



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

CASE NO: LCC195/2021

Before: Bishop AJ
Heard on: 26 May 2025
Delivered on: 30 May 2025

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
30 MAY 2025 DATE	 SIGNATURE

In the matter between:

**CHIEF LAND CLAIMS COMMISSIONER: COMMISSION
ON RESTITUTION OF LAND RIGHTS**

First Applicant

**REGIONAL LAND CLAIMS COMMISSIONER, LIMPOPO
PROVINCE**

Second Applicant

**DIRECTOR-GENERAL: DEPARTMENT OF RURAL
DEVELOPMENT AND LAND REFORM**

Third Applicant

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM

Fourth Applicant

and

**HLOMELA LAND CLAIMS – MALAMULELE
STEERING COMMITTEE**

First Respondent

MABASA SAMUEL MUKWACHANI

Second Respondent

CHAUKE HASANI MOURICE

Third Respondent

XANISEKA NELLY MANGANYI

Fourth Respondent

MZAMANI RICHARD MABASA

Fifth Respondent

MAGEZI AMOS CHAUKE

Sixth Respondent

ORDER

1. The late filing of the rescission application is condoned.
2. The order made by this Court on 29 August 2022 is rescinded.
3. The First and Second Applicants (**the Commission**) shall, by 6 June 2025, file a notice stating whether or not the Commission has taken a decision to financially compensate the beneficiaries under the Hlomela Land Claim, and, if so, any records of such a decision.
4. The Applicants in the review application may, by 23 June 2025, supplement their founding affidavit if they wish to do so.
5. The Commission, or any of the Respondents in the review application shall, by 7 July 2025, file their answering affidavits, if any.
6. The Applicants in the review application shall, by 14 July 2025, file their replying affidavits, if any.
7. The Applicants in the review application shall deliver heads of argument by 21 July 2025.

8. The Respondents in the review application shall file their heads of argument by 28 July 2025.
9. The review application will be heard before Bishop AJ on 4 August 2025.
10. Each party shall pay its own costs.

JUDGMENT

BISHOP, AJ

[1] This is the surprising case of the rescission of the review of a decision the decision-maker says does not exist.

[2] It arises against the backdrop of unfulfilled state promises to the Hlomela Community. The Community lodged a land claim over various farms in Limpopo. The Community – which included both Tshivenda and Xitsonga speakers – had occupied the land as beneficial occupants since 1888. The Xitsonga-speaking people were removed in 1969 in terms of the Bantu Authorities Act 68 of 1951. The removal was part of the apartheid government's racist policy of "separate development". The Xitsonga speakers were forced to relocate to the Gazankulu "homeland".

[3] They applied timeously for restitution in terms of the Restitution of Land Rights Act 22 of 1994 (**Restitution Act**). In 2004, the Community's restitution claim was approved and settled in terms of s 42D of the Restitution Act. Because it was not feasible to restore the land to the community, the settlement agreement provided for the state instead to improve the Community's conditions where they now live in various villages in Limpopo. That included five elements: electricity for the Hlomela and Gawula villages, a community office at Hlomela village, a clinic at Khakala village including staff, and roughly 240¹ "RDP type of houses" on the land where the claimants live. Various state entities were responsible for fulfilling different parts of the

¹ The settlement agreement records 240, 245 and 250 as the number of houses to be built. Nothing turns on the discrepancy for present purposes.

agreement. The settlement agreement did not include separate monetary compensation.

[4] By 2021, the state had provided electricity, built a community office, and constructed a clinic. But it had not built the houses. Or at least, had not built adequate houses. The details are unclear, but the Applicants say houses had not been completed “due to delays associated with poor workmanship of the previous appointed service provider”. The Respondents provide a more damning appraisal. They say that “the developmental compensation failed miserably in that the houses built in most cases were incomplete and in other cases they were of such poor quality that some fell or are in a bad condition.”

[5] The failure to build the houses seems to have been apparent from at least 2012 when the Steering Committee wrote to the Commission on Restitution of Land Rights to complain about the failure and the Department responded to “apologise for this unfortunate state of affairs and commit ourselves to finding a lasting solution”. The Department rightly recognized that it should not “add more suffering to our land claimants who have been subjected to the brutality of forced removals during the apartheid regime.”

[6] But here we are, 13 years later, and the houses have still not been built, and the suffering of the Hlomela Community continues. The reasons for this ongoing state failure are not before me. It is difficult to think of reasons that could justify failing to fulfil the promise for more than two decades.

[7] What is before me is the status of the Applicants’ most recent attempts to remedy the situation, which began in 2021. On 5 to 7 October 2021, the Commission visited the villages to assess the status of the incomplete houses in order to “come up with a way to complete the project”. According to the Commission, all that occurred was an assessment of the current state of affairs, and an attempt to update the beneficiary list to cater for the lapse in time.

[8] The Respondents take a different view. They say that at a meeting at Giyani Xilumani Hotel, Mr Masingi – a Project Coordinator at the Commission – conveyed that the Commission had “decided to financially compensate those who are affected by the poor conducting of the developmental compensation programme.” They allege

it was also announced that only the residents of Hlomela village would benefit, and not the residents of Malamulele village. It is unclear exactly when this meeting took place, but presumably it was around October 2021. Mr Masingi admits the meeting occurred, but denies he announced any decision to compensate beneficiaries.

[9] This fear of exclusion prompted the residents of Malamulele village – the Respondents in this application – to bring an urgent application to interdict the Commission and the other state actors from pursuing further development of the 240 houses pending a review of the supposed decision. The respondents in the urgent application were the Applicants in this application, and the Hlomela Traditional Authority, which abided.

[10] The Applicants did not oppose the interdict because they wished “to avoid [the] incorrect perception ... [that] the Commission wanted to block them from having their rights adjudicated”. The Commission’s position was that it had not taken any decision to financially compensate, or to exclude the Malamulele claimants, and so chose to abide and await the review application.

[11] I pause to note that this was a strange attitude to adopt. If an interdict was premised on the review of a non-existent decision, the appropriate response would have been to oppose the interdict on the basis that the respondents had the wrong end of the stick. A clear statement at the outset that no such decision had been taken might have avoided the misunderstanding, delay and legal fees that would follow.

[12] In the absence of opposition, this Court granted the interdict on 5 November 2021. The interim order interdicts the Commission from “making any financial compensation” to the Hlomela Traditional Authority, and “taking any steps to further the process of the restitution to the members of the” Hlomela Traditional Authority, or transferring any property to them. The order “operates as an interim interdict pending the final outcome of the Review Application”. Although the Respondents had promised to launch the review application within 30 days, the interim order includes no deadline by which the review must be brought.

[13] This brings me to the cause of the current rescission application: a dispute about service. The Applicants state there was an agreement that the review application would be served on Ms Moloto, the state attorney in Polokwane who was

handling the matter on their behalf. The Respondents do not deny that they agreed to serve the review on Ms Moloto.

[14] Rightly so because the agreement is reflected in correspondence. On 11 November 2021, Ms Moloto wrote to the Respondents' attorneys indicating that she was acting for the Applicants, and that her clients would abide the urgent application if no costs were sought against them. Mr Maluleke – the Respondents' attorney – responded the same day stating: "As you have confirmed telephonically that you are not opposing this application but you wi[s]h to be notified of the progress of the application and be served with any documents in the proceedings." On 16 November 2021, Ms Moloto filed a notice to abide which stated that the Applicants "will accept service of all notices in this matter" at the address of the state attorney.

[15] The timing of this correspondence is somewhat strange. It occurred six days after the interim order had already been granted. It seems that Ms Moloto was unaware the interim order had been granted. It is unclear when the order was served. The service affidavit recording service is dated 16 November 2021, but it does not specify when it was served on the Applicants. Nonetheless, two things are plain. One, the Applicants were abiding the interim application, not the review application which had not been launched. Two, there was an agreement to serve all future process – including the promised review application – on Ms Moloto.

[16] But the Respondents did *not* adhere to that agreement. When it was eventually launched in March 2022 the Respondents did not serve or even email it to Ms Moloto. Instead, they delivered a copy to the Commission. Exactly how this was done, nobody knows. There is no evidence whether it was done by the sheriff, by an attorney, or by somebody else. There is no return of service, and no service affidavit.

[17] However, the Commission accepts that it received the review. But, it explains, it did not appreciate that it was a new application. The Respondents issued the review under the same case number as the urgent interdict. The Commission's officials mistakenly believed that the papers were just another copy of the urgent interdict, which it had abided. They expected that the promised review application would be served on Ms Moloto as agreed. The Respondents accept the truth of this explanation, but deny it is adequate.

[18] There is scant evidence on whether the review application was delivered at all to the other Applicants – the Minister and the Department. The only evidence is a stamp on the notice of motion from the “Directorate: Litigation” of the Department, dated 15 March 2022, with a variety of signatures.

[19] The further documents securing a hearing of the review – the application for a date and the notice of set down – were not served on the Applicants. They are addressed only to the Registrar.

[20] In the absence of service on their attorney, and an awareness there was a fresh review application, the Applicants did not oppose the review. They filed no papers at all. They believed that, if action was required, their attorney of record would receive the papers and would contact them to respond.

[21] The review application was heard unopposed on 29 August 2022. This Court granted the following order:

1. That the decisions/actions of the Chief Land Claims Commissioner and Regional Land Claim Commissioner, Limpopo Provincial (first and second Respondents) to financially compensate the verified beneficiaries of Hlomela Village to the exclusion of the members of the first Applicant are hereby reviewed and set aside.
2. That the first and second Respondents are hereby directed and Ordered to also compensate members of the Applicant in the inclusion of the verified beneficiaries.

[22] This order was served on the Commission on 8 September 2022. It prompted the current application for rescission, which was launched on 3 November 2022.

[23] The Applicants apply, first, for condonation because the application for rescission was launched outside the time periods permitted by rule 64(2). It should have been brought within 10 days of the date the Applicants became aware of the Order; 22 September 2022. It was, instead, launched on 3 November 2022. At the hearing, Mr Malatji informed me that the Respondents do not oppose condonation. I condoned the delay. The explanation – the difficulty in the State Attorney procuring

counsel – is reasonable. The delay is not long and could cause no prejudice to the Respondents. And, as will appear, the prospects of success are strong.

[24] The application is brought on two alternative grounds.² In the main, it is brought in terms of s 27 of the Land Court Act 6 of 2023. Specifically, the Applicants rely on ss 27(a) and (c) which permit this Court to rescind an order that was “erroneously sought or erroneously granted in the absence of the person against whom that judgment or order was granted”, and an order which was “void from its inception or was obtained by fraud or mistake common to the parties”. In the alternative, the Applicants rely on the common law which affords courts a discretion to rescind their orders when there is justifiable reason for the party’s absence and a bona fide defence.

[25] I deal first with the argument under s 27(a), then the common law, and finally with s 27(c).

Erroneously Sought or Granted

[26] Section 27(a) reflects the language of rule 42(1)(a) of the Uniform Rules of the High Court.³ It sets two requirements for rescission: “A party must be absent, and an error must have been committed by the court.”⁴ The two are related – the absence may lead to the error, or the error may be the reason for the absence. But they remain separate requirements.⁵

[27] There is no debate that the Applicants were not present on 29 August 2022 when this Court granted the Order. That requirement is met. The question is whether an error was committed in granting the Order in their absence. The error may arise

² It was originally brought under the comparable provisions of the Restitution Act that have since been repealed and replaced by s 27.

³ Rule 42(1)(a) reads: “The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary: (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby”.

⁴ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 57.

⁵ *Ibid.*

either in the process of seeking the judgment on the part of the applicant, or in the process of granting default judgment on the part of the court.⁶

[28] Granting an order in the absence of service on an affected party will ordinarily mean the order was erroneously sought (as the applicant ought not to have approached the court without service) and erroneously granted (because the court should not have granted the order without proof it was served). As Streicher J put it in *Fraind v Nothmann*: “The applicant had a right to be served with the summons and to defend the action. If that is so, the applicant must also have the right to apply for the rescission of a judgment erroneously granted against him without the summons having been served on him. If that were not so, the applicant's right to be served with the summons and to defend the matter would be meaningless.”⁷

[29] The question is whether the delivery of the review application to the Commission – and seemingly the Department and the Minister – constituted “service”.

[30] The Applicants argue that the delivery did not suffice for three reasons: it was not proper service in terms of this Court’s rules and practice directives, it was non-compliant with s 2 of the State Liability Act 20 of 1957, and it did not adhere to the agreement to serve on Ms Moloto.

[31] Let us begin with the rules. Rule 24 deals with the service of process. Rule 24(1) incorporates rule 4(1) of the Uniform Rules, unless this Court’s rules provide otherwise. Uniform Rule 4(1) generally requires service by sheriff for documents that initiate application proceedings. But rule 4(1)(aA) provides: “Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.” This is an alternative to service by sheriff. It is not mandatory. But if service is not effected on the attorney in terms of this subrule, it must be effected in terms of the other provisions of Rule 4.

[32] Rule 24(4) deals with proof of service. It provides for only two methods to prove that service occurred. If service was effected by the Sheriff, service is proved by a return of service. Otherwise, service is proved by “an affidavit of the person who

⁶ D Van Loggerenberg *Erasmus: Superior Court Practice* (3 ed, RS25, 2024) Vol 2 at D1-Rule 42-19.

⁷ 1991 (3) SA 837 (W) at 841G.

effected the service” accompanied by the relevant document establishing service. In the case of hand delivery, it must be proved by a receipt as described in rule 24(2).

[33] The Rules must be read together with this Court’s Practice Directions. In 2015 the Judge President of this Court issued Practice Direction 17, which is headed: “Service on the Land Claims Commission”. It reads:

In all matters in which the Land Claims Commission is a party, service shall be effected on the relevant regional office of the Commission as well as on the national office. Service shall also be effected upon the legal representative of the Land Claims Commission.

[34] As I discuss below, this requirement reflects the requirement in s 2 of the State Liability Act. Its obvious purpose is to ensure that legal process in fact comes to the attention of both the Commission, and its attorneys. It was presumably prompted by experience that service on the Commission alone was often inadequate to ensure that the Commission was legally represented in matters that affect it.

[35] The service in this case was manifestly non-compliant with the Rules and with Practice Direction 17. It is unclear how the review application was delivered – whether by sheriff or otherwise. There is no return of service, and no service affidavit. It was not served on the state attorney, despite the clear requirement of Practice Direction 17.

[36] That brings me to the second basis on which the Applicants claim the order was “erroneously sought” and “erroneously granted” – s 2 of the State Liability Act. Section 2(1) requires that, when suing a “department”, a litigant must cite the “executive authority”⁸ of the department as the nominal defendant/respondent. Section 2(2) then requires that, in those circumstances, the plaintiff or applicant must serve the proceedings on the executive authority, and within five days “serve a copy of that process on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued.”⁹

⁸ Section 4A defines “department” as “a national or provincial department”, and defines “executive authority” to mean the relevant minister or MEC. I return to these definitions below.

⁹ The provision reads in full:

(2) The plaintiff or applicant, as the case may be, or his or her legal representative must-

[37] In *Molokwane*, the SCA held that the purpose of s 2(2) is “to ensure that the relevant ‘executive authority’ ... is afforded effective legal representation in the matter by the State Attorney.”¹⁰ That purpose will have been served as long as the State Attorney provides representation, even if it was not served with the application. As Makgoka JA put it, “it is not so much about how the State Attorney obtained the knowledge of the process commencing proceedings, as the representation of the party in the legal proceedings itself.”¹¹

[38] Applying that rationale, the *Molokwane* Court held that s 2(2) had been complied with even though the plaintiff had not served on the State Attorney, because the State Attorney had nonetheless represented the affected Minister. The message is obvious – s 2(2) is a mechanism to ensure notice and representation; it is not a technical point for the state to take when it is in fact notified and represented.

[39] *Miya*¹² concerned the reverse situation – the summons was served on the State Attorney, but not on the Minister. The Minister raised a special plea that service on the State Attorney alone was insufficient and, without service on the Minister, the action was a nullity. The Minister asked the SCA to reconsider its finding in *Molokwane*. The Court did not do so. Instead, it re-affirmed *Molokwane* and held that it applied to non-compliance with both s 2(2)(a) and 2(2)(b). It concluded that, on the facts, “the Minister was fully aware of the proceedings against him. There was not even an iota of prejudice decried by the Minister as a result of this failure.”¹³ For that reason, the non-compliance with s 2(2) was not fatal, and the action could proceed.

[40] *Molokwane* and *Miya* establish the purpose of the special service requirements in s 2(2) – to ensure that litigation in fact comes to the attention of the executive, and that they are properly represented. The corollary is that s 2(2) should only be used to

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- (a) after any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the head of the department concerned at the head office of the department; and
 - (b) within five days after the service of the process contemplated in paragraph (a), serve a copy of that process on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued.

¹⁰ *Minister of Police and Others v Samuel Molokwane* [2022] ZASCA 111 at para 18.

¹¹ *Ibid.*

¹² *Minister of Police v Miya* [2024] ZASCA 71; 2025 (3) SA 130 (SCA).

¹³ *Ibid* at para 18.

excuse the executive when the failure to meet s 2(2)'s dual service requirement in fact meant that the executive was unrepresented.

[41] That is what happened here. The Applicants were not represented in the review. If the review application had been served on the State Attorney – as s 2(2) required – they likely would have opposed the review.

[42] However, it is not clear to me that s 2(2) applies to the Commission. It applies when suing a “department”. Is the Commission a “department”? I did not hear full argument on the issue, and therefore prefer not to decide it. Ultimately, it does not matter for two reasons. First, because the Commission was not the only respondent in the Review – the Minister was also a Respondent. Section 2(2) undoubtedly applies to the Minister and compelled service on the State Attorney. Second, even if s 2(2) does not require service on the State Attorney when suing the Commission, Practice Direction 17 does.

[43] What is concerning about this matter is that the Respondents were plainly aware of the requirement to serve on the State Attorney because they agreed to do so. No explanation was proffered for why the review application was not served on the State Attorney. It is difficult to conceive of an acceptable explanation. Where parties have agreed on a form of service permitted by the Rules, that form of service is not followed, and the result is that a party does not have notice, that too may be enough to mean an order was erroneously sought.

[44] In short, there was non-compliance with Rule 4 of the Uniform Rules, no proof of service in the form required by rule 24(4), non-compliance with Practice Direction 17, a failure to comply with s 2(2), and a breach of the agreement to serve on Ms Moloto. These failures were the reason the Applicants were not represented in the Review.

[45] The Respondents' counsel properly conceded as much. His argument was that as the review application had still been delivered to the Commission, even if it had not been properly served, that the Court should overlook the defects in service. He relied on the case of *Prism Payment Technologies*.¹⁴ There, a summons had been served

¹⁴ *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd (t/a Altech Card Solutions) and Others* 2012 (5) SA 267 (GSJ).

on one of the defendants at the correct business park, but the wrong employment address. The defendant was nonetheless aware of the summons and filed a notice of intention to defend. But he also filed an irregular step notice seeking to set aside the summons on the basis that it was defective. It was in that context that Lamont J discussed the purpose of service, and the circumstances in which a defendant can raise defective service.

[46] He explained that the rules for service “provide for a mechanism by which relative certainty can be obtained that service has been effected upon a defendant.”¹⁵ If those rules are complied with “then the assumption is made that the service was sufficient to reach the defendant’s attention and his failure to take steps is not due to the fact that he does not have knowledge of the summons.”¹⁶ But it does not follow that “if service is not effected as required by the rule, the service is not effective”.¹⁷ If, despite non-compliance with rule 4, the defendant came to know of the summons, then there has been proper service. In *Prism Payment Technologies* the purpose of service had plainly been met. The defendant knew of the summons and had given notice of his intention to defend.

[47] The reasoning does not aid the Respondents. *Prism Payment Technologies* concerns service that was defective, but nonetheless effective. The delivery in this case was both defective and ineffective. We know it was ineffective because the Applicants, despite wishing to oppose the review application, did not do so. Had there been proper service – including service on the State Attorney – the Applicants likely would have been aware of the review application. The non-compliance with the Rules led to their absence from the proceedings. In those circumstances, there is no room to “condone” the failure to serve in terms of the rules.

[48] It follows that the Order was “erroneously sought” and “erroneously granted” in the Applicants’ absence. The Respondents did not serve the review application in compliance with this Court’s rules or the State Liability Act. There was no compliant proof that the Applicants had been served. And there was a breach of the agreement

¹⁵ Ibid at para 21.

¹⁶ Ibid.

¹⁷ Ibid.

to serve on the State Attorney. The failure to properly serve was the reason they did not participate. I am satisfied that this is a sufficient basis to rescind the Order.

The Common Law

[49] The Applicants also sought rescission under the common law. This Court retains the power to rescind under the common law on grounds not enumerated in s 27 of the Land Court Act.¹⁸ An order granted in the absence of a party can be rescinded under the common law if there is “good cause”, which is generally understood to set two requirements: “First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success.”¹⁹ The Court retains a discretion whether to rescind or not.

[50] Here, both requirements are met.

[51] The reason the Applicants failed to participate was the failure to serve on the State Attorney. That is a reasonable explanation for the failure to participate. The Commission’s officials who received the review application should have done better. They should have read the documents, and referred them to the relevant officials who would have realised this was a new application requiring a new response. But Practice Direction 17 and s 2(2) of the State Liability Act exist precisely because there is a risk in large bureaucracies that litigation will not find its way to the relevant decision maker. That is why service on the state attorney is a safeguard. And that is why the Applicants agreed with the Respondents that the review application would be served on Ms Moloto. In my view, the explanation is satisfactory.

[52] Second, there Applicants undoubtedly have a bona fide defence – there was no decision to review. There is no documentary evidence of the decision. The only evidence is the averment in the answering affidavit of Mr Mabasa that Mr Masingi

¹⁸ See, for example, *King Sabata Dalindyebo Municipality v Njemla, Njemla v King Sabata Dalindyebo Municipality and Others* [2010] ZALCC 2; and *Sokhela and Another v Mhlungu and Another* [2023] ZALCC 22

¹⁹ *Zuma* (n 4) at para 71.

announced the decision at the Xilumani Hotel. Mr Masingi denies that he made such a statement. It is inherently unlikely that a decision of this kind would be announced orally without any written evidence.

[53] I do not wish, at this stage, to decide whether or not there was a decision. The Respondents continue to assert there was a decision. Resolving that dispute would likely pre-empt the outcome of the review which must be decided on its own papers. But if the Applicants had been able to participate in the review, they would have had a genuine defence: the Commission had not taken a decision to depart from the terms of the s 42D agreement.

[54] Even if the order ought not to be rescinded under s 27(a), considering this matter under the common law, I would exercise my discretion to rescind the Order.

Section 27(c)

[55] The Applicants advanced various other grounds of rescission under s 27(c) of the Land Court Act. Given the outcome I have reached on s 27(a) and the common law, I prefer not to decide those grounds of rescission.

[56] In general, the basis for this attack was that there was no decision and therefore the Order was “void from its inception”, and obtained by the Respondents misleading the Court. The Applicants relied on *Njemla*²⁰ where the Supreme Court of Appeal upheld the rescission of an order which was based on false information about the scope of a restitution claim.

[57] I have no doubt that if the Respondents knowingly misrepresented that there was a decision when they knew there was not, that would be a basis for rescission. It would likely also be a basis for rescission even if the representation was made in good faith, but the Respondents now accepted that there was no decision.

[58] But that is not the case. The Respondents continue to assert that there was a decision. Whether there was or not will be a central issue in the review. While I think

²⁰ *Njemla v KSD Local Municipality* [2012] ZASCA 141; [2012] 4 All SA 532 (SCA).

the Applicants have reasonable prospects of success in showing there was no decision, I do not think it would be appropriate to rescind on that basis as that would effectively decide the review application as well. As there are other bases to rescind the Order, I prefer not to decide the application under s 27(c).

Further Conduct

[59] The result of rescission is that the review application must still be decided. That also has the consequence of resuscitating the interim order which was made until the determination of the review. The consequence is that progress on actually implementing the s 42D settlement agreement will again come to a halt.

[60] That is particularly unfortunate where there is no substantive disagreement between the parties. All the parties agree that the Malamulele claimants have not been, or should not be, excluded from benefitting under the settlement agreement. The only difference is why. The Applicants say it is because they have never taken a decision to exclude them. The Respondents say it is because there was a decision to exclude them, but the decision was unlawful. It is a distinction with no apparent practical consequence for the implementation of the s 42D agreement. Since the review was granted, the parties have continued to engage about how to finally ensure implementation on the basis that there is no decision excluding the Respondents.

[61] The resolution of the review will not alter the substantive position of the parties. But it may cause further delay for successful claimants who have already waited two decades to see the promise of restitution fulfilled.

[62] I therefore raised with counsel at the hearing the possibility of an expedited hearing of the review. They agreed this was appropriate and after the hearing proposed a timetable. With some minor adjustments, I am going to make the timetable part of my order. As I have already read the papers, I also intend to keep the file and to hear the review.

[63] I appreciate the parties' willingness to agree to an expedited resolution. But I would still encourage them to explore a non-litigious solution. It is unclear to me what

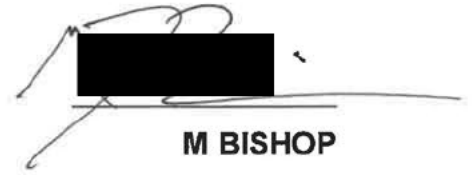
either party will gain from an opposed review application that cannot be gained from a simple acceptance that all the parties will move forward on the basis that there is no decision to financially compensate beneficiaries, or to exclude the Respondents. If a court order is needed to formalise that position, the Court can be approached to make such an order. But it is ultimately for the parties to decide what their disputes are, and how to resolve them.

[64] That leaves only the issue of costs. The Applicants did not seek costs and accepted that, if they were successful, there should be no costs order. I agree.

[65] Accordingly, I make the following order:

1. The late filing of the rescission application is condoned.
2. The order made by this Court on 29 August 2022 is rescinded.
3. The Commission shall, by 6 June 2025, file a notice to the effect that there is no decision taken by the Commission, and no records of that nature, to financially compensate the beneficiaries under the Hlomela Land Claim.
4. The applicants in the review application may, by 23 June 2025, supplement their founding affidavit if they wish to do so.
5. The Commission, or any of the Respondents in the review application shall, by 7 July 2025, file their answering affidavits, if any.
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10. Each party shall pay its own costs.

A handwritten signature in black ink, appearing to be 'M BISHOP', is written over a solid black rectangular redaction box.

M BISHOP
Acting Judge
Land Court

APPEARANCES:

For the Plaintiff: **Adv K Toma**
Instructed by: State Attorney, Polokwane

For the Defendant: **Adv C Malatji**
Instructed by: GA Maluleke Attorneys