IN THE LAND CLAIMS COURT OF SOUTH AFRICA

LCC 217/2009

Delivered:2nd May 2014
In the matter between:

THE SALEM COMMUNITY	Plaintiff
and	
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Defendant
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Second Defendant
THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Third Defendant
THE CHIEF DIRECTOR OF DEPARTMENT OF LAND AFFAIRS	Fourth Defendant
THE PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Fifth Defendant
THE MAKANA MUNICIPALITY	Sixth Defendant
THE REGISTRAR OF DEEDS	Seventh Defendant
THE SALEM PARTY CLUB	Eighth Defendant
THE LINDALE TRUST	Ninth Defendant
HENDRIK JOHANNES NEL	Tenth Defendant
CUAN KING	Eleventh Defendant
JONATHAN GOTTFRIED STANDER and MARIA PAULINA PHILIPA STANDER	Twelfth Defendants
DAVID CRAWFORD GOWANS	Thirteenth Defendant
WILLEM CHRISTIAAN LODEWYK SCHOOMBEE	Fourteenth Defendant

EZRA CHRISTIAAN SCHOOMBEE	Fifteenth Defendant
KIKUYU LODGE	Sixteenth Defendant
JONATHAN FLETCHER HARRIS	Seventeenth Defendant
PARTICK GRANT BRADFIELD	Eighteenth Defendant
E.S.A LODGES (PTY) LTD	Nineteenth Defendant
SEVEN SUMMITS PROPERTY INVESTMENTS (PTY) LTD	Twentieth Defendant
KENNETH JAMES SEYMOUR RICHARDSON	Twenty-first Defendant
VARYLYNN SHARRON HILL	Twenty-second Defendant
PHILLIP GEOFFREY AMM	Twenty-third Defendant
PARTICK GRANT BRADFIELD	Twenty-fourth Defendant
and	
THE REGIONAL LAND CLAIMS COMMISSION, EASTERN CAPE	Referring Party

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JUDGMENT

SARDIWALLA AJ

Introduction

[1] This is a restitution matter relating to the area known as Salem, described as the area bordered by the Assegai River, where it is joined by its tributary, the Mantjies Kraal. The matter involves the Commonage in Salem that was subdivided and the Native location which was established and then disestablished. The Plaintiff then lost rights they enjoyed at the time. They were forced to make a choice to remain as labourers on the farms of the settlers or move away.

[2] By agreement between the parties the issue of the validity of the Plaintiff's claim is before me and the question of feasibility of restoration has been deferred.

[3] The eight to twenty forth Defendants, for convenience I will refer to them as Land-Owner Defendants, in effect dispute that a Community existed in the area known as the Zuurveld[1] and it is the argument of the plaintiff and the Regional Land Claims Commission, Eastern Cape, for convenience I will refer to it as the Commission, that in the early years a Community consisted of indigenous people with historical records verifying their existence as early as the 1800's. In support of this evidence the Commission led extensive expert historical evidence on the indigenous communities' existence prior to the 1820 settlers. The Plaintiff's contention was that these communities enjoyed indigenous rights to the land and this was a clear indication that the communities who lived there were removed subsequently after colonial occupation. It is the Land-Owner Defendants' contention that even if these communities existed, that their rights were extinguished by colonial conquest. The claim goes to the very heart of early contact and subsequent conflicts recorded in history books between the early British settlers who came in the 1820's and the Native occupants. The area in question which is referred to as the Zuurveld is also known as central Albany and is demarcated by the Sundays River to the west and the Great Fish River to the right. The Land-Owner Defendants' response to the claim is—

a) the plaintiff is not a Community;
b) the subdivision of the Commonage was not as a result of the application of any racially discriminatory law or practice;
c) the plaintiff never held rights in land in respect of the Commonage prior to or after 1913; and
d) The plaintiff was not dispossessed of rights in land as a result of racially discriminatory laws or practices.

[1] The Zuurveld is the greater area in which Salem falls.

[4] Section 1 of Restitution of Land Rights Act[2] ("The Act") defines "restoration of a right in land" to mean:

> "The return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices".

[5] The Constitutional Court in *Department of Land Affairs and Goedgelegen Tropical Fruits (Pty) Ltd*[3] ("*Popela"*) confirmed the requirements for a restitution claim by a Community as follows—

a. the claimant is a Community;
b. that had a right in land;
c. which was dispossessed;
d. after 19 June 1913;
e. as a result of past racially discriminatory laws or practices;
f. the claim was lodged no later than 31 December 1998; and
g. no just and equitable compensation was received for the disposition.

[6] It is common cause that certain properties that are included in the plaintiff's original claim have indeed been restored by the first to fifth Defendants, hereinafter referred to as State Defendants, to the Plaintiff and due compensation paid to the respective land owners.

[7] I am therefore required to decide on the remainder of the Salem land that has not been restored. The issues that are before me are—

[2] 22 of 1994
[3] 2007 (6) SA 199 (CC)

1. whether the State Defendant's decision in admitting the Plaintiff's claim is valid; and
2. in the process of making that determination it would be necessary to consider:
    a) Is the Plaintiff is a Community.
    b) Whether it was dispossessed of rights in land as a result of racially discriminatory laws or practices
    c) Whether the indigenous Community being the forefathers of the claimants acquired a right in the land.
    d) Whether the periodic absence from the land as a consequence of colonial conquest or by a Court upholding racially discriminatory practices by subdividing the Commonage and evicting the Communities from the land, extinguished their rights.

[8] The Plaintiff's case focuses on the history of occupation before 1913 in line with the principles in *Richtersveld Community and others v Alexkor Ltd and Another*[4] (*Richtersveld Community*) where it was held that it is necessary to look at the history of the land and it's people .[5] The Court looked at different stages of history to formulate an understanding relying on events preceding 1913. Therefore the pleadings sketch the history beginning in the 1820s until the alleged dispossession in 1941. It is alleged that after the dispossession the Plaintiff's members were forced to either remain only as labourers or to move away.

[9] The Land-Owner Defendants argue that the failure to comply with the provisions of Section 10(3) constitutes an illegality, rendering any steps taken thereafter a nullity. This Court must make a finding in this aspect as it is raised as a point *in limine*.

[4] 2003 (6) SA 104 (SCA)
[5] Id at para 13

Points in limine

[10] The Land-Owner Defendants raised the following points *in limine*—

a) the claim was not validly lodged, considering that 31 December 1998 was peremptory and the lodgement may have fallen outside that date;
b) the claimants did not comply with provisions of Section 10(3) of the Act in that they failed to set out the basis upon which the person signing the claim form represented the Plaintiff. There were no resolutions or documents authorising such person to represent the Plaintiff;
c) the plaintiff does not constitute a Community as defined in Section 1(iv) and in the alternative, even if such a Community existed such Community did not have any right in land as defined in Section 1(xi) of the Act; and
d) any dispossession was not as a result of any racially discriminatory laws or practices.

[11] The Land-Owner Defendants abandoned the first point *in limine* and that will not be discussed further. The third and fourth points speak to pertinent features of the case and are thus not *in limine* but form part of the merits of this case. They will thus be discussed within the merits of the case. Only one point is pursued by the Land-Owner Defendants namely, that the Plaintiff did not comply with the provisions of section 10(3) of the Act when lodging the claim and as a result the claim is a nullity.

Summary of the Plaintiff's case

[12] The Plaintiff is the Salem Community comprising of families represented by Mzukisi Madlavu, Lingani William Nondzube, Mtututozeli Gladman Madinda, Douglas Wilfred Mlungisi Rwentela, Misile De Villers Nondzube and Ndoyise Ngqiyaza. The Plaintiff allegedly lost rights in ownership, residence, grazing and the use of the land for agricultural purposes in the property described as the Remainder and certain portions of the Farm Salem, No. 498 referred to as the Commonage. The Plaintiff allegedly also lost access to firewood, burial sites, grazing, cropping and the

use of the land as the Commonage. The period of dispossession allegedly began around 1947 and continued until the 1980s. The members of the Plaintiff occupied what was then a Native Location and the Commonage. About 500 members were in occupation of the Commonage and the Location that was disestablished and they were dispossessed without compensation.

[13] The Plaintiff called two witnesses to testify. Their evidence is summarised below.

Mr Misile Nondzube

[14] Mr Nondzube was born in 16 April 1945, in Tyelera the name given to the Location. He was informed by his father and grandfather that they were originally from Transkei, they were nomads searching for land to graze their cattle and moved towards Dikeni until they came to the place called Tyelera which is Salem. Dikeni is the present day Alice. He described the clan names of those that settled in Tyelera as the Mtikas, Mazaneni, Tiyo, and Soga. Collectively, they are called Jwara. He testified that they were classified as Xhosa.

[15] Mr Nondzube described life at Tyelera; there were two Churches and a school. The Church was built in 1832 and a stone was erected there in memory of the "White men" who arrived in 1820 one of whom was Mr Gush. He testified that the history surrounding the erected memorial stone is that when you stand there and look on the other side you will see another stone, the Xhosa were standing in that vicinity when Mr Gush arrived. The story he told is that Mr Gush and another man went up to the Xhosa; they had no weapons and he told them that they had not come to this country to fight. There was a misunderstanding between the Xhosa and Mr Gush and his people; they came to an agreement that they were going to plant on the land and share the fruits but the Xhosa were not aware that the land had been given to the White men.

The witness testified that his grandfather was there before the White people and that they were not employed by the White people.

[16] In cross examination Mr Nondzube was questioned about Chief Dayile, and why he had never been mentioned to the investigator from the Commission. The witness could not recall if he or any other person had specifically told Mr Paul about Dayile. There was no explanation elucidated for why this chief was only mentioned at the inspection *in loco* for the first time. It was also established that Mr Nondzube's testimony was mainly with reference to his maternal relatives and his father Jamane Sukala who was also resident on the Commonage.

Mr Ndoyisile Ngqiyaza

[17] Mr Ngqiyaza testified that he was born in Salem; he admitted that he was not educated and thus did not know the date of his birth. He testified that his father was resident in Salem when he was born; he stated that his father practiced subsistence farming on the Commonage and sold fire wood in Grahamstown. After the sub-division Mr Ngqiyaza's father was forced to seek employment on the Commonage and he was a servant of Mr Ruben Bradfield. Mr Ngqiyaza later left Salem to look for other prospects. He testified that before the sub-division his family survived on subsistence farming and they had rights in the Commonage.

[18] It was put to the witness that none of the members of the Bradfield family present at the Court could identify him. His response was that he left the Commonage after the sub-division.

Summary of Commission's case

[19] The Commission focused on the history of occupation before 1913 based on the principles enunciated in *Richtersveld Community Case*. The Court in this case emphasised the relevance of considering the history preceding 1913 as it is significant in cases of this nature. The Commission's case dealt extensively with the history of the Plaintiff from the 1820s until the alleged dispossession in 1941. It is alleged that after the dispossession the Plaintiff's members were to either remain only as labourers or vacate the land. The Commission through its investigation concluded that the claimants had rights pertaining to the Commonage after 19 June 1913.

[20] The Commission called three witnesses to testify on its behalf the evidence of each will be summarised below.

Mr Vincent Paul, the Investigator of the Claim & Referral of the Claim to Court

[21] Vincent Paul Quba was an employee of the Regional Land Claims Commission in the Eastern Cape. He testified for the Commission in his capacity as the investigator of the claim. He holds a Bachelors of Arts (BA) and a BA Honours degree in History and is pursuing his Master's degree in the same field. Mr Paul testified that his investigation revealed that the 1820 settlers were allotted portions of land in Salem which was occupied at that stage by the native community and the settlers were awarded communal rights of grazing on the Commonage. He expressed the view that the Supreme Court (Grahamstown) in failing to consult with the native community, who also had rights in the Commonage before granting an order for its subdivision, was a party to a racially discriminatory practice.

[22] An assessment of the letter of 4 March 1923[6] indicated that the natives in Salem had a right to own and graze cattle as the Salem Village Management Board,

[6] This letter was a response to an earlier query by the Salem Village Management Board to the Department of Land Affairs regarding the branding of cattle. The initial query was in relation to the requirements to brand

for convenience I will refer to it as SVMB[7], was informed that branding had to be applied equally to both Europeans and Natives. Mr Paul also testified that the payment of hut tax was indicative that the natives had a right to be present in Salem. His conclusion from the correspondence which was exchanged between the provincial office and the SVMB was that there existed a Location.

[23] The key issue in his report is that there was dispossession of the Blacks in Salem as a consequence of the Natives Urban Areas Act of 1923. This Act failed to take cognisance of the fact that there was more than one community was resident in Salem. Whilst he was aware that the Plaintiff's right to the land dated to before the 1800s by virtue of occupation by their forefathers this was not an aspect on which he focused given the limitations of Restitution Legislation. He testified that on the basis of the information obtained in his interviews with members of the Plaintiff, their Community was bound by unwritten rules, there was no designation of who owned what, but they communally owned the entire Commonage. Ploughing and grazing took place communally on various parts of the Commonage.

[24] Under cross examination Mr Paul conceded that the Salem settlers had title deeds and rights to the Commonage; he also conceded that the SVMB had the power in terms of legislation to regulate and control the Commonage. He admitted that a number of documents presented by the defence had not been included in his report but he explained and that the reason for this was that his focus was on the period after 1913.

cattle, especially considering that the natives had cattle in the Commonage. The response was that branding would have to apply equally to Europeans and Natives.

[7] The Board tasked with management of the Commonage in Salem which comprised of land owners of that time.

Professor Legassick

[25] Professor Legassick is an historian who holds a PhD obtained in 1970s at the University of Los Angeles, his doctoral thesis focused on the Griqwas in the Northern Cape. He testified on the concept of a frontier zone, as a zone where different communities interacted/resided without a single source of authority. He described the Zuurveld as part of a frontier zone and at a certain stage the Xhosa and the White colonists were occupants. The Xhosa preceded the White colonists in the Zuurveld, but for decades there was fighting between them with no clear single authority. The original claim of the Land-Owner Defendants is that the land was vacant when the settlers came. This was only the case because of the expulsion of the Xhosa in 1812 in the Fourth Frontier War, prior to that the Xhosa had occupied the Zuurveld and it was considered Xhosa land. Colonel's Graham[8] in the 1812 frontier War expelled the Xhosa from the Zuurveld across the Fish River in an effort to claim their land. Such expulsion was never accepted by the Xhosa and in 1819 about 10000 Xhosa under the leadership of Prophet Makana laid siege to Grahamstown in an attempt to reclaim their land. This signifies that they still considered the Zuurveld their land. The Xhosa are described as being extremely attached to their land and if they were dispossessed they would seek to have it returned. There is evidence that as early as 1822 the Xhosa still raided the settlers seeking cattle and to regain their land.

[26] It has been admitted that the Location was established in 1921; however the Land-Owner Defendants deny that this recognised the rights of the Xhosa to reside therein. This argument has to be viewed at in the correct perspective. The Location formed a small area of the Commonage. The Regulations published in March 1919 testified that the SVMB was to be in control of the Location. However, the location could not have housed the population of natives in the Salem Commonage. There were Natives on the Commonage outside the location and these are referred to as squatters, but they had been there and had rights to be there. On 15 July 1941 the Native Commissioner for Grahamstown wrote to the Secretary for Native Affairs in

[8] Colonel Graham was a soldier who is notable for founding Grahamstown in 1814.

Pretoria, indicating that the regulations of March 1919 had never come into effect indicating that the SVMB did not regulate the location and had no control over the Natives on the remainder of the Commonage. To elucidate this point Professor Legassick looked at the Native population as recorded in July 1932 that the Native population was 300-400 and there were 6 huts on the location. Logically such a large number of people could not live in 6 huts meaning that there were Natives outside the location contrary to what the Land-Owner Defendants claim. This also indicated that there was a non-servant population in Salem as the Location was established to house the workers for the White farm owners.

[27] Professor Legassick argues that the sub-division of the Commonage by order of the Grahamstown Supreme Court and the disestablishment of the location without consultation with the resident Natives was in violation of the rights of Native Community. While the location was not formed in terms of the Native Urban Areas Act of 1923, it was relied on in its disestablishment. The judgment was discriminatory in that it failed to consult and it also resulted in the disestablishment of the location. This judgment thus affected the Natives on the location and the Commonage. Communication from the Provincial Secretary indicated that the location had to be disestablished before the area could be included and surveyed for the sub-division. On the disestablishment the Secretary indicated that even if labour requirements increased and squatting entirely stopped the areas of the farms should be large enough to accommodate Natives for labour.

[28] Under cross examination Professor Legassick admitted that, the San were the first inhabitants of the Zuurveld prior to the Xhosa and the White colonists. It was put to the witness that Governor Swellengrebel[9] who visited the Zuurveld in 1776 made no mention of Black people and that on 25 October 1780 the Politieke Raad Field Corporal Daniel Bouwer (who incidentally also had a loan farm where Salem is)

[9]Hendrik Swellengrebel was the first and only Dutch East India Company governor of the Dutch Cape Colony who was born in the Cape.

reported that the Xhosa were illegally west of the Fish River. Professor Legassick's response was that, Field Corporal Bouwer's understanding of the events is incorrect because the Xhosa had indigenous rights there.

Mr Garthford Chandler: Chief Directorate National Geospatial Information, Mowbray, Cape Town.

[29] Mr Chandler works at the National Geospacial Information Chief Directorate which he explained was formally known as Surveys and Mapping. He obtained a Bachelors of Science in Geometrics at the University of Cape Town and has been working at the National Geospacial Information for three and a half years. He testified that he found evidence of traditional settlements along the Assegai River in the form of traditional type structures.

[30] Regarding the pathways that were visible on the maps Mr Chandler testified that, it generally takes a substantial amount of years of usage for an actual pathway to be that clear on an image. A pathway created only a few months prior would be barely visible. The ones on these images were obviously very well established and had been used for a very long time. The positioning of the pathways is indicative that there is evidence of traditional dwellings situated mainly along Assegai River with connections to the commercial farming areas as well as the Commonage.

[31] At a meeting between Mr Chandler and Mr Gerber[10] agreement was reached on the aerial photography and the topographical maps the following findings:

1. Evidence of traditional dwellings as found and agreed on images 1-13 and 15 are per Mr Chandlers report. Agreement on Image 14 being questionable as to the status be traditional could be silo or farming related activities. no pathways linking to buildings

[10] The photograph expert who submitted a report on behalf of the Land-Owner Defendants.

2. Evidence of commercial farming fields and buildings as evidence by the red arrows in Mr Gerber's report, pathways connecting the traditional dwellings with the commercial farming areas and the Commonage as evidence in both reports. Primary area of traditional dwellings around the Assegai river.

[32] The conclusion is that there is evidence of traditional dwellings situated mainly along the assegai river with connections to the commercial farming areas as well as the Commonage. Although the close proximity to commercial farms can infer that traditional dwellings may be occupied by farm workers we cannot however infer from photography whether the occupants of the dwellings are farm workers or not.

Argument

[33] The Commission argued that the phrase "right in land" is extremely widely defined. The words in the Act should be given beneficial interpretation. Relying on *Transvaal Agricultural Union v Minister of Land Affairs and Another*[11] it was argued that any informal rights are included. The right to claim restitution trumps the existing rights of the owners and the general approach should be that the right to claim trumps every other right save for public interest.

[34] The Commission argued that while it may not be deemed to be necessary to discuss the 1812 expulsion caused by the Fourth Frontier War; this case is post-1913. The relevance of this part of the history is that, the Land-Owner Defendants' case is that the land settled on, in 1820 was vacant land; their view is any suggestion of indigenous rights is negated. The Commission argues that the reliance on the pre-1913 history was to show that the premise of the Land-Owner Defendants' case was false; the land was not vacant, its inhabitants were cruelly expelled. The argument is that there is authority for the view that indigenous rights continue despite conquest for

[11] 1997 2 SA 621 (CC) at para 36

as long as the indigenous people assert them, and exercise them, they are not extinguished. 1819 and 1835 are clear examples and instances where the indigenous Xhosas staged a return to their land. Even if they did not succeed militarily, as they faced superior military force.

[35] The Commission argues that it is common cause that Salem came into being in 1835 when there was an attempt to make peace with the advancing Xhosas to the Zuurveld. Salem is a universal concept across religious, cultural and linguistic communities, in English it means Peace. *In casu*, we see instances of the original Xhosas and their descendants returning to their land time and time again, up until their dispossession, in particular, over the period 1913 to 1947. The Act is a remedial Act, in line with the Constitution. The right to restitution it is contended must and should be enforced by this Court.

[36] The Commission states that the Land-Owner Defendants' standpoint is that this Court must ignore all documentary evidence, especially that which supports the Plaintiff's case. This, is for the Commission, clearly untenable and disingenuous, to say the very least.

Summary of the Land-Owner Defendants' case

[37] The Land-Owner Defendants own of the Remainder and certain portions of the Farm Salem claimed by the Plaintiff. They aver that the subject properties were originally awarded to the 1820 British Settlers who were known as the Salem Party of Settlers. In December 1836 the Salem Party of Settlers were awarded land measuring 2333 Morgan in the district of Albany for the common use of the Salem Party of Settlers. A further 5365 acres was awarded by the Governor of the Cape of Good Hope in November 1947. In terms of the provisions of Ordinance 15 of 1844, this land awarded to the Salem Party of Settlers was subdivided and awarded to individual settlers by way of grants. The ascendants of some of the Land-Owner Defendants'

were original recipients of such grants. In addition to the grant each erf owner was awarded a share in a common area in the form of perpetual quitirent. The utilisation of the Commonage was strictly limited to the grazing of livestock for those owners that had rights to the Commonage. The owners of the Commonage individually and collectively through SVMB exercised exclusive control over the Commonage.

[38] The evidence of the Land-Owner Defendant's witnesses is discussed below.

Mr Arthur David Mullins

[39] Mr Mullins testified that he was born on 4 March 1955. His father arrived from Zimbabwe (then known as Rhodesia) in April 1952 and purchased the farm Moorelands where he farmed until 1964. Moorelands is outside the claimed area. His father also purchased the farm Avondale in 1963. Mr Mullins testified that when his father arrived at Avondale it was a virgin farm except for some pieces of land on the farm. There was only one small piece of land on the Commonage where Mr Ross Atwell was farming pineapples, the remainder was unoccupied. In 1964 Mr Mullin was a young boy and he recalls that only two people employed on the farm Jamane Sukula and Nimrod Plaatjie. The witness knew Jamane Sukula for most of his life and he testified that he was approximately 65 years old in 1964. The witness testified he was quite close to Mr Sukula (Misile Nondzube's father) and that in the time he had known him he had never mentioned that the Xhosa had any right to the Commonage.

[40] Mr Mullins testified that the Commonage was mostly virgin land when his father arrived with only a few huts scattered around on the borders of the erven, and the occupiers were Africans who worked for the owners. He testified repeatedly that the claim was invalid and that there was no evidence that Africans had rights in the Commonage.

[41] Under cross-examination he admitted that having only been born in 1955, he could not firmly state that prior to that there were no Africans with rights in the Commonage. Similarly he admitted that his father only came to Salem after the sub-division by of the Commonage. Mr Mullins conceded that he was not well versed in the wars that took place in the 1800s and the subsequent expulsion of the Xhosa. He however, maintained that the claim was not valid. He admitted that he had sold his land to the State and as such was not one of the Land-Owner Defendants, but he testified that this was only for commercial reasons and not due to the legitimacy of the claim.

Spencer John Hill

[42] Mr Hill testified that was born in 1949, he is the grand-son to Jack Hill. Jack Hill is mentioned in testimony by both the Plaintiff's and the Land-Owner Defendants' witnesses. Mr Hill is not a Defendant in this matter. His testimony is for the benefit of the Land-Owner Defendants in that he assists them with his memory of the time he spent at his grand-father's home. He testified that when he was growing up he visited his grand-father once a month; he usually walked to his grand-father's house from his own home. He testifies having no recollection of any huts on the Commonage or any Native people living on the Commonage. He testified that the route was one that he frequented and the vegetation as he remembered it was indicative that there was no ploughing on the Commonage.

[43] Mr Hill testified that he recalled the SVMB was running the Commonage and did so properly and all decisions were through the SVMB.

Mrs Bradfield

[44] Mrs Bradfield married Andrew Bradfield in 1974; she then moved to farm Providence in Salem, which was owned by her father-in-law Donald Bradfield. She

relied on the records kept by her father-in-law in her testimony. She testified that he moved to the farm in 1940 he had maintained a wage book where he recorded wages that he paid his employees. He allowed his workers to keep cattle on their farm, she testified, that while they were allowed to keep cattle, such consent was limited and they were only allowed to keep a certain number of animals.

[45] Mrs Bradfield admitted that her evidence was mostly second hand, she relied on conversations she had with her mother and father-in-law. The date of her father-in-law's arrival in Salem was a contentious point in cross examination.

Mrs Ethell Page

[46] Mrs Page was born in 1926. In 1934 she and her family moved to the farm Residency in Salem. She was approximately nine at the time. She lived in Salem form age 9 to 20 and after her marriage she left Salem. Her testimony was on her memory of the Commonage before and during sub-division. She testified that she did not recall any Black people living on the Commonage. She recalls a few Black people being present but they lived on the properties of their employers and not on the Commonage. She could not recall many specific details regarding Salem, but she testified that her family employed two Black people but was not aware as to where they lived.

Mr Van Rensburg

[47] Mr Van Rensburg was born in 1923 and lived on the farm Residency in Salem from the age of nine. He resided in Salem intermittently, going off to school elsewhere and being enlisted in the army. He was a soldier in the Second World War and only returned to Salem in 1945; he did not indicate when he commenced his duties. He testified that he did not stay in Salem for a long time after he returned that and he moved to the Transvaal. While in Salem he assisted his father with the grazing

of cattle, his father had 36 head of cattle which he grazed on the Commonage. His father also employed two Black employees to assist in this regard, one of them had a family and they built huts across the road from the farm where they resided. His father allowed his employees to keep some cattle and they grazed their cattle on the Commonage along with those of his father. He denied seeing any huts or homes on the Commonage when his family arrived; he also denied that the Natives had any control over the Commonage.

[48] Mr Van Rensburg rejected the statistics regarding the huts and Black people residing on the Commonage as recorded in the Natives Commissioners Return. He testified that when his family moved there he did not see them.

Mr Alwyn Cuan King

[49] Mr King was born in 1954, and resided on the farm Kingston in the Commonage. His father first settled in Salem in 1936, at the age of 30. He is a direct descendant of Thomas King, who is mentioned in the minutes of the meeting held in Albany in 1824. He is a member of one of the families of the Septhon Settlers. He testified that he recalls his father and aunts who lived on the farm Kingston; they had four Black employees, who had families, three of them lived on the farm and one lived on the Commonage. He testified that none of the erven owners were allowed to plough and graze on the land and that the Commonage was virgin land. He testified that the SVMB had complete control over the Commonage and the erven owners were very protective over their Commonage rights.

[50] Under cross examination Mr King conceded that he could not explain the discrepancies between the Natives Commissioners report and his testimony about the presence of Natives on the farms. He explained that he was not born at that stage. He admitted that his testimony regarding employees living on the Commonage and erven

was only in relation to farm Kingston; he could not make the statement generally for all Black people in Salem.

Argument

[51] The Land-Owner Defendants argue that three pertinent facts must form the background of this case, the first is, save for hearsay evidence by Mr Nondzube there is no credible evidence to prove that Blacks occupied the entire Commonage, nor did they do so unhindered as of right until 1947; secondly, the archival evidence does not support the referral report; and finally, the Land-Owner Defendants' witnesses have refuted the contentions.

[52] The Land-Owner Defendants attacked the evidence adduced by the witnesses of the Plaintiff arguing that it largely consists of hearsay evidence, has no probative value and has been refuted by that of the Land-Owner Defendants witnesses. Most damningly they argue is that it is that Mr Nondzube's version is not supported by the archival information.

[53] The Land-Owner Defendants argue that contrary to the referral report the Commission relied on indigenous title acquired prior to 1913, while the referral was reliant on the existence of a Location after 1921. They argue that the factual evidence, as well as the probabilities clearly proves that the allegation that Black inhabitants of the Salem Commonage could rely on any indigenous title to land has been disproved and is nothing but a figment of imagination.

[54] The Land-Owner Defendants deny that any indigenous title existed, but if it did they argue that prior to 1913, any such rights would have been extinguished in *toto.*

They rely on the notion that the land had been conquered by the colonial government in 1819 and that effectively destroyed any right any Black could have in the Zuurveld.

Expert Reports

Professor Legassick (for the Commission)

[55] Professor Legassick in his report reminds us that recorded history is usually what dominant cultures leave behind them as they relegate the dominated to the shadowy status of people without a history. Documentary evidence, with its distortions and selections, is itself an indicator of what was becoming lost in the past while the present was being made. Thus, even the gaps in a history based on documentary evidence can be revealing, gesturing mutely to that which vanished.

[56] The question for Professor Legassick is: do the claimants have historical continuity with a people occupying the Zuurveld prior to White colonisers? The answer to this contains a number of elements. Firstly, that the Xhosa occupied the Zuurveld prior to the White colonisers is conceded by the Defendant's experts. Secondly, Salem is in the South-Eastern part of the Zuurveld, between Bushman's and the Lower Fish Rivers. Governor Van Plettenberg[12] tried to reach an agreement with minor chiefs of the Gwali and Dange, that the Upper Fish River would be the eastern boundary-but excluded from the colony the area between Lower Fish and the Bushman's[13].

[57] Professor Legassick relies on Keal[14] (who follows Jose M Cobo UN special rapporteur) states that indigenous persons are those with "self-identification as

[12] Joachim Ammena van Plettenberg was the governor of the Cape of Good Hope from 11 August 1771 to 14 February 1785

[13] Map on page 484 of the Experts bundle the shaded portion indicates the portion of the Zuurveld not included within the colonial boundary.

[14] Keal P "*European Conquest and the Rights of Indigenous People: The Moral Backwardness of International Society"* (University Press, 2003 Cambridge).

indigenous" and "recognises and accepted by these populations as one of its members." In other words it is not necessary to prove blood/family descent between the Xhosa who occupied the Zuurveld and those who occupied Salem. Indigenous Xhosa are those that regard themselves as Xhosa and are accepted as such by other Xhosa. Professor Legassick argues that the Land-Owner Defendants reformulate this to argue that any Xhosa can today claim land in Salem, he responds by stating only the Xhosa occupying land within Zuurveld in June 1913 and who were subsequently evicted can make a claim for restitution

[58] Professor Legassick examined the January 1878 report stating that the Inspector of Natives Locations forwarded to the Civil Commissioner of Grahamstown a report giving returns of Natives locations in Lower Albany. This included the figures of the number of huts and people on the Salem Commonage. It was reported that the residents were dissatisfied with the new regulations. Such returns were available for several years but ceased in 1884. The report in December 1877 indicates that there was one hut with a population of three people, the last report in June 1884 indicates that there were 24 huts with a population of 130 people and 70 cattle. These returns are significant in that they indicate the habitation of the Salem Commonage by Natives was officially recognised as legitimate. The establishment of the SVMB ignored the existing rights of the Black inhabitants of the Salem Commonage. There was no consultation with them in its establishment which was racially discriminatory.

[59] In summary Professor Legassick's report concludes that the Plaintiff has indigenous rights as descendants of Xhosa who occupied the South-Eastern Zuurveld prior to colonisation by European settlers. Post-1879 the claimants, independently of their claim to indigenous rights, have rights to land and cultivation as a result of their descent from occupants of a location called "Salem Commonage" in 1879-1884 from which they were not removed until the 1940s when they were dispossessed and evicted as a result of racially discriminatory laws.

Dr Visagie (for the Land-Owner Defendants)

[60] Dr Visagie's report states that the original inhabitants were the hunter/gatherers called 'Bushmen' more often referred to as the 'San'. In 1752 Ensign Beutler found that the sole inhabitants of the area between the Upper Fish River and the Thyume (Keiskamma) River were the Bushmen. The Gonaqua were at the front of the Khoekhoens' eastward movement, the Gonaqua were noted for the first time in 1689 by Schrijvr when he was introduced to them by the Inqua as the Community along the Coast that provided them with Dagga. By the end of the 18th century all the Khoekhoen east of Van Stadens River were called Gonaqua although they were different groups. The Gonaqua were those Khoekhoen who vigorously attempted to preserve their tribal identity.

[61] By 1750 the Xhosa had acquired the area as far south as Keiskamma. By 1780 some clans of the Xhosa were across (Western side) of the Fish River. By 1778 Governor van Plettenberg embarked on a journey inland and met some petty chiefs of the Xhosa at the Upper Fish River. In 1776 in a recordal by Pieter Cloete, Governor Swellengrebel's diarist makes no mention of Black people present on the west of the Upper Fish River. Therefore, one can conclude some Xhosa groups crossed the River between 1776 and 1778. The agreements with Van Plettenburg and the Xhosa were meant to indicate that the Lower Fish River was to be considered the boundary. It is argued that as early as 1778 Van Plettenburg already agreed with Black chiefs that the Fish River will be the boundary. Thereafter, various loan farms were also registered in the Zuurveld by the 1780s. Loan farms developed as a result of the quick expansion of the area occupied by White stock farmers. By 1793 there were already 1 959 occupied loan farms in the Cape Colony.

[62] During the period 1790 to 1812 the Dutch and later British governments at the Cape were insistent on keeping Tshaka and his son Chungwa at the eastern side of the

Lower Fish River but this was not easy to accomplish. In both clashes of 1793 and 1799 the colonial governments were reluctantly forced to make peace with the Gqunukhwebe having been removed to the other side of the Fish River. However, it remains a fact that the Black communities west of the Fish knew the Fish was the colonial boundary. After the Fourth Frontier War in 1811 Chungwa was killed and for the first time the colonial government stamped its authority.

[63] After the Fifth Frontier war in 1819, Governor Charles Somerset[15] established an area East of the Fish River that neither Xhosa-communities nor White colonists were allowed to occupy that territory. The Fish River was to serve as the colonial boundary to the Zuurveld. However, Governor Somerset was dishonest about the ceded territory and intended to use it for the White colonists. In 1820, the Sephton party of settlers established themselves south of the Assegaaibos River. A town settlement was proclaimed in 1829 by Sir Lowry Cole which consisted mainly of Coloureds and the Khoekhoen in the area between Koonap and Kat Rivers. This was a step towards making the ceded territory smaller in breach of the 1819 agreement.

Professor Giliomee (for the Land-Owner Defendants)

[64] Professor Giliomee has degrees in History and Political Science and was a professor of political science. His dissertation for his Masters was "Die af die administrasie tydperk van Lord Caledon 1807 to 1811". In that dissertation he dealt with the history of the Xhosa. Professor Giliomee for the Land-Owner Defendants states that various groups hold claim over the contested area. The first claim is that of the Gonaqua, Khoikhoi who were spread between the broad coastal plain between the mountains and the Fish River in 1700. By 1750, the Khoi who were depicted as previously rich in cattle had become entirely destitute as a result of wars with the Xhosa.

[15] Governor of the Cape Colony, South Africa, from 1814 to 1826

[65] The second claim is by the Xhosa nguni-speakers who around 1750 began to lay claim to the area. Two major splits occurred in the hundred years before 1770. At the end of the 17th century while the Xhosa were living west of the Mbashe River, several minor chiefs and their followers hived off from the nuclear political unit under the paramount and established different chiefdoms. The second occurred in the middle of the 18th century when the Xhosa nucleus split into Gcaleka and Rharhabe which lived in the west. By 1750 and 1770 sizeable numbers of Gqunukhwebe established themselves in the Zuurveld and incorporated many of the Ntinde.

[66] The third claim is that of the colony which started moving into the area between Sundays and the Fish during the 1770s. The colony's claim was based on the boundary settlement concluded by Governor Van Plettenberg in 1778, there were understandings with minor chiefs but these did not bind other chiefs and their followers. Between 1780 and 1814 when the Cape Colony formally became a British Colony. Successive colonial governments considered the Fish River as the Colony's eastern border.

[67] It is not denied that there were Africans on the Salem Commonage in 1913, there is however no Community, as defined in the Restitution Act, which had been formed comprising of Africans in Salem and that had rights to land.

Professor De Beer (for the Land-Owner Defendants)

[68] Professor De beer was the head of the Department of Anthropology and Archaeology at the University of South Africa and acted in this capacity until his retirement in 2007. Professor De Beer's view is that the Plaintiff which is composed of Xhosa speaking persons belonging to the Xhosa tribe was not resident in Albany in the 18th Century. The Xhosa he testifies, in that period occupied the area closest to the Fish River and never in Albany, this area is not in the Albany district.

[69] The land allocated to the Salem/Shepstone settlers was situated on both sides of the Assegaaibos River. Prior to this it was hired by Barend Bouwer before he moved upstream. The Salem Settlers allegedly settled on virgin country. There was only sporadic contact with Xhosa speakers in 1835 and 1847; the first real contact was in 1857 after the cattle killing tragedy where thousands of Xhosas died as a result.

[70] Professor De Beer consulted the Private Locations Act 32 of 1909 (Cape of Good Hope) and other relevant legislation at the time. After perusing letters attached in annexures 4[16] and 5[17], he concludes that the Location never came into operation and that there were squatters on the premises. He found that had there been a location then Act 32 of 1909 would have been applicable. Interpreting the letters and the provisions of the Private Locations Act he concluded that there were no Black people resident in 1941 and thus dispossession in 1947 is improbable. In the event that a location had been established, Act 32 of 1909 would have been applicable, and as such any Black person resident in a location acquired no rights in and to the area occupied. Further there was strict control over the Commonage.

[71] Professor De Beer submitted a supplementary report where he concluded that the − Sephton Party of Settlers settled on unoccupied land in Albany as a result of the expulsion of Xhosa speaking persons in Zuurveld during the Fourth Frontier War of 1811-1812; SVMB exclusively controlled and managed the Commonage; SVMB was a structured organisation with control over the inhabitants; any inhabitants on the Commonage did so with the permission of SVMB; the establishment of the location was initiated by SVMB which was responsible for its administration until its

[16] Letter dated 15 July 1947 addressed by the Native Commissioner of Grahamstown to the Secretary of Native Affairs. The letter states that a Black location previously existed but at that date there was only one dilapidated unused hut and that the location ceased to exist 12 years prior.

[17] Letter dated 14 December 1931 addressed by the Assistant Health Officer of King Williams Town to the Secretary for Public Health. In this letter it was testified that a location had been established and 10 families were resident. Site rent was charged for each family and only persons employed in the settlement were allowed to reside.

disestablishment in 1941; the identity of Dayile the last chief is shrouded in mystery raising doubt as to his actual existence; and there is no evidence that the Plaintiff was ever forcefully removed.

Facts that are not in dispute –agreed as between parties

Stellenbosch Meeting 17 January 2013[18]

[72] The following facts were agreed upon at the above meeting, the—

a) definition of the Zuurveld; the narrow definition being the area between the Lower Fish and the Bushmans Rivers and the wider definition being the between the Sundays and Fish Rivers;

b) extent of the Zuurveld in terms of the narrow definition comprises of 5000 square kilometres;

c) earliest date on record that Whites occupied the Zuurveld is 1778; and

d) Xhosa people occupied the Zuurveld before the Whites; however, this agreement is qualified in that Professor Giliomee and Dr. Visagie who contend that such occupation was temporary and sporadic and did not constitute a right of occupation.

Pleadings

[73] The pleadings indicate that it is not disputed that:

a) there were Black people (or Natives) resident at the Commonage as evidenced by the reports of the Inspector of Natives Locations;

b) the Location on the Salem Commonage was established in 1921;

c) by1811 there were Xhosas in the Zuurveld;

[18] A meeting of the experts was held in Stellenbosch (as agreed by the parties) it was minuted and the facts which were agreed upon by the experts were recorded.

d) in 1812 Xhosas were expelled from the Zuurveld by British forces;

e) there were Burgers (Dutch farmers) present in the Zuurveld from 1780s and there were about 148 families;

f) it is not clear when the Village Management Board came into existence;

g) the Regulations of 1917 (establishing the Location) which were reissued in 1919 were promulgated; and

h) a judgment of the Supreme Court in Grahamstown, sub-divided the Commonage and portions were allotted to the existing erven owners.

Facts that are in dispute- not agreed as between the parties

[74] It is disputed that;

a) the Plaintiff constituted a Community as defined in Section 1(iv) of the Act;
b) the claimant had a right in land as defined in Section 1 (xi) of the Act; and
c) any dispossession was not as a result of any racially discriminatory laws or practices.

Inspection in loco

[75] As reflected in the minutes of this excursion which included the Court; Counsel for the Commission, Plaintiff and Land-Owner Defendants; the instructing Attorneys; members of the Plaintiff; and some land owners. At the inspection in loco the Land-Owner Defendants pointed out certain historical information which included three old photographs in a hall depicting Salem harvest Home dated 19 April 1894 and other photographs relating to the Salem cricket club. The Land-Owner Defendants also pointed out the old church in the village which was dated 1832 and specifically a stone plaque in the church yard with the following words inscribed thereon

> "On the hill opposite in January 1835 Richard Gush persuaded the Kaffirs from attacking the settlers in the larger at Salem erected by descendants of Richard Gush 1959."

[76] It was noted that members of the Plaintiff pointed out that diagonally across the valley that a further stone was erected on the hill as being the alleged position the AmaXhosa warriors in 1835. Mr Nondzube pointed out the homes of the Tsana family and the position of their residences. He also pointed out the mountain spring where the community fetched water for drinking purposes. He indicated that there were no more homes as the area was ploughed by farmers. There was extensive pointing out by Mr Nondzube of the area that spans right to Kenton on Sea. He also pointed out the graves of the families of Nkwinti, Robile, Mbebeto and Ngqiyaza. Other families' names he could not remember. This was contested by the Land-Owner Defendants who alleged that there were only a few stones and they do not constitute a grave.

[77] The inspection then proceeded to farm of Carl Roux known by the claimants as Kwanonggqokela; grave sites were pointed in various sections of the area. The party where then taken to ESA Lodges also known as Volunteer Valley. At that inspection Mr Nondzube pointed out the place where the lime was obtained for the purposes of initiation of young boys and was also used for decoration of their houses and for facial cream and also medicinal purposes.

Literature overview

Pieres

[78] Both Professor Legassick and Giliomme relied on Pieres in *House of Phalo*[19] when trying to substantiate their argument for the nature of the Xhosa. Legassick proposing that they did not exist as a political nation and Giliomee asserting the

[19] Pieres "*The House of Phalo: A History of the Xhosa People in the Days of their Independence*" (Univesity of California Press, 1982 California)

opposite. Giliomee defines the Xhosa politically as "All persons or groups that accept the rule of Tshawe." Legassick's view is that this is a much stronger statement of political centralisation of the Xhosa Kingdom than in Pieres's book. While he acknowledges Pieres' expertise he finds the definition somewhat static. Tshawe was a unifier but the 'kingdom' had moved on through fission, which resulted in the splitting of groups generally under the leadership of sons or brothers of chiefs. Two major fissions are the split between Gcaleka (east of Kei) and Rharhabe (west of Kei); another is Ndlambe's split form Ngqika. While Pieres makes fission appear conflict free, it was not necessarily peaceful and did not preclude conflict or turmoil.

Gordon

[79] Regarding the south-eastern Zuurveld in January 1778 the traveller Robert Gordon[20] encountered Xhosa around the present day Alicedale and Assegai Bos. Proceeding from Bushman's River on his way to the Fish River he met "other large groups" of Xhosa. His route to and from the mouth circumnavigated Salem, and they appeared to be settlements east, west, south and north of it. This is strong evidence that Salem, including its Commonage was within Xhosa territory.

Dugard[21]

[80] The Land-Owner Defendants rely on Dugard's book on international in particular they rely on the following:

> "Conquest on the other hand was an accepted method of acquiring title until after World War 1. In 1928 War was outlawed in the General treaty for the renunciation of War (also known as the Pact of Paris or Kellog-Briand Pact) and in 1945 the Charter of the United Nations prohibited the use of force in International Relations, as no right may arise from a wrong. It follows that

[20] Professor Legassick makes reference to evidence extracted from his Journal in his report.
[21] Dugard "*International Law: A South African Perspective*" 4 ed (Juta & Co, 2011 Cape Town).

> title acquired by the use of force is no longer recognised as illustrated by the non-recognition of Israel's purpoted annexation of the Golan Heights and East Jerusalem."

[81] The Land-Owner Defendants rely on the above and argue that it is clear that Colonel Graham in the 1811/12 War expelled the Xhosa from the Zuurveld. Dugard in particular differentiates between conquest and annexation. The Land-Owner Defendants argue that this case is thus distinguished from those of the Richtersveld Community and the Mabo cases because in those instances no war was waged. Therefore, by virtue of the fact that the conquest pre-dates 1928, such conquest was valid at the time and was an acceptable way of acquiring title. In terms of intertemporal law the title of the Zuurveld must be judged by the laws in force at the time.

Case law

Richtersveld Community and Others v Alexkor LTD and Another[22]

[82] The appellant community appealed against the dismissal by this Court of its claim for restitution of a right in land in terms of the Act. The appellant comprised the inhabitants of four villages in an area known as Richtersveld in the Northern Cape Province. In the mid 1920's alluvial diamonds were discovered near Alexander Bay after which alluvial digging were established on the land (the subject land). During 1994, the State, granted the subject land, including all mineral rights, in terms of a deed of grant to the first respondent, in which the State was the sole shareholder. The appellant applied for restitution of the subject land. In order to qualify for restitution of a right in land, the appellant had to meet the requirements of Sec 2 of the Act.

[22] Above n 4.

[83] It was not disputed that the appellant had maintained its identity as a people and the essential attributes and characteristics of their forebears and the society and culture of earlier times. The appellant could accordingly be regarded as a Community for the purposes of the Act. This left only the remaining three requirements in terms of Sec 2(1) of the Act to be determined by the Court. This Court having dismissed the claim, in an appeal, the SCA held:

a) The uninterrupted presence on the land need not amount to possession at common law for the purpose of an indigenous right of occupation. Furthermore, a nomadic lifestyle was not inconsistent with the exclusive and effective right of occupation of land by indigenous people.[23]
b) The undisputed facts of the case showed that the Richtersveld Community was largely ignored by successive governments although those governments had always recognised that the Community had some kind of exclusive entitlement to the land. The result was that they had been left in undisturbed possession of the land which was never taken away from them for the purposes of settling colonists. This situation made the case unique in the arena of restitution.[24]
c) The Richtersveld Community had been in exclusive possession of the whole of the area, including the subject land, prior to the annexation of the area by the British Crown in 1847 for inclusion in the Cape Colony. The territory had accordingly not been amenable to acquisition by occupation or settlement.[25]
d) The Richtersveld Community's rights to the land, including precious stones and minerals, were akin to those held under common law ownership these rights constituted a "customary-law" interest and consequently a "right in land" as defined in the Act. The substantive content of the interest was a right to exclusive beneficial occupation and use, akin to that held under common-law ownership. These rights survived annexation and the

[23] Id at para 23
[24] Id at para 8
[25] Id at para 8

Community could not be said to have lost its rights because it was insufficiently civilised to be recognised.[26]

e) When diamonds were discovered on the subject land during the 1920's the State ignored the Richtersveld Community's rights and, acting on the premise that the land was Crown land, dispossessed the Community of its rights in the land by the grant of full ownership of the land to Alexkor.[27]

[84] This practice was racially discriminatory as it was based on the false premise that, because of the Richtersveld Community's race and perceived lack of civilisation, they had lost all rights in the land upon annexation. The fact that the Act expressly included indirect racial discrimination in the definition of racially discriminatory practices was significant. In the case of indirect discrimination proof of motive or intention to discriminate on the part of the State was not required.

[85] Just as the circumstances in Salem, where before the arrival of the Dutch colonists, followed by the British settlers, people enjoyed undisturbed possession of land, akin to common law ownership.[28] It is this mischief and injustice that Section 25(7) of the Constitution read with the Act seeks to remedy.

[86] Accordingly, it was held that the *Richtersveld Community* was entitled to restitution of the subject land and the appeal was upheld. The decision in this Court in *Richtersveld Community and Others v Alexkor* was set aside by the Supreme Court of Appeal.

[26] Id at para 8 and 29
[27] Id at para 8 and 105
[28] It took nine wars of resistance for the occupying forces to subdue the indigenous people, and take over their land

Alexkor Ltd v the Richtersveld Community[29]

[87] The matter discussed above was taken on appeal to the Constitutional Court. The first and second appellants (the State) contended that any rights in the land which the Richtersveld Community may have had prior to the annexation of the land by the British Crown were terminated by the annexation and that dispossession of the land after 1913 was not the consequence of racially discriminatory laws. The argument in the present case is similar.

[88] A number of issues were outlined for determination by the Constitutional Court. The most significant for the present case are firstly a determination of the nature of the right held by the Community prior to annexation with this regard the Court found that "under the indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones. Indeed both Alexkor and the Government were unable to suggest in whom ownership of the minerals vested, if it did not vest in the Community. Accordingly the court concluded that the history and usages of the Richtersveld Community established that ownership of the minerals and precious stones vested in the Community under indigenous law."[30]

[89] The second aspect explored by the Court was the effect of the annexation by the British Crown to the rights of the Community; the Court found that there was nothing in the events preceding the annexation of the Richtersveld or in the language of the Proclamation which suggested that annexation extinguished the land rights of the Richtersveld Community.[31]

[29] 2004 (5) 460 (CC)
[30] Id at para 64
[31] Id at para 68

[90] The third aspect and perhaps the most pertinent concerned the nature of the rights held by the Plaintiff after 19 June 1913. In this regard, the Court held:

> "The inevitable conclusion is that the indigenous law ownership of the Richtersveld Community remained intact as at 19 June 1913. No steps were taken to extinguish the rights of ownership prior thereto. No ticket or certificate of occupation or certificate of grant had been issued which had the effect of limiting the indigenous law ownership of the Community in any way. No law was passed to render unlawful the exercise of any right by the Richtersveld Community in respect of the land in terms of its own indigenous law. Many opinions were expressed, there was much debate about what was to be done, considerable effort was expended in investigating the position of the Richtersveld, many letters were written, many claims were made on both sides and not an inconsiderable number of reports were compiled. But the Richtersveld Community in fact continued to occupy the whole of the Richtersveld including the subject land, to use it, to let it, to grant mineral rights in respect of it and to exercise all other rights to which it was entitled in accordance with its indigenous law ownership of the land."[32]

[91] In light of the above findings the Constitutional Court upheld the findings of the Supreme Court of Appeal.

Foreign case law

Australia

[92] Australia was one of the four countries including Canada that voted against the United Nations Declaration on the Rights of Indigenous Peoples, it has since changed its position and is now in support of the Declaration. As in other previous colonial countries, the Australian courts at first did not recognise indigenous land rights. An example is *Millurpum v Nabalco Ltd*[33]. The Court rejected the idea of indigenous land rights or aboriginal title in common law and said these rights only exist insofar as

[32] Id at para 80
[33] [1971] 17 FLR 141

they are created by statute. This decision, however, was overturned in the now famous second *Mabo*[34] case.

[93] The background to the two *Mabo* cases is − in 1879 the British took possession of the Murray islands in the Torres Straits between Northern Australia and Papua New Guinea and annexed it to Queensland, Australia. At the time the islands were inhabited by the Miriam people of Melanesian descent. They still inhabit these Islands. In the late 1980s the Miriam people took their claim to court, resulting in both *Mabo v* Queensland[35] cases, in the High Court of Australia.

[94] In the first *Mabo* case, Brennan, Toohey and Gaudron J, expressed the majority view that negative differential treatment of aboriginal rights by official organs of the State is racially discriminatory. With respect to the aboriginal rights of the Miriam people, the Justices viewed such differential treatment as "impairing their human rights while leaving unimpaired the human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people".[36]

[95] The second *Mabo* case became the watershed case in favour of "Native Title" or "Aboriginal title". The Court declared that the "idea that land which is in regular occupation may be terra nullius is unacceptable, in law as well as in fact. Even the proposition that land which is not in regular occupation may be terra nullius is one that demands scrutiny; there may be good reason why occupation is irregular. Rather, the question is whether, at the time of colonisation, the land belonged to no-one"[37] Brennan J held:

[34] *Mabo v Queensland No 2* 1992 (HCA) 23;(1992) 175 CLR 1 (the second *Mabo* case)
[35] *Mabo v Queensland* [1988] HCA 69; (1989) 166 CLR 186 (the first *Mabo* case.)
[36] Id at para 20.
[37] The second *Mabo* case above n 31 at para 20.

> "Natives Title has its origin in and is given its content by the traditional laws acknowledged by the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of Natives title must be ascertained as a matter of fact by reference to those laws and customs"[38]

> "Natives Title . . . may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence whether possessed by a Community, a group or an individual. Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable Community, the members of whom are identified by one another as members of that Community living under its laws and customs, the communal Natives title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed."[39]

[96] Brennan J stressed that "international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. Quoting *Vajesingji Joravarsingji v Secretary of State for India*[40] the Court stated that:

> "But a summary of the matter is this: when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on a treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay, more, even if in a treaty of cession it is

[38] Id at para 64.
[39] Id at para 68.
[40] (1924) LR 51 Ind App, 360

> stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the Municipal Courts."[41]

[97] Following the reasoning elucidated above the Court concluded that the "Crown did not purport to extinguish Natives title to the Murray Islands when they were annexed in 1879."[42]

[98] In the case of *Western Australia v Commonwealth* [43] it was held that aboriginal title is enforceable even if a colony had been deemed *terra nullius* at the time of colonisation. The Court also found that the doctrine of Aboriginal Title automatically became part of the law in all British colonies, regardless of how the territory had been acquired.

[99] In the case of *Ward v Western Australia*[44] the Court held that the question of use and occupation to establish Natives title must be looked at from the standpoint of the indigenous Community. The Court must determine whether the Community's attachment to the land was consistent with the nature of the land and with the Community's needs and culture. It was readily accepted that survival might have depended upon a sparse and wide-ranging occupation. In the light of this judgement, pastoral, hunting and gathering tribes will no longer find it difficult to prove their occupation of their land. Modern courts acknowledge that, for the purpose of Natives title, occupation is not the same as common-law possession.

[100] In *the Wik People v State of Queensland and Others; Thayorre People v State of Queensland and Others*[45], the Wik and Thayorre peoples claimed to have been the holders of Native title over certain areas of land in Queensland. The land claimed by

[41] The second *Mabo* case above n 31 at para 58.
[42] Id at para 77.
[43] [1995] 128 ALR 1at para 12
[44] [1998] 159 ALR 483
[45] [1996] HCA 40; (1996) 187 CLR 1; (1996) 141 ALR 129; (1996) 71 ALJR 173

the two groups included land for which the Queensland Government had issued two pastoral leases - the Mitchelton Pastoral Holding Lease, granted pursuant to the Land Act 1910 (Qld), and the Holroyd River Pastoral Lease, granted pursuant to the Land Act 1962 (Qld). The Wik claimed that their Natives title was not extinguished by the granting of pastoral leases but constituted a valid and enforceable interest in the land co-existing with the interests of the lessees under the pastoral leases and exercisable at all times during the continuation of the pastoral leases. The Thayorre filed a cross-claim seeking, inter alia, declarations that on a proper construction the leases which the Crown granted over Mitchelton Holding in 1915 and again in 1919 allowed the co-existence of the Thayorre people with the lessees. The lessees were to use the land for pastoral purposes and the Thayorre in terms of their Aboriginal title.

[101] The judgment deals at length with pastoral leases; the rights of a lessee under pastoral leases; inconsistency between a lessee's rights and the continued right to enjoy Natives title; the nature of Crown's reversion; temporary suspension of Natives title; claims for equitable relief; and claims against the State of Queensland.

[102] On pastoral leases the submissions on behalf of the claimants was that the pastoral lessees did not acquire a right to exclusive possession of the land; and that the subject of the leases and even if they did , it is not the right to exclusive possession that extinguished Natives title but only the exercise of that right to exclude the holders of Natives title; that Natives title was not extinguished but merely suspended during the term of a lease and that Crown held any reversion as a fiduciary for the holders of Natives title. On the right of a lessee under pastoral leases, Brenan CJ, concluded that the lessees under each pastoral lease had possession and a right to exclusive possession at the latest from the moment when the lease was issued. And for the reasons testified, the Crown had the reversion expectant on the termination of the lease.

[103] On inconsistency between a lessee's rights and the continued right to enjoy Natives title Brennan CJ said—

> "that does not mean that the holders of Natives title became trespassers. Their continued presence on the land would have been expected and probably known by the lessees. Unless the lessees took some action to eject them, their presence on the land would have been impliedly consented to. It appears that the holders of Natives title were never trespassers on the Mitchelton leases. The holders of Natives title did not acquire a possessory title."

[104] On the nature of the Crown's reversion. Brennan CJ quoted the Mabo decision thus:

> "If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on expiry of the term, becomes a plenum dominium. If this view is correct, there is no occasion for the revival of Natives title."

[105] On temporary suspension of Natives title.

> "In my opinion, the common law could not recognise Natives title once the Crown alienated a freehold or leasehold estate under that Act. Consequently, the common law was powerless to recognise Natives title as reviving after the determination of a pastoral lease under the 1910 Act."

[106] Given the reasoning outlined above Brennan CJ dismissed the appeals and made orders against the Wik Peoples and the Thayorre People.

Canada

[107] In the case of *Delgamuuk v British Columbia*[46] *(1997) 153 DLR (4th) 193* the Supreme Court of Canada found it necessary to define aboriginal title comprehensively and to give an exposition of the content of aboriginal title and the way in which it has to be proven. Lamer CJ describes a continuum of aboriginal title—

> "aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection to the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the *'occupation and use of the land'* where the activity is taking place is not *'sufficient to support a claim of title to the land'* . . . . Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. . . . At the other end of the spectrum, there is aboriginal title itself [which] confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself. Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s.35(1), including site-specific rights to engage in particular activities[47]"

[108] Aboriginal title is a common law right to land protected by Section 35(1) of the Constitution Act of 1982[48]. Section 35 (1) did not create aboriginal rights, but accorded constitutional status to rights existing in 1982, including aboriginal title[49].

[46] (1997) 153 DLR (4th) 193
[47] Id at para138-139
[48] Pienaar "Aboriginal Title or indigenous ownership-what's in a name" (2006) *THRHR* Vol 69 pages 1-13 at 3
[49] Pienaar "Aboriginal Title or indigenous ownership-what's in a name" (2006) *THRHR* Vol 69 pages 1-13 at 3

Indigenous peoples and indigenous rights

[109] The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the general Assembly on the 13th of September 2007. 143 countries voted in favour of the Declaration, 11 abstained from voting and 4 voted against the Declaration. South Africa was one of the countries that voted in favour of its adoption. Certain provisions of the preamble of the Declaration are noteworthy:

> "Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests
> Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources"

[110] Articles 8 (2), 10, 25, 26 and 27 all deal with the protection of traditional land rights belonging to indigenous people. Most significant in the context of Restitution is Article 28 which provides that:

> "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
>
> Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

[111] The Declaration recognizes the inherent rights of indigenous peoples over their land and territory. And indeed it provides for the redress when traditional rights have been *confiscated*, *taken*, *occupied*, used or damaged without free prior informed

consent. The terms used are unambiguous if an indigenous Community has been dispossessed of land without free, prior and informed consent then such Community is eligible for redress. What is noteworthy is that the wording opens itself up to many eventualities the most easily proven would be loss of land through war with a colonial power whereby consent can never be a part of the equation.

[112] in defining Indigenous peoples four principles are extracted—"key inter-related factors common to most definitions of indigenous peoples; subjection to colonial settlement; historical continuity with pre-invasion or pre-colonial societies; an identity that is distinct from the dominant society in which they are encased, and a concern with the preservation and replication of culture."[50]

Application of principles to this Case

[113] *In casu*, I will start with conquest and its legal consequences for those involved, especially the claimants, in particular whether it extinguished their rights, however precarious or tenuous they were; relevant to this case is the impact of no less than nine wars that were fought in the region at which Salem lies at the centre, including the fourth War of expulsion of 1811/12 which is reported to have killed no less than 40 000 Xhosas. The impact of the inclusion of the Zuurveld into the British Colony after the second British Occupation of the Cape; the impact of the laws which purported to give title to White settlers exclusively, to the exclusion of indigenous people who inhabited the same territory, even before the White settlers came in the Zuurveld.

[114] Furthermore, the question must be asked and answered, having regard to the outlawing of the Natives Land Act of 1913, for its racist nature, whether its antecedents, which were equally racist, could conceivably have legal effect, for

[50] Working Group on Indigenous Peoples (1980) "S*tudy on the Problem of Discrimination against Indigenous Populations*", Jose Martinez Cabo's working definition of "indigenous communities, peoples and nations".

example, transferring clear legal title to land, especially viewed in the context of, and through the prism of constitutional dispensation; whether it is a legal requirement that the claimants before court must adduce evidence linking them in the minutest detail with the original occupiers of the land, or it is it sufficient that they led oral evidence to the effect that they regard themselves as an integral part of those who originally settled on the land in Salem.

[115] It is also noteworthy that the State in this Salem case has decided to throw its weight on the side of the Plaintiff, rather than oppose the claim, as it did in the *Richtersveld Community* cases, it probably learnt its lesson there. The Constitutional Court assumed without deciding that no provision of the Constitution had retrospective effect antedating 1 June 1913, when the Natives Land Act 27 of 1913 came into operation. It was not clear how the time limitation set by the Act was to be applied to the requirement that such dispossession had to be "as a result of past racially discriminatory laws or practices" but one purpose was to make clear that the dispossession must have occurred before the interim Constitution came into operation.[51] That whatever the phrase might mean, it could not have the effect of making a dispossession that took effect before 19 June 1913, actionable. This did not mean regard could not be had to racially discriminatory laws and practices that were in existence or took place before that date (as it happened in the Plaintiff's case). Cognisance of such laws or practices is necessary if the purpose is to throw light on the nature of a dispossession that took place thereafter or to show that when it took place it was the result of racially discriminatory laws or practices that were still operative at the time of the dispossession.[52]

[116] As in the case of Salem, where by 1941 lives were made so untenable for the Black people who persisted in living in and around the Commonage, and the location, they were forced out by the abolition of the location and the sub-division of the

[51] Id at paras 38-9
[52] Id at paras 38-40

Commonage, albeit by a judgment of a court of law that used pieces of racially discriminatory laws, in the context that had no regard for people who were not White, hence the consummation of a process of dispossession which started much earlier. It is going to be critical to make use of the theory of the commencement and consummation of an act, commonly encountered in Criminal Law, to demonstrate the point that dispossession in Salem commenced much earlier, even as the wars were fought, the Fourth Frontier War, for instance was called the War of expulsion, because it was hoped by the settlers that they would inflict so much pain upon the Xhosas that they would not dare to come back. There is a preponderance of evidence that people returned to their ancestral land.

[117] The Constitutional Court in *Richtersveld Community*, when it came to the legal effect other events prior to 19 June 1913, these had to be judged according to the law prevailing at the time. Thus, when considering the effect of the British annexation of the Cape in 1806 and its impact on acquired rights or of the 1847 Proclamation or other legislative or administrative acts, the then prevailing law had to be applied. This begs the question as to how such law can be the basis for evaluating the justness or otherwise of the events or acts, when we have our Constitution, which obliges all courts and institutions of government to live by its tenets, and outlaws anything that smacks of racism.

[118] Reference to the common law rights of the owners was the approach adopted by the Land-Owner Defendants in this matter. The *Richtersveld Community* decisions[53] indicate that the rights people enjoyed must be determined by reference to customary or indigenous law. The Land-Owner Defendants contend that because the Xhosa's holding of the land was not registered in the Office of the Governor in the Cape Colony, or the offices of the Landrost, they did not exist. The only persons who

[53] In The Supreme Court of Appeal and the Constitutional Court

held such rights are those who registered them in these official places that only Whites had access to. It is clearly and blatantly a flawed approach. Accordingly, it must fail.

[119] While in the past indigenous law was seen through the common-law lens, in the context of our internationally acclaimed Constitutional dispensation it must be seen as an integral part of our law.[54] The courts are obliged by Section 211(3) of the Constitution to apply customary law when it was applicable, subject to the Constitution and any legislation that dealt with customary law. In doing so the courts had to have regard to the spirit, purport and objects of the Bill of Rights.[55]

[120] The Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Whereas, colonial powers simply denied that there was customary law and norms by which communities lived. They poured scorn and contempt over their ways and despised them. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution that specifically dealt with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.[56]

[121] Indigenous law could be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses where necessary. *In casu*, the historical literature that formed part of the record with the testimonies of witnesses, formed the basis that such customs and norms consequently the sources of customary law observed by the people. However, caution had to be exercised when dealing with textbooks and old authorities because of the tendency to

[54] Id at para 51
[55] Id at para 51
[56] Id at para 51

view indigenous law through the prism of legal conceptions that were foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides.[57]

[122] Racial discrimination lay in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. Precisely, what happened in Salem. Indigenous rights were accorded no protection, whilst the registered title to land taken from the Xhosas was recognised and given protection - an anachronism. The inevitable impact of this differential treatment was racial discrimination against the Plaintiff, which caused it to be dispossessed of its land rights. Although it is correct that the Precious Stones Act referred to in the *Richtersveld Community* case did not form part of the panoply of legislation giving effect to "spatial apartheid", its inevitable impact was to deprive the Richtersveld Community of its indigenous law rights in land while recognising, to a significant extent, the rights of registered owners. This was racially discriminatory and fell squarely within the scope of the Land Restitution Act.[58] This reasoning is on par with what happened at Salem, like the Precious Stones Act, the Judgment of Justice Gane in the Supreme Court is such an innocuous thing, to be regarded as being part of the nefarious panoply of racially discriminatory laws, yet in context it had the effect of dispossessing the Plaintiff of its grazing rights, residential rights, ploughing rights, and burial rights, amongst others. It too was racially discriminatory and fell squarely within the scope of the Act.

[123] It was not necessary in the *Richtersveld Community* case to fix the precise date or dates of dispossession as it was after 19 June 1913, the actions of the State resulted in the loss by the Richtersveld Community of its rights in the subject land and that this

[57] Id at para 54
[58] Id at para 99

dispossession was complete by 1993.[59] In the case of Salem the dispossession was complete or consummated by 1947, after 19 June 1913, before 1993.

Issues

Is the Plaintiff a Community as defined in the Act?

[124] The Act defines a Community as follows:

> " . . . any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group".

[125] The Land-Owner Defendants have argued that the Plaintiff does not consist of a Community; the inhabitants of the Commonage (and some of farms) were all employees of the land owners and as such did not form a Community. Mr Nondzube for the Plaintiff argues differently detailing in his testimony the nature of the communal tie that bound the inhabitants of the Commonage. Mr Mullins for the Defendant denies Mr Nondzube's claim stating that he knows Mr Nondzube's father as he was employed by his father. The difficulty with Mr Mullins testimony in this regard, is that he admitted he only met Mr Nondzube when Jamane Sukula died in 1997. Prior to then he had only met Mr Sukula's other children. Mr Nondzube in his testimony clearly testified that he did not live with his father, and he resided with his maternal grand-father. It is therefore difficult to accept Mr Mullins' version over that of Mr Nondzube because at the outset it is accepted that Mr Mullins never had any knowledge Mr Nondzube who did not live with his father.

[59] Id at para 101

[126] The Defendant's attack Mr Nondzube's evidence as being mainly hearsay evidence which should not be admitted. Section 30(2) of the Act provides that:

> "Without derogating from the generality of the aforegoing subsection, it shall be competent for any party before the Court to adduce -
>
> (a) hearsay evidence regarding the circumstances surrounding the dispossession of the land right or rights in question and the rules governing the allocation and occupation of land within the claimant Community concerned at the time of such dispossession".

The nature of land claims is such that, in many cases those that suffered dispossession are no longer alive. In order to ensure that the Act is meaningful the legislature deemed it necessary to intervene on this point. There are no compelling grounds for this Court to reject the evidence of Mr Nondzube merely because it is hearsay. A number of the Land-Owner Defendants witnesses also adduced hearsay evidence in that most were born after the sub-division and their evidence on the period before was with regard to what they had been informed.

[127] It has been admitted that the location was established in 1921, however the Land-Owner Defendants deny that this recognised the rights of the Xhosa to reside there. This has to be looked at in perspective. The Location only formed a small area of the Commonage. There were regulations that were drafted and there was a back and forth about them but they were eventually published in March 1919. The SVMB was supposed to be in control of the Location. However, the location was only a small part of the Commonage and could not have housed the population of Natives in the Salem Commonage. There were Natives on the Commonage outside the Location and they were referred to as squatters.

[128] On 15 July 1941 the Natives Commissioner for Grahamstown wrote to the Secretary for Natives Affairs in Pretoria, indicating that the regulations of March 1919 had never come into effect indicating that the SVMB did not regulate the Location and had no control over the Natives on the remainder of the Commonage either. The Natives population as recorded in July 1932 whereby it testified the Natives population was 300-400 and there were 6 huts on the location. Logically such a large number of people could not live in 6 huts meaning that there were Natives outside the Location contrary to what the Land-Owner Defendants claim. This also indicated that there was a non-servant population in Salem. Because as has been indicated the Location was established to house the workers for the White farm owners.

[129] None of the witnesses of the Land-Owner Defendants could proffer an explanation for the large Natives population. It was argued that Mr Nondzube's version was incorrect because in 1877 the Native population was recorded as "3 Natives living in one hut". However, again this has to be considered in context as the returns for the following year indicate that there were 42 Natives, 47 cattle and 9 huts on the Commonage. Such a rapid increase is not explained by the Land-Owner Defendants, more so it is difficult to understand how there could be cattle on the Commonage. All the Land-Owner Defendants witnesses save for Mr Van Rensburg testified that they were not allowed to plough and graze on the Commonage and as such it was virgin land. Only Mr Van Rensburg whose family came to the Commonage after the 1930s testified that they used the Commonage to graze, all the other witnesses described it as virgin land.

[130] Another improbable aspect is that all the witnesses for the Land-owners testified that they only knew of one or two Natives that were employed by the land owners. Mr Mullins, Mr Van Rensburg and Mrs Page all gave this testimony. The conclusions they give are startlingly different from the documentary evidence, in 1932 the Native population was recorded as 300-400 however, Mrs Page who was born in 1926 and moved to the Residency at age 9 (approximately 1935) testified that she did

not see any huts or any Black people on the Commonage save for those employed and living adjacent to the farm. Contrary to the contention by the Land-owners Defendants, Mr Nondzube's testimony is supported by documentary evidence to a far greater extent than theirs. Both Mr Nondzube's and Mr Ngqiyaza were honest and credible witnesses. The cross examination largely tried to discredit their versions, but as already mentioned their version is corroborated by the evidence more so than that of the Land-Owner Defendants. Given this analysis I find that the version of the Plaintiff in this regard is more probable than that of the Land-Owner Defendants.

[131] The Constitutional Court in *Popela* held that:

> "However, what must be kept in mind is that the legislation has set a low threshold as to what constitutes a 'Community' or any 'part of a Community'. It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a Community. This generous notion of what constitutes a Community fits well with the wide scope of the 'rights in land' that are capable of restoration. These rights, as defined, go well beyond the orthodox common-law notions of rights in land. They include any right in land, whether registered or not; the interests of labour tenants and sharecroppers; customary law interests; interests of a beneficiary under a trust; and a beneficial occupation for a continuous period of not less than ten years before the dispossession. The legislative scheme points to a purpose to make good the ample hurt, indignity and injustice of racial dispossession of rights or interests in land that continued to take place after 19 June 1913.
>
> The threshold set by s 2(1)*(d)* is well met if the right or interest in land of the group is derived from shared rules determining access to land that is held in common. This generous understanding of what constitutes a Community is consistent with the retroactive reach of the restitution process back to 19 June 1913. With the passage of time the composition and cohesion of communities who were victims of dispossession would be compromised in that communities would be displaced and alienated from their original homes at huge human and social expense. Also, that interpretation advances the declared purpose of the operative legislation, which is to

> provide restitution and equitable redress to as many victims of racial dispossession of land rights after 1913 as possible.[60]

[132] The above passage serves as guidance of how this Court must construe the definition of a Community. The threshold is deliberately low and this Court is empowered to use a generous notion of what constitutes a Community. Mr Nondzube's evidence is that the Plaintiff used the Commonage in terms of shared rules and practices, and the right to use the Commonage was held communally. Such evidence has not been contradicted and it is supported by the documentary evidence. In 1932, only 6 huts were on the Location yet there were 300-400 Natives. It can be inferred that these Natives were not all living in 6 huts. And it is Mr Nondzube's testimony that they lived on the Commonage. Mr Nondzube's testimony described the community's shared interest in the Commonage that the families grazed their cattle and ploughed the land according to communal rules. The families interacted with each other and through their chief there were demarcations and homesteads were built and land was allocated. Cattle were grazed communally in one area. This evidence could not be refuted only because the basis of the defence is that such people did not exist. It is difficult to conclude that such persons could have lived on the Commonage in such large numbers and not form a Community. Even more difficult is that such a large number of people would go unnoticed. Given the constitutional imperative to perceive the notion of a Community generously, it is difficult to come to another conclusion. Therefore, I find that the Plaintiff is a Community in terms of the definition of a Community in the Act.

Did the Plaintiff have a right in land at 19 June 1913?

[133] The evidence led, as well as the historical literature relied upon by both sides, makes it abundantly clear that the Xhosas had Kingdoms, below the Kings were the Chiefs, and below the Chiefs were headmen, but at all material times the people were

[60] See *Popela* above n 3 at paras 42-3

under some figure of authority. The Kings, Chiefs and headmen were custodians of traditional beliefs and ways of doing things. They were consulted on a range of matters concerning life in general. Actual names of Kings like Sarhili, Rarhabe, and others are names of people who lived. Names like Ndlambe, Ngqika, Chungwa, and Tshawe are names of people who are written about in the very historical material were brought to this Court's attention by the parties herein. In the history books that were handed in as part of the evidence by both sides there are maps showing Ndlambe's Great Place and Chungwa' s Great Place in the Zuurveld area. It is also recorded that Chief Chungwa gave the British settlers a hard time in the Zuurveld, such that when they found him sick in his hut, they shot him in his heart, to make sure that they killed him. That is how Chungwa met his death.

[134] On another level, the Colonial government introduced a system of governance through the SVMB, which governed without representation of those governed, and even levied taxes , without representation. The SVMB made regulations governing the lives of the Xhosas, from basic things like carrying a knobkerrie, brewing of Kaffir beer, and a host of other things. It is these rules and regulations that were regarded as superior to any other rules, which were unwritten. In fact some witnesses admitted that "if it was not written, it did not exist ".

[135] So when it is said the Plaintiff, consisting of Xhosas lived by Community rules, it is meant the traditional, customary rules, passed from one generation to another, by word of mouth. Clearly over time the written rules of the SVMB took pre-dominance, over traditional and customary rules, as the two were inherently contradictory. Customary and traditional rules were about creating cohesiveness in communities, whereas the SVMB rules and regulations were about effecting control and authority over everyone who fell under the ambit of the SVMB's jurisdiction.

[136] To the Xhosas in Salem the rules told them where residences were, where the fields were for ploughing, where fields were for cattle – grazing, where graves were when people died, and a range of other things they did as a Community. These rules, as far as they were concerned subsisted up to the time the location in the Location was disestablished and the Commonage sub-divided and re-allotted to the erven-owners, which was the consummation of their dispossession that started years earlier.

[137] Professor Giliomee mentions no less than six wars that were fought between the White colonists and the Xhosas. The first war he mentions is the war in 1781 and the last the war of 1834-35. The full list of the wars is recorded in *Frontiers* by Noel Mostert, and other historians, as follows:

a) First Frontier War-1781.
b) Second Frontier War-1793.
c) Third Frontier War-1799.
d) Fourth Frontier War-1811-12.
e) Fifth Frontier War-1819.
f) Sixth Frontier War-1834-35.
g) Seventh Frontier War-1846-47.
h) Eighth Frontier War-1850-52.
i) Ninth Frontier War-1856-57.
j) Tenth Frontier War-1877-78.

[138] All these wars in the eastern frontier were over territory and cattle. There is general consensus that they took place, differences arise as to what caused them and the impact they had. Those who favour the White colonists postulate that the defeated Xhosas never returned to the original lands from which they were driven off, whereas those who favour the victims of these wars believe that their ancestors kept returning back to the land, because they believed it to be their territory and they belonged there.

[139] Much as the war of expulsion in 1811-12 was the most severe war, where no less than 40,000 Africans were killed, whilst those who favour the colonists version want us to believe that the Xhosas never returned, evidence is to the contrary, hence more wars followed this war, as early as 1819, with the siege of Grahamstown. The entire Zuurveld area between Sundays River and the Fish River was the field of war, covering the area of Salem in the middle of it all.

[140] The Land-Owner Defendants have invited the Court to rely on Dugard to look at the conquest of the Zuurveld by Colonel Graham as one that extinguished the rights of the Xhosa in the Zuurveld. They argued that intertemporal law demands that the law at the time is applied and in 1811/12 acquiring of rights by way of conquest was allowed in law. This argument is valid and conforms with the findings of the Constitutional Court in *Richtersveld Community* where it was testified that:

> "After annexation, the right of the Richtersveld Community to indigenous law ownership could have been extinguished in a number of ways. The Richtersveld Community would have lost its indigenous law ownership if:
> *(a)* the laws of the Crown expressly extinguished the Community's customary law ownership of the land;
> *(b)* the laws of the Crown applicable to the Richtersveld rendered the exercise of any of the material incidents of the indigenous law right to ownership unlawful;
> *(c)* the Community was granted limited rights in respect of the land by the Crown in circumstances where the only reasonable inference to be drawn is that the rights of indigenous law ownership were extinguished; or
> *(d)* the land was taken by force."[61]

The above dictum indicates that indigenous law ownership can be extinguished in a number of ways one of which is if the land was taken by force. The present case is concerned with this aspect.

[61] *Richtersveld Community* above n 4 at para 70

[141] That the argument is valid does not mean it is applicable to these facts. If this Court is to accept the argument it would have to be convinced that the land had been taken by force and as a result of such conquest the rights had been extinguished. This argument ignores the concept of a frontier zone, I accept the evidence of Professor Legassick in this regard, that the Zuurveld which Salem falls under was a frontier zone. This concept has been explained above but to illustrate my point I will repeat that a frontier zone is a zone where different communities resided with no single authority. The Land-Owner Defendant's rely on the Fourth Frontier war and its resultant expulsion to argue that at that point the land was taken by force. This argument ignores the fact that there were six more frontier wars in the Zuurveld, and in those wars the Xhosa and the settlers fought to establish authority over the land. The Zuurveld was a highly contested area so much so that expert reports indicate that the Dutch colonists found it extremely difficult to settle families to farm due to the raids and attacks from the Xhosa, leading to many families fleeing from the Zuurveld. Thus I cannot find that the Fourth Frontier War amounted to the rights of the Xhosa being extinguished, the different communities continued to fight over the Zuurveld in the decades that followed and there is no evidence that the settlers at any time managed to have complete authority over the Zuurveld and that the Xhosa relinquished their rights and were completely expelled. Therefore none of the features mentioned in *Richtersveld Community* find application here.

[142] Contrary to the Land-Owner Defendants' argument that the Xhosa were expelled the archival evidence indicates that a large number of Black people were resident on the Commonage who were not employed by the erven owners, this remains unexplained. A report on public finance on 9 June 1921 indicated, in regard to, the assessment of common land that large amounts have been allowed to get into arrears with the Natives owing £128. Regarding wood the report indicated that there was indiscriminate chopping down of wood in the Commonage and the largest culprits

were described as the squatters. The documentary evidence also indicated that the Location was not being used for the purpose for which it was originally intended.

[143] Furthermore, there was reference to a query from the SVMB regarding the branding of cattle and evidence before me is that branding had to apply to both Natives and Europeans. All the above indicated that Black people on the Commonage were self-sufficient enough to be paying dues, they were resident on the Commonage outside of the Location and were descendants from the Natives referred to in the returns of the 1870s and 1880s.

[144] Reference is made to squatters in some of the letters[62] indicating that the SVMB had no control over them. Squatting was a term used by White South Africa to refer to Blacks who were not under control. Professor Gilliomee argues that the Natives on Salem could not have been allowed to acquire any rights. He states that the entire thrust of Cape legislation in the last quarter of the 19th century was restrictive and discouraged labourers from making a living as peasants. Legislation had a clear goal of turning independent squatters, lessees, sharers into dependent, wage earning labourers. However, the presence of "squatters" in Salem is significant because contrary to the evidence, the SVMB did not have full control of the Commonage. Natives that were not employed nor under the control of the land owners they were deemed to be a nuisance.

[145] In 1920 there was correspondence concerning huts of Black people living on the Commonage and not the Location. It was pointed out by the SVMB that "Huts placed anywhere else [than the Location] on common land or on private erven do not seem to come under any of these regulations or under the control or supervision of my

[62] See reference to correspondence in para 147.

Board." Correspondence on the subject continued between the SVMB and the Department of Natives Affairs, what was not explicitly mentioned was the existence of Black people living on the Commonage who were not full time labourers or sharecroppers, but were the descendants of those who had lived there in the 1870s and 1880s. The SVMB was in tune with prevailing White sentiment believed all Black people should be servants and subject to White control. Squatting was also raised by a resident C. Gardener in a letter to the Provincial Secretary complaining that the SVMB allows "Native squatters" to live on the common land.

[146] The evidence indicates that after 19 June 1913, there were Natives on the Commonage, a number of which were not employed on any of the farms and who the SVMB had no control over. Mr Nondzube's evidence is that these people formed the Salem Community. It is evident from the ten frontier wars that there was a continuing claim over the Zuurveld by the Xhosa. This Community that the SVMB regarded as a nuisance because they could not control them are descendants of the Xhosa in the Zuurveld at the turn of the 19th Century. They clearly had a right to the Commonage before its sub-division.

[147] In 1940 when the issue of sub-dividing the Commonage was before the Supreme Court the Judge found that "the only persons who might feel annoyed would be those making a profit out of grazing the animals of friends and *Natives* on the Commonage . . . the position would now appear to be that the Commonage is used by persons, some of whom have a good class of stock and others who have scrub animals.." The presence of Natives on the Commonage which is denied by the Land-Owner Defendants is evident in the documentary evidence proffered; the claim that they settled on virgin land cannot stand. Significantly, the admitted inability of the SVMB to control the Natives on the Commonage is an indication that they had a right to be there. More damning as the Land-Owner Defendants claim the Black people were only employees, it begs the question, why would the Judge mention them and not their employers who would be affected.

[148] As a result of the above I find that the Plaintiff enjoyed a right in land in the Commonage after 19 June 1913. Such right stemmed from the Xhosa occupation of the Zuurveld which was never extinguished and extended to the community that occupied the Commonage in Salem after 1913.

Was the Plaintiff dispossessed as a result of past racially discriminatory law or practice?

[149] The Constitutional Court in *Popela* dealt with the issue of dispossession. It tackled three aspects broadly—the use of the phrase "as a result of"; the proper approach to statutory interpretation; and the grid of discriminatory laws and practices.

[150] The first two must be discussed together, Moseneke DCJ, discussed the use of the "but for" test employed by this Court and the Supreme Court of Appeal in concluding what the proper approach to statutory interpretation ought to be. He held that:

> "It is indeed so that the Restitution Act is an enactment intended to express the values of the Constitution and to remedy the failure to respect such values in the past, in particular, the values of dignity and equal worth. To achieve this remedial purpose, as it is shown later in this judgment, the history and context within which land rights were dispossessed and in particular the manner in which labour tenancy operated and was terminated must be considered. The causal enquiry required by s 2(1) of the Restitution Act must be understood in the light of this purpose and the full context of the dispossession of land rights in issue. It is to the legal and social context of the dispossession in this case that I now turn."[63]

[151] On the third aspect he found that one cannot look at any law or practice in isolation. He held that:

[63] See *Popela* n 3 at para 57.

> "These laws on labour tenancy cannot be viewed in isolation. They must be considered in the context of other laws which ensured that Blacks could not acquire title to land; could not insist on the recognition of their existing rights in land; could not seek to protect those existing rights in land against further erosion; and were precluded from asserting rights to occupy or move on to land in so-called non-scheduled areas other than as squatters or labour tenants whose rights continued to be diminished. These laws must be understood, particularly from the 1930s onwards, in light of labour laws which prevented Blacks from unionising; from withholding labour or otherwise effectively bargaining; and from lobbying or otherwise having an effective voice in central government because of a lack of proper representation."[64]

[152] Finally, he concluded that the term "as a result of" means:

> "I conclude that the term 'as a result of' in the context of the Restitution Act is intended to be less restrictive and should be interpreted to mean no more than 'as a consequence of' and not 'solely as a consequence of'. It is fair to add that, on this construction, the consequence should not be remote, which means that there should be a reasonable connection between the discriminatory laws and practices of the State, on the one hand, and the dispossession, on the other. For that determination, a context-sensitive appraisal of all relevant factors should be embarked upon."[65]

[153] The Land-Owner Defendants have argued in the alternative that even if this Court is to find that the Plaintiff is a Community, which was dispossessed, such dispossession was not as a result of "past discriminatory laws and practices". Such argument cannot be upheld if one considers one of the statements by the Judge prior to the sub-division to come to a different conclusion—

> "the only persons who might feel annoyed would be those making a profit out of grazing the animals of friends and *Natives* on the Commonage...the position would now appear to be that the Commonage is used by persons, some of whom have a good class of stock and others who have scrub animals".

[64] Id at para 63.
[65] Id at para 67.

[154] The term "as a result of" must be looked at in context of the entire frame of restitution, it must be interpreted purposively. There is ample evidence that there were Natives living on the Commonage, also there is evidence that not all the Natives were employees. The Judge when taking the decision to sub-divide the Commonage was aware that there were Natives on the Commonage that would be affected. It is not in dispute that the SVMB, land owners or the Judge at any point attempted to consult the Natives on the Commonage before dividing it.

[155] The decision of the Supreme Court Grahamstown, has to be looked at in context of the grid of discriminatory practices. This decision "ensured that Blacks could not insist on the recognition of their existing rights in land and could not seek to protect those existing rights in land against further erosion".[66] This decision must be looked at in context and the sentiment of the government of the day was that Black people could not have rights in certain places; the attitude of the SVMB and the residents was clear in that all the Natives that were not employed were by reference squatters despite the payment of hut taxes. The decision ignored the Natives, despite being aware of them, only because they were Black, they could not have rights and they did not need to be consulted despite the fact they were affected. This was a racially discriminatory practice.

Point in limine

[156] On the Land-Owner Defendants' point *in limine* alleging non-compliance with section 10(3) of the Act the Plaintiff and the Commission contend that this was not the case.

[157] Section 10(3) reads in full as follows:

[66] Id at para 63.

> "if a claim is lodged on behalf of a Community the basis on which it is contended that the person submitting the form represents such Community shall be declared in full and in any *appropriate resolution or document* supporting such contention shall accompany the form at the time of lodgement: provided that the Land Claims commissioner having jurisdiction in respect of the land in question may permit such resolution or document to be *lodged at a later stage.***"** (My emphasis)

[158] The provisions of this section must be read in context, it was clearly designed to give ample leeway to a claimant who is often not acquainted with the legalities of a process and simply wishes to lodge a claim in a representative capacity unlike other legislation such as the Companies Act which is specific and pre-emptory on the question of resolutions and the authority to act. It is unfortunate that the claim form does not specifically require a resolution to be filed at the time of lodgement but simply requests "capacity". It is wishful thinking to expect an ordinary Community representative to assume that his capacity must be supported by a resolution. Mr Paul in his evidence testified that the constitution of the claimant committee was accepted by the Regional Land Claims Commissioner and the claim was validated. The claim form was lodged on the 24 December 1998 and it was conceded by the Land-Owner Defendants' after initially being placed in dispute. The Land-Owner Defendant's did not question the Plaintiff's witnesses or Mr Paul regarding Mr Madinda's authority to lodge the claim. On the contrary the Land-Owner Defendants' questioning was not that the report was invalid but rather that it was valid and accepted by the Regional Land Claims Commissioner.

[159] Accordingly, I am satisfied that the provision of section 10(3) was complied with and that the claim is valid.

Costs

[160] On the issue of costs order to be made by this Court, this is a claim for restitution of rights in land under the Restitution Act and is a claim against the State.

The owners of the land, which is the object of the claim, are entitled to resist the claim but that does not alter the core character of the statutorily devised claim as one against the State. The claim is not retributive but restorative in purpose. Nothing in the manner in which the Land-Owner Defendants have conducted the case justifies an order of costs against them.

Conclusion

[161] Finally, it is appropriate to observe that the rights of the Plaintiff were not merely economic rights to graze and cultivate in a particular area. They were rights of families connected by indigenous forbearers. The Community's aged were buried and the inspection *in loco* revealed a startling disregard for their ancestral graves. The area is the birth place of children that were born in modest homesteads which passed from generation to generation. And they were not simply there by grace and favour of the Colonialists. The paternalistic and feudal-type relationship involved contributions by the family, who worked the lands of the farmer. However unfair the relationship was, as a relic of past conquests of land dispossession, it formalised a minimal degree of respect by the farm owners for the connection of the indigenous families to the land. It had a cultural and spiritual dimension that rendered the destruction of the rights more than just economic loss. These are factors that might require appropriate consideration by the Department of Rural Development and Land Affairs or the Land Claims Court when an appropriate remedy is fashioned.

Order

[162] The following order is made:

1. The Salem Community was dispossessed of a right in land after 19 June 1913, as a result of past racially discriminatory laws and practices in terms of section 2 of the Restitution of Land Rights Act 22 of 1994.

2. No order as to costs.

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SARDIWALLA AJ

Assessor:

DR WALLACE MGOQUI

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For the Regional Land Claims Commission

Advocate Krige SC instructed by the State Attorney Umtata

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