IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

Case Number: LCC 121/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

27/05/2020 P.P. [signature]
DATE SIGNATURE

Delivered on: 27 May 2020

In the matter between:

LUHLWINI MCHUNU COMMUNITY	Applicant
and	
LAURENCE HANCOCK	First Respondent
PETER GOBLE	Second Respondent
BUCKSTONE CC	Third Respondent
MICHAEL ROBERTS	Fourth Respondent
HALLIWELL PROPERTY TRUST	Fifth Respondent

ARTHUR JAMES ARATHOON	Sixth Respondent
AMANDA JANE CMPBELL	Seventh Respondent
JOHN NORMAN CAMPBELL	Eight Respondent
WILLEM JAN SCHORTEMEIJER	Ninth Respondent
BETH SUSAN SHAW	Tenth Respondent
BRETT DAVID SHAW	Eleventh Respondent
QONDISA CECIL NGWENYA	Twelfth Respondent
GLR PROPS 005 CC	Thirteenth Respondent
NEWINVEST 136 (PTY) LTD	Fourteenth Respondent
MICHAEL BENSON	Fifteenth Respondent
VENGARITE (PTY) LTD	Sixteenth Respondent
ELPIS TRUST	Seventeenth Respondent
MACKENZIE TRUST	Eighteenth Respondent
SAPPI MANUFACTURING (PTY) LTD	Nineteenth Respondent
MONDI (PTY) LTD	Twentieth Respondent
CHURCH OF PROVINCE OF SOUTHERN AFRICA	Twenty-First Respondent
REGIONAL LAND CLAIMS COMMISSIONER, KWAZULU-NATAL	Twenty-Second Respondent
MINISTER OF RURAL DEVELOPMENT & LAND REFORM	Twenty-Third Respondent

JUDGMENT

MEER AJP

[1] The Applicant applies for leave to appeal to the Supreme Court of Appeal against paragraph 5 of the order contained in my judgment of 16 March 2020. That paragraph orders as follows:

"The fees of the Plaintiff's legal team, Attorney Sinama and Advocates Chithi and Cele, for this entire matter are disallowed in full. They are ordered to repay to the relevant entity that funded them on behalf of the State, whatever fees that may have already been paid to them."

[2] The Applicant was the Plaintiff in the trial before me. The parties cited as Respondents in this application were the Defendants. They have informed the Registrar that they shall abide the decision of the Court. The application was also served on Nkosi Sabelo Attorneys Inc., the firm of attorneys that administers the Land Rights Management Facility ("LRMF"). This is an entity established under the auspices of the Land Claims Commission and authorized by it to allocate cases to legal practitioners who are funded by the State to appear for indigent litigants before the Land Claims Court. The LRMF allocated this matter to the

Plaintiff's legal team and paid their fees from State funds. Mr Hugh Nkosi of Nkosi Sabelo Attorneys Inc. informed the Registrar that as the LRMF was not a party to the proceedings, that entity would not participate in this application.

[3] Reasoned findings are made in my judgment at paragraphs 24 to 33 for the order disallowing the fees of the Plaintiff's legal team. In those paragraphs it is explained that the fees were disallowed on the grounds that the proceedings were vexatious, frivolous and an abuse of the court process. It is pointed out that the Plaintiff's legal team persisted with a community claim for restitution of rights in land, in defiance of established legal principles, and despite being cautioned by the Court of the consequences of proceeding with a community claim that was unsupported by the legal principles as established by the case law in this regard.

[4] The judgment makes clear that there was not a shred of evidence to prove what has been referred to as the "acid test" established by the Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 CC ("*Goedgelegen*"), that the Plaintiff derived its use and possession of land from common rules. The absence of such evidence must have been apparent to the Plaintiff's legal team, during consultations with their clients. My judgment also highlights the fact that Mr Chithi, the leader of the Plaintiff's legal team, had appeared as part of the Plaintiff's legal team in an earlier case,

Elambini Community v Minister of Rural Development and Land Reform and Others [2018] ZALCC 11 (*"Elambini"*), where exactly the same stance was adopted as in this matter, and unsuccessfully. In *Elambini* like in this matter, where there was not a shred of evidence to support the *Goedgelegen* acid test for a community claim, his team argued unsuccessfully, contrary to *Goedgelegen*, that persons who were at best labour tenants or farm workers on privately owned land constituted a community as defined in the Restitution of Land Rights Act, 22 of 1994 ("Restitution Act").

[5] Disquietingly, notwithstanding the outcome in *Elambini*, the Plaintiff's legal team saw fit to, in essence, repeat the *Elambini* performance, in defiance of the clear letter of the law and the caution given to them by this Court not to do so. They did so during a lengthy trial involving many witnesses, at great cost to the State, which funds the Plaintiff as well as the State Defendants' legal teams, and at great cost to the Landowner Defendants. Added to this was the abuse of the Court's time and resources and the expenditure incurred in travelling to and being accommodated in Durban for a lengthy hearing.

[6] I pause to mention that to the benefit of the Plaintiff's legal team I chose to exercise my discretion to order the lesser sanction of disallowance of legal fees as opposed to the greater sanction of costs *de bonis propriis*, which, given the circumstances, would have been justified. I did so because I had ordered the

Minister of Rural Development and Land Reform, to bear the Landowner Defendant's costs. This latter order was in keeping with the decision in *Biowatch Trust v Registrar, Genetics Resources and Others* 2009 (6) SA 232 (CC), that in constitutional litigation, if the defense against the State is good, the State should bear the costs.

[7] There are several grounds of appeal which appear from an initial and supplementary notices of leave to appeal, some of which are elaborated upon in comprehensive heads of argument. Those grounds which pertain to issues in respect of which reasoned findings are made in the judgment are not traversed here as it would serve little purpose to do so. I deal with the remaining grounds of appeal under the headings below.

Notice of intention to make the order

[8] The initial notice of application for leave to appeal contends that the affected parties were not given notice of my intention to make the order disallowing their fees. This is simply not so. The judgment makes clear at paragraph 26 that the question of punitive costs was raised pointedly at a pre-trial conference. I specifically cautioned the Plaintiff's legal team to consider whether in the light of the established case law, the claim as a community on the part of the Plaintiff could pass muster, and cautioned them of punitive cost implications if it did not. Cautions such as these have become almost customary in pre-trial

conferences, regrettably due to what is fast becoming a spate of hopeless cases being brought by legal practitioners funded by the State to appear for indigent land claimants. Often these legal practitioners simply do not prepare adequately. The caution was given as part of the expeditious and efficient case management function of the Court, and was in no way an indication that the Court had a predetermined view on the issue of costs, as is contended by the Applicant.

[9] Thereafter, during argument I *mero motu* asked Mr Chithi for submissions as to whether the fees of the Plaintiff's legal team should be disallowed in the event of my finding that contrary to established case law, a community claim had been persisted with. I pause to mention that it is simply not so, as suggested by the Applicant (at paragraph 6 of the notice of application for leave to appeal dated 26 March 2020), that my enquiry pertained to fees for the period 17 to 21 February only. My enquiry was in respect of fees for the entire matter.

[10] Mr Chithi made his submissions. The Applicant contends that I erred in accepting Mr Chithi's "general and spontaneous answer" to my request for submissions. Its heads of argument state moreover that Mr Chithi, in making his submissions, was not speaking on behalf of the legal team. If Mr Chithi wanted time to consider the issue of disallowance of fees or to make further submissions either orally or in writing, it was open to him to request an opportunity to do so. Such request would have been readily granted. He did not, but chose to make his

submissions. Similarly he could have informed the Court that he was not speaking on behalf of the legal team, the members of which were present in Court. They themselves could have addressed the Court or asked for a postponement or stand down to make further representations. The contention that the Court erred in accepting Mr Chithi's answer, in response to an invitation for submissions, is bemusing, in the circumstances.

The ground pertaining to fees and disbursements

[11] Insofar as it is contended that I erred in failing to realize that the legal representatives' fees invariably involve disbursements, it is clear that my order refers only to the fees of the Plaintiff's legal team. What those fees may or may not invariably involve is not a matter for the Court to consider but more appropriately falls within the purview of the taxing master.

[12] I note further that whatever tax implications my order may have, a matter that is alluded to as a ground of appeal, is in no way a bar to the order granted.

Composition and roles of legal teams in *Elambini*

[13] This is referred to in considerable detail in the initial notice of application for leave to appeal. The composition and roles of the various legal teams that appeared in the *Elambini* matter in no way detracts from the characterization of the litigation in the matter before me as vexatious, especially given the accepted

legal principles established by the Constitutional Court in *Goedgelegen*. Mr Chithi, as aforementioned, was part of the legal team in *Elambini* where the *Goedgelegen* acid test for community claims loomed large, and ought to have known better than to have replicated the failed stance there in the current matter. But even if he had not appeared in *Elambini*, it was incumbent upon the Plaintiff's legal team not to persist with a community claim which the evidence so clearly defied. This is especially so given the well-established case law which gives context to the definition of "community", as referred to at paragraphs 8 and 9 of my judgment, and the test established in *Goedgelegen*, all of which are, or ought to be, well known among practitioners, especially those like Mr Chithi, who are regularly funded by the State to appear in this Court.

Grounds of appeal pertaining to the Restitution Act

[14] Arguments made by the Applicant with reference to the Restitution Act are considered below:

14.1 In heads of argument for the Applicant it was pointed out that matter was instituted by the Regional Land Claims Commissioner and not the Plaintiff. It was contended that it would not be open to a legal practitioner instructed and appointed in terms of section 29(4) to engage in anything else than to facilitate a hearing of the matter in court. This is so because the Restitution Act contains in-built mechanisms at sections 11 and 11A to prevent frivolous and vexatious claims being brought before Court.

14.2 I note that section 29(4) merely provides for the Chief Land Claims Commissioner to take steps to arrange legal representation for indigent claimants. There is nothing in the section to suggest that a legal practitioner cannot advise clients on the prospects of success on a matter, and to suggest so as the Applicant does, is in my view, ludicrous.

14.3 Sections 11 and 11A of the Restitution Act deal with the procedure after the lodgment of a claim with the Land Claims Commission. Section 11(1)(c) provides that if the Regional Land Claims Commissioner is satisfied that the claim is not frivolous or vexatious he/she shall cause notice of the claim to be published in the gazette and shall take steps to make it known in the district.

14.4 It is established law that a Regional Land Claims Commissioner in satisfying himself/herself that a claim has been lodged in the manner prescribed in section 11(1) of the Restitution Act, does not adjudicate claims. See *Farjas (Pty) Ltd v Regional Land Claims Commissioner, KZN* 1998 (2) SA 900 (LCC) at 926 I- 927E. A Regional Land Claims Commissioner is thus certainly not empowered to adjudicate whether a claim, once lodged, is a community or individual one, or indeed whether a legal practitioner has brought a community claim frivolously. Whatever in-built mechanisms section 11 may contain pertain only to the lodgment of claims which precede the adjudication thereof by the Court. The fact that the Commissioner accepts that a claim is not frivolous or vexatious

for purposes of lodgment, is no bar to this Court adjudicating the claim to be frivolous and vexatious.

14.5 Neither sections 29(4), sections 11, 11(A) nor any other section of the Restitution Act relieve legal representatives of the ethical obligation to ensure that only genuine and arguable cases are ventilated. Nor do they excuse legal representatives from bringing claims that are contrary to established law. This is so regardless of the profile of legal representatives who appear for land claimants in this Court or the fact that they have to travel the breadth of the country to consult with clients, factors also alluded to in the Applicant's heads.

The Court's intervention in the payment of counsel's fees

[15] As a supplementary ground of appeal it is contended that another Court would come to a decision different to mine given that I, at a stage of the hearing, facilitated the payment of the "affected parties'" fees. It is stated that another Court may find that I should not have facilitated the payment of the fees had I been of the view that the proceedings were frivolous. There is no substance to this argument for the following reasons:

15.1 The record makes clear that the hearing commenced initially during 25 to 29 November 2019 and was due to continue between 17 to 21 February 2020. On the evening preceding the resumption of the hearing, by which time the Court had already incurred the expenses of travelling to Durban

for the continuance of the trial, my Registrar received an email to the effect that that Advocate Chithi had not been paid and this would prevent the trial from continuing as planned. Why notice of this state of affairs was only given at the eleventh hour, as it were, was not explained.

15.2 Faced with the potential collapse of the trial, I actively facilitated the payment of Mr Chithi's outstanding fees for no other reason than the urgent continuation of the trial. I did so in the interests of justice, especially given that some twenty years had lapsed since the lodgment of the claim, and further delays were untenable. Had I not done so the trial would not have been able to continue.

15.3 Due to my intervention the trial continued between 17 and 21 February 2020. After all the evidence had been led a separate hearing was held on 6 March 2020 on the discrete issue of law as to whether the Plaintiff was a community as defined in the Restitution Act. In my judgment delivered on 16 March 2020 I found as aforementioned, that not a shred of evidence had been lead to support a community claim, that the proceedings had been vexatious, frivolous and disallowed the Applicant's legal team's costs.

15.4 Thus at the time that I facilitated the payment of fees on 17 February 2020 I had not formed a view that the proceedings were vexatious and frivolous. This view was only formed after the further evidence was led

between 17 and 21 February and after the hearing on 6 March 2020. It is disingenuous to suggest otherwise.

15.5 The fact that I facilitated payment of Mr Chithi's fees at some stage of the proceedings in no way detracts from my finding concerning the vexatious nature of the litigation and the ultimate disallowance of the Plaintiff's legal team's fees.

Further grounds upon which leave to appeal is sought

[16] The Applicant seeks to distinguish the cases referred to at paragraphs 28 to 32 of my judgment from the matter which was before me. They however fail to address why these cases are substantially distinguishable on the merits or why the principles enunciated in those cases were not applicable to the matter before me. Nor, I note, has an appeal been noted against my judgment on the merits. I note also that the cases cited in the Applicant's heads of argument at paragraphs 78 to 85 concerning the disallowance of fees, pertain to administrative tasks that were mishandled, including *inter alia* missing parts of records and improper filing. These are distinguishable from the matter that was before me, pertaining as it did to disallowance of fees due to vexatious and frivolous litigation.

[17] *Apropro* the established facts referred to in the Applicant's heads of argument I am satisfied that another Court would not on those facts come to a decision different to mine.

[18] The Applicant relies as a further ground, on the fact that the Landowner Defendants did not apply to have the claim struck on the basis that it constituted a frivolous or vexatious claim. That fact however was no bar to this Court exercising its discretion to *mero motu* raise the issue and grant the order it did.

[19] My order referred to the disallowance of fees of those persons in the legal team named in the order. These were the persons who presented and pursued the claim in Court contrary to established law, notwithstanding being cautioned on this very aspect by the Court. The fact that there might have been a previous set of legal practitioners as alluded to in the Applicant's heads of argument has no bearing on my order.

[20] I note moreover that the fact that practitioners may be dissuaded from practicing in the area of land restitution if orders disallowing costs are granted, as stated in Applicants heads of argument, can never be a justification for tolerating vexatious litigation contrary to established law.

[21] In light of the aforegoing and having carefully considered the submissions, I am of the view that another Court would not come to a decision different to mine. This being so there are no reasonable prospects of success on appeal.

[22] I accordingly order as follows:

22.1 The application for leave to appeal is dismissed.

22.2 In keeping with this Court's practice, there is no order as to costs.

Y S MEER

Acting Judge President

Land Claims Court

APPEARANCES

For the Applicant:	Adv. T V Norman SC
	Adv. C Nqala
Instructed by:	Hintsa & Associates