they wished to argue the point, the facts were straight forward: Although the Moletele had initially required funding some ten years earlier, since the matter was referred to court in 2010 significant amounts of commercially exploitable land had been transferred to them under the Act. At the time they sought continued funding for litigation, State land and significant riparian rights had been transferred to them which was yielding an annual revenue stream of over R20 million and enabled them to have accumulated reserves (in other words undistributed after tax profits built over time) of close on R141 million.

124. This court in its judgment said the following :

“ Despite this, they continue to also receive funds earmarked for indigent communities and individuals. The fund which provides the finances for litigation is not a trough; it is taxpayers money intended by legislation for a remedial purpose. The applicants’ decision makers should have known better and have no excuse.

They are members of a community which itself has known hardship and was rendered indigent through the greed and racial oppression of others and itself sought and obtained funding which enabled the members to secure what they have now.

I repeat; if anyone should know better it is them.

This case (i.e., for continued legal funding) is therefore also about avarice, taking what is not meant for the applicants and about violating our constitutional construct of ubuntu.²⁸

²⁸ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 237 per Madala J; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) per Ngcobo J (at the time) at paras 51 and 73; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para 71 per Moseneke DCJ. See also *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC) at paras 17

125. In its judgment of July 2021 the court, when dealing with the application to stay proceedings pending the final outcome of review proceedings mentioned (at paras 46 and 47) its concern ;

".... that the applicants have adopted an unnecessarily rigid approach which may have driven costs up unnecessarily. By way of illustration the engagement of Telkom appears to have resulted in costs that could have been readily avoided, as too with the present application which has no merit and was ill advised

Equally important in respect of the application to stay proceedings is that the competing claimants have had none of their claims determined while the landowners have been prejudiced as a result of the uncertainty of the litigation which has dragged on for such a lengthy period. Time is also no one's ally in litigation save for those who suffer no adverse consequences."

That was said in July 2021

126. The judgment of July 2021 also dealt with the courts concern regarding unnecessary litigation. It is apposite that the factors which weighed with the court in not making special orders at that stage be repeated because the main claimants and their legal representatives have failed to heed them. I said the following:

"57. What I have said, and am about to say, is with a heavy heart. I have come to know this relatively small community of legal practitioners and believe that the working relationship with the Court is a good one. Nevertheless, I cannot shirk my responsibilities to litigants generally and more particularly the individual members of the applicants' communities going forward.

and 35 and especially Victor AJA at para 207 to 210 citing *Makwanyane* and *Everfresh* in relation to the constitutional value of ubuntu permeating the general body of our law.

58. *A cost order against the applicants depletes the amount available for distribution to each member and, exponentially, the next generation of a claimant community.*

59. *The options available to a court are few.*

A court can hold to account those within the applicants' communities responsible for this wholly unnecessary litigation while debarring them from having recourse to the applicants' funds whether held via the CPA or otherwise.

A court can also consider holding one or more of the legal representatives to account. This would entail a separate enquiry as to whether the obdurate attitude of the client was the real cause. And if it was, whether despite their responsibilities as officers of the court the lawyers were bound by the instructions, and whether any one or more of those responsible for persisting with this irresponsible challenge to the Commissioner's decision should be deprived of their costs aside from paying the costs of the other litigants de bonis propriis- or whether on circumspection such orders would stifle vigorous and independent representation.

60. *Each of these considerations are raised in light of a fundamental concern on the part of this Court; that the ordinary members of the applicant communities should not be prejudiced by sanctionable conduct taken in their name, but not necessarily with their approval.*

127. The court concluded that:²⁹

The Court however has a greater responsibility to the applicants' individual members and looking forward both the decision makers and

²⁹ At para 61

the legal representatives are implored not to embark on spurious litigation. If the court in the future finds on the merits that spurious litigation has been embarked on by any party, then it will enquire as to who is responsible and determine whether a party is obliged to pay for the folly of others or whether the individuals responsible should do so personally. (emphasis added)

128. The court did its best to inform the legal representatives of its concerns going forward and said:

"What I have said, and am about to say, is with a heavy heart. I have come to know this relatively small community of legal practitioners and believe that the working relationship with the Court is a good one. Nevertheless, I cannot shirk my responsibilities to litigants generally and more particularly the individual members of the applicants' communities going forward.

129. The caution set out in that judgment has not been heeded and the court cannot be expected to turn a blind eye, notwithstanding the effect it may have on our small community, when a party persists with spurious litigation, which to the knowledge of the main claimants is disruptive and negates the object and purpose of bringing matters to trial expeditiously and avoiding unnecessary costs. This court cannot shirk from its responsibilities of acting impartially and without fear, favour or prejudice.

130. The failure to comply with the directions and orders in the present matter, the notice to set them aside and the condonation application itself, still without providing the information required, was spurious.

131. In the present matter the Commission applies for costs on the attorney and client scale.

This is a clear case where it should be granted for reasons that should appear clear from the judgment.

132. The question is who should pay these costs.

The main claimants are well able to pay for failed litigation and should do so particularly where they continue to delay the matter from finalisation and put all the other parties at risk of incurring unnecessary legal costs.

133. However it is not clear whether the community as a whole or the CPA Committee members are in fact benefitting from these actions. In part my concern arises because I already raised concerns about the CPA's financial accountability to the Moletele community in the judgment of July 2021.³⁰

134. Accordingly a suitable order is made which calls on the CPA committee which heads the community, and which was responsible for bringing the condonation application by way of the resolution referred to earlier, to show cause why each of its committee members should not be personally liable to pay the costs *de bonis propriis* as opposed to the community as a whole. An order is also made for the applicants' attorney and legal counsel to show cause why they should not be deprived of the fees in bringing the application for condonation, the notice of 12 September and of attending the conferences of 16 May and 12 June where its deliberations were ignored whether in whole or in part or why the CPA Committee members should not personally bear these costs of their legal representatives *de bonis propriis* and not the community as a whole.

ORDER

135. The following order is therefore made:

1. *The application for condonation brought on behalf of the claimants under case number LCC 206/2010 (hereafter referred*

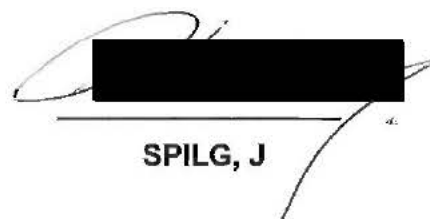
³⁰ The main claimants had contended that all assets acquired were illiquid. It required a court order and further delay before the financials were produced which clearly showed that this was just not so

to as the “main claimants”) is dismissed with costs on the attorney and client scale in favour of the Commission on the Restitution of Land Rights (“the Commission”) , such costs to include the costs of two counsel, the liability for such costs to be determined at the hearing provided for in paras 3 and 4 below.

2. *The counter-application is granted and the referral under case number LCC 206/2010 shall be confined to the farms listed in annexure NR1A and NR1B to the notice of referral, the costs to be on party and party scale C in favour of the Commission, including the costs of two counsel, such costs to be borne by the main claimants. This replaces the directions and order of 16 May 2024 and 12 August 2024 respectively.*
3. *Each member of the Committee of the Moletete Communal Property Association (“the CPA Committee”) who passed the resolution of 16 January 2025 authorising the application for condonation, such resolution being annexure A to the application (“the said resolution”), shall show cause to this court on Tuesday 17 June 2025 at 10am whether each of them personally and not the main claimants per se should bear the costs order as set out in para 1.*
4. *In order to deal with the liability for paying the costs order as set out in para 1:*
 - a. *By no later than Friday 16 May the main claimants shall deliver to the court;*
 - i. *a minute of the meeting and a note of those who attended (if not contained in the minute) in terms of which the said resolution was passed identifying the members of the CPA Committee who were present;*

- ii. *a list of office bearers of the CPA Committee together with their physical addresses and emails for purposes of service of this order.*
- b. *By no later than Friday 23 May the Commission shall serve on those persons identified in the documents provided under sub-para (a), and should no such document be provided, on the persons who are identified as members of the CPA Committee in the most current official returns required under the Communal Property Association Act 28 of 1996.*
- c. *By no later than Friday 13 June 2025 each member of the CPA Committee shall file an affidavit setting out why they should not be held personally liable for such costs jointly and severally with every other member of the Committee having regard inter alia to any meetings held with the main claimants whereby they obtained specific authority to bring such application in any general or special meeting and the precise information provided and the minutes of such meeting or meetings to enable the court to determine the details that were provided at such meetings to enable an informed decision to be made by those in attendance.*
- d. *In the event that no such affidavits are filed, or no member of the CPA Committee appears at the hearing on Tuesday 17 June 2025, the court will determine liability for the said costs on the papers presently before it including those in other applications that have been determined by this court in matters involving the claimant community and which include the review application brought against the Commissioner by the main claimants relating to the funding of legal costs.*

5. *Each of the legal representatives of the main claimants, being its attorney of record and senior and junior counsel involved in the said condonation application shall show cause to this court on Friday 25 July 2025 at 10am whether each of them should not be deprived of their costs in relation to the conferences of 16 May and 12 August 2024 and the application for condonation referred to in para 1 above as well as the main claimants' Notice of 12 September 2024, or whether such costs should be borne by the CPA Committee members personally.*
6. *In order to deal with the issue of the legal representatives' fees as set out in para 5 above:*
- a. *By no later than Friday 4 July 2025 each legal representative shall deliver written submissions as to why he should not be deprived of such costs or why the claimant community as opposed to the CPA Committee members personally should not bear their costs,*
 - b. *By no later than Friday 18 July 2025 the CPA Committee shall deliver written submissions as to why, if its legal representatives are not to be deprived of costs, each of them personally (and jointly and severally), and not the main claimants, should be liable for such costs;*
 - c. *the main claimant's attorney shall ensure that this order is served on each CPA Committee member by no later than Friday 16 May 2025 and the returns of service shall be filed at court by no later than Wednesday 21 May 2025.*



SPILG, J

DATE OF JUDGMENT AND ORDER: 5 May 2025
DATE OF REVISION: 7 May 2025
FOR THE MOLETELE CLAIMANTS: Adv. V S Notshe SC
Adv. Z Madlanga
Ngoepe Attorneys
FOR COMMISSION: Adv. A Dodson SC
Adv. M Manetje
Maluleke Attorneys