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

**CASE NO: LCC 48/2011**

In the matter between:

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| **MAHLANGU FAMILY** | Plaintiff |
| and | |
| **MINISTER OF RURAL DEVELOPMENT AND LAND REFORM** | First Defendant |
| **THE SAFY TRUST** | Second Defendant |
| **THE REGIONAL LAND CLAIMS COMMISSIONER: MPUMALANGA** | Interested Party |

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**JUDGMENT**

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**INTRODUCTION**

1. On or about 21 December 1998 an attorney with the Legal Resources Centre, Pretoria, Ms Louise Du Plessis, lodged an individual land claim on behalf of Ms Mavis Sikhosana against the farm Mooikopje and the farm Badplaas with the Regional Land Claims Commissioner (RLCC) for Mpumalanga. The claim was lodged in terms of the Restitution of Land Rights Act 22 of 1994 (RLRA).

2. The claim was researched and investigated. A research report was then compiled by an official of the RLCC: Mpumalanga. From the report it appears that the claimant had, in the interim, married and her surname changed to Ngomane. I shall, for purposes of this judgment, continue referring to her as Ms Sikhosana. It also appears *ex facie* the report that the claim was apparently lodged on behalf of her mother. In this regard, the claimant deposed to an affidavit on 08 June 2009 to the effect that she was the granddaughter of a William Mahlangu and that she had lodged the claim on behalf of her mother. In the aforesaid affidavit Ms Sikhosana recorded that her claim was lodged in respect of Mooikopje only and not in respect of Badplaas. The dispossession described in the research report was said to have occurred in 1972 but was elsewhere in the papers also stated to have taken place in 1962.

3. The research report, referred to above, appears from page 4 thereof to have been signed off by its compiler on 12 June 2009. Its recommendations were accepted by the Commissioner's legal unit on 23 June 2009, the Director Operations on 25 June 2009 and finally the Acting Commissioner for Restitution of Land Rights: Mpumalanga on 22 July 2009. The claim was therefore accepted as valid and ready for gazetting on 22 July 2009.

4. The first defendant caused the claim to be published in the Government Gazette on 21 August 2009. The relevant portion of that publication read as follows:

*"Notice is hereby given in terms of Section 11(1) of the Restitution of Land Rights Act [Act 22 of 1994] as amended, that a land claim for Restitution of Land Rights has been lodged by Ms Sikhosana Mavis [720408 2860 082] on behalf of on the properties mentioned hereunder situated in the Steve Tshwete Local Municipality in the Mpumalanga Province: [KRP: 1155]…."*

The notice then goes on to describe the property, its owner, extent, the bond holder and other endorsements. It also calls on interested parties to submit comments to the Commissioner for Restitution of Land Rights at an address in Witbank and is dated 11 August 2009.

5. On or about 12 November 2009, the second defendant lodged a landowner's response to the claim with the interested party in which a number of objections were raised. The status of Ms Sikhosana as a claimant with a valid claim was pertinently placed in issue. This objection was primarily based upon the claim form lodged with the first respondent that lacked any particulars on the strength of which the claimant could have qualified herself as such. Furthermore, given her birth in 1972, she could hardly be said to have been deprived of a right in land given that the alleged dispossession occurred allegedly in 1962 (or 1972).

6. After attempts at resolving the dispute between the parties failed and after the interested party failed, "timeously," in the second defendant's opinion, to, *inter alia*, refer the claim to this Court for adjudication, the second defendant brought an application to compel such referral. An order to that effect was granted by this Court on 02 September 2011. It is worth noting that the parties to that application were the second defendant (as applicant), the interested party (as the first respondent)

and Ms Sikhosana (as the second respondent). The plaintiff in these proceedings was not a party to that mandamus application. The court ordered the referral of the existing claim, namely that of Ms Sikhosana (acting on behalf of her mother) to this Court. The claim to be referred was, as is clearly apparent from the court order, an individual claim.

7. The land claim was ultimately referred to this Court on 20 February 2012. However, the claimant was now cited as the Mahlangu Family. Eight months later, on 11 December 2012, a response to the referral was lodged by the plaintiff setting out, *inter alia*, the history and dispossession of the rights they allegedly had in the land they were claiming.

8. The second defendant responded to the above on 21 January 2013 and raised, as a point *in limine*, the contention that the plaintiff did not have *locus standi* in the present matter. In support of this contention, the second defendant relied on the fact that the claim lodged on behalf of Ms Sikhosana was in her individual capacity and that the Mahlangu Family did not lodge a claim as contemplated in Section 2(1) read with Section 10 of the RLRA.

9. After close of pleadings, the matter was then set down for hearing on 12 May 2014. The parties agreed at a pre-trial conference held during the week before the trial that the matter would proceed on 13 May 2014 and that the only issues to be determined, as points *in limine*, were (a) whether the claim as formulated, gazetted and referred to court for adjudication is a proper claim, (b) whether the original claimant, Ms

Sikhosana or the Mahlangu Family have *locus standi* and (c) whether the claim qualifies to be adjudicated by this Court.

10. At the start of the hearing, counsel for the plaintiff, Mr Mokotedi, advised that he was new to the case and applied for a postponement of the matter in order for it to be further researched by the interested party. This application was made, without notice to the court or the other parties, informally from the Bar, without any affidavit by the litigant or the plaintiff's attorney of record, setting out the grounds upon which the postponement was sought. There was no explanation and no reasons were advanced why it was launched at the late stage it saw the light of day and why the plaintiff and plaintiff's legal advisers had not taken steps earlier to address the apparent shortcomings in the RLCC's referral report. The high water mark of counsel's argument for the postponement was the submission that there was simply not enough information before the court for it to make a final determination. The matter should therefore be referred back for further research, he contended. In support of this contention, Mr Mokotedi cited, *inter alia*, the mistakes in the research report raised by the second defendant and the paucity of information in the claim form lodged by attorney Du Plessis on behalf of Ms Sikhosana, who, according to counsel, was basically illiterate. An explanation was consequently required from Ms Du Plessis as to why the form was completed in that manner and more work on the research report was required, so the argument went.

11. In response to a question by the Court, Mr Mokotedi advised that neither he nor his instructing attorney, who was present in court, had instructions in respect of the postponement or the proposition that the

matter be referred back to the interested party for further research. There was no explanation why no affidavit was obtained from the client, let alone the instructing attorney.

12. The second defendant opposed the application and the attorney for the interested party agreed to abide the decision of the court.

*13.* It is convenient to first deal with the application for the postponement and thereafter with the arguments advanced in respect of the points *in limine.*

**THE APPLICATION FOR POSTPONEMENT**

14. The law applicable to an application for the grant of a postponement by the Court is trite[1]. The following principles, distilled from case law, bear repeating, given the unusual circumstance presented in the current application. A trial judge has a discretion, to be exercised judiciously, as to whether or not the application should be granted or refused. Such an application must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. The application must be bona fide and not be used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled. The court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not. Finally, a court should be slow to

[1] See Myburgh Transport v Botha t/a SA Truck Bodies 1991(3) SA 310 at 314F – 315J for the legal principles applicable to an application for the postponement of a trial and Persadh and Another v General Motors South Africa (PTY) Ltd 2006(1) SA455 at 459 E-G in respect of an application for postponement of an application.

refuse a postponement where the true reason for a party's non-preparedness has been fully explained and justice demands that he be granted further time to present his case. In *Lekolwane v Minister of Justice and Constitutional Development*[2] it was stated that the prospects of success on the merits should also be a factor to be considered in granting a postponement.

**THE APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS**

15. Although Mr Mokotedi stated that he was new to the case, there is no evidence before the Court as to when he was seized with the matter and became aware of the deficiencies in the claim, the research report and hence, the plaintiff's case. Regardless though, the plaintiff has been represented by an attorney from the start of this matter and certainly so, since the referral report was filed by the interested party. The alleged deficiencies should have been identified earlier and a timeous application to postpone the trial date should have been launched. Both the court and the legal representatives of the second defendant were only advised of the application just before the start of the hearing. Apart from there not being any timeous notice of the application, Mr Mokotedi also conceded that neither he nor his instructing attorney had instructions to bring the application or to approach the Court for a mandamus that the claim be researched further by the interested party. In this age of modern telephony where nearly every South African, no matter how humble his or her social status, has a cell phone, it is difficult to accept that the plaintiff's legal representative could not have

[2] 2007(3) BCLR 280 (CC) at para 17

obtained telephonic instructions on this matter. At the very least, they could have had a telephonic consultation and arranged for an appropriately worded affidavit to be faxed to a correspondent attorney in the town where their clients are based and, after its deposition, for it to be faxed back to their offices or chambers here in Johannesburg. There was, in my view, no need to wait for a face to face consultation with client/clients. I am, accordingly, not convinced that the application is bona fide. It seems to be a manoeuvre designed to cure lacunae in the plaintiff's case.

16. The RLCC indicated before the hearing that he would abide by the Court's ruling. The suggestion that the matter ought to be referred back to the interested party was only made during argument. In effect the court was invited to grant a mandamus against an organ of state without prior notice.

17. Regard is also had to the prejudice the second defendant will suffer in the event that the application is granted. The property in question has been labouring under the burden of a gazetted land claim since approximately August 2009, resulting in its possible devaluation and the non-investment of a capital by the land owner. Also, the second defendant's legal team was ready to proceed with the trial. Finally, as will appear below, when dealing with the points *in limine*, plaintiff's prospects of success on the merits are, *prima facie*, not particularly rosy.

18. In the circumstances, plaintiff's application for a postponement of the trial has no merit and it is consequently denied.

**IS THE CLAIM, AS LODGED, PUBLISHED AND REFERRED, A PROPER CLAIM THAT QUALIFIES TO BE ADJUDICATED?**

19. It is common cause that the land claim form in this matter was poorly completed and lacks the most basic and fundamental information such as the facts upon which the claim is based, a proper description of the land claimed, evidence to substantiate the claim and the contact details of the claimant. From the letter that accompanied the claim form, it is clear that the claim was an individual one.
20. It is also common cause that the research report compiled by the interested party contains errors, such as for example, a statement that "*the claim was lodged by Ms Sikhosana Mavis ……..[who] is claiming on behalf of the Mahlangu Family as her mother's family which was disposed of land ……"* The correct position is that the claim form was signed by attorney Du Plessis on behalf of Ms Mavis Sikhosana, as an individual claim, and not the Mahlangu Family. Furthermore, the claim was also gazetted and published as a claim by Ms Sikhosana in her individual capacity rather than as a representative of the Mahlangu Family.

21. Mr Havenga, who appeared on behalf of the second defendant, attacked the validity of the claim on the grounds that the claim, as lodged and published, did not comply with the requirements of section 2(1) of the RLRA and hence, no proper claim was lodged by Ms Sikhosana. For this contention he advanced the following argument.

22. Because the claim, as lodged, was one contemplated in Section 2(1)(a)[3] of the RLRA, it was neither a claim for a family nor a claim as a direct descendant of a person who lost a right in land. Neither Ms Sikhosana's land claim form, the referral report nor the plaintiff's response made any mention of her being dispossessed of any rights in the property. This would, in any event, not have been possible, so the argument goes, as the dispossession took place a decade before Ms Sikhosana's birth or in the same year as her birth in 1972. Consequently, she was not a person as contemplated in Section 2(1) of the RLRA and therefore did qualify for restitution.

23. Mr Mokotedi could not convincingly counter this argument. He merely stuck to his contention that the interested party needed to do further research on the claim and absent an explanation by attorney Du Plesssis as to why the form was completed in that manner, the court was not in a position to adjudicate on the matter.

24. I agree with Advocate Havenga's argument. *Ex facie* the papers Ms Sikhosana, on whose behalf the claim form was signed, lodged and gazetted, is not a person who lost a right in the land claimed.

25. Deposing to an affidavit on 8 June 2009, advising that she is the granddaughter of William Mahlangu and that she had claimed the land on behalf her mother does not assist Ms Sikhosana in turning the claim into one by her mother and other relatives. The fact that the affidavit appears to have been deposed to four days before the research report

[3] Section 2(1)(a) reads as follows: "a person shall be entitled to restitution of land if he or she is a person disposed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices;"

was signed off by its complier, leads one to the conclusion that the affidavit was an afterthought designed to rectify the flaws in the referral report.

26. I therefore find that there is no family or community claim before this court.

**DOES THE MAHLLANGU FAMILY HAVE LOCUS STANDI?**

27. Advocate Havenga attacked the *locus standi* of the Mahlangu family on the following grounds:
    27.1 There is no indication in the claim form that the claim is lodged on behalf of anyone other than Ms Sikhosana. The affidavit, in which it is claimed that the claim was on behalf of her mother, was deposed to after the cut-off date for valid claims and does not mention the Mahlangu family as a claimant.
    27.2 The referral of the of the claim to court under Section 14 of the RLRA was irregular as a proper referral must follow acceptance thereof under Section 11(1) of the RLRA and publication in the government gazette. The claim was not published as a claim by the Mahalngu family.
    27.3 The Mahlangu family did not lodge a claim at all and do not qualify as a claimant as defined in the RLRA. The claim which the interested party has referred to the court purports to be a community claim. However, no such claim was lodged. In support of this contention, the court was referred to *In re: Former Highlands Residents* 2000(1) SA 489 (LCC) at 494 C-E where the

learned Judge stated that "*The important elements are that the claimants must be persons and that those persons must have lodged claims."*

*27.4* We were also referred to *Haakdoornbult Boerdery CC & Others v Mphela & Others* 2007 (5) SA 596 at 601 E-F where the court pointed out, *inter alia,* that the claim had to include a description of the land in question, the nature of the right in land which the claimant was dispossessed and the nature of the right or equitable redress being claimed. None of this information was contained in the claim form.

*27.5* Finally, Advocate Havenga argued that the interested party had acted *ultra vires* its powers by purporting to convert the individual claim of Ms Sikhosana into a community claim by the Mahlangu family. He cited the cases of *Minnar*,[4] *Bouvest*,[5] and *Shongwe*[6] in support of this argument.

28. Mr Mokotedi, who had not submitted Heads of Argument, urged the court to exercise the powers granted to it by section 32(3)(a) of the RLRA and refer the matter back to the interested party. Denying the plaintiff an opportunity to have the matter re-looked at by the interested party would be unfair given the purpose of the RLRA, Counsel submitted. In support of that submission he cited the remarks of Moloto J in Gamavest (PTY) LTD v Regional Land Claims Commissioner, Northern province and Mpumalanga and Others [2001] JOL 8503 (LCC).

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[4] Minnar N.O v Regional Land Claims Commissioner, Mpumalanga (LCC42/06) [2006] ZA LCC12 (8 December 2006).

[5] Bouvest 2173 CC & Others v Commission on Restitution of Land Rights and the Regional Land Claims Commission, Limpopo (LCC68/2006) [2007] ZA LCC7 (7 May 2007).

[6] Shongwe N.O & Others v Regional Land Claims Commissioner, Mpumalanga (LCC46/2009), an unreported case where judgment was delivered on 27 July 2012 by Meer AJP.

29. The plaintiff before this Court is the Mahlangu family and not Ms Sikhosana. I agree with Advocate Havenga that the interested party had acted *ultra vires* its powers to convert Ms Sikhosana's claim into that of the plaintiff. To refer the claim back for further research will serve no purpose in the circumstances.

30. In the light of all the evidence and legal submissions placed before this Court and taking into account the authorities cited, I find that it has been established that the Mahlangu family is not properly before this Court. They consequently have no *locus standi* in this matter.

31. It follows that the point *in limine* has been well taken and must be upheld. This means that the claim referred to this Court by what was supposed to have been a referral report as ordered by this Court, purporting to be a claim by the Mahlangu family, must be dismissed and the referral report must be set aside. What the Court ordered the RLCC to do was to refer Ms Sikhosana's individual claim to this Court. That order was not complied with and the order remains in place. So does Ms Sikhosana's individual claim. It is up to her and the RLCC to decide what steps to take next.

COSTS

32. It is clear that the second defendant has been successful and is, *prima facie,* entitled to its costs. Although the Court is normally loathe to grant costs orders in proceedings of this nature, being, in essence constitutional litigation, the fact that needless litigation had to be embarked upon to scuttle the unlawful attempt to morph an individual claim into a family claim is solely to blame upon the interested party. No justification can be found for this ill-advised attempt to introduce a non-

existent claim through the back door. The second defendant should not be victimised further by having to pay its own costs.

**Order:**

33. For the reasons set out above, I make the following order:

(i) The application for a postponement is dismissed;

(ii) The interested party's referral report prepared in response to this court's order to refer Ms Sikhosana's claim in terms of section 14 RLRA is set aside;

(iii) Ms Sikhosana's individual claim is postponed *sine die* pending any further steps in pursuit thereof by the interested party or Ms Sikhosana;

(iv) The interested party is ordered to pay the second defendant's costs of the proceedings since the date the referral report was filed.

Dated at Randburg this 21 day of May 2014

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**CANCA AJ**

I Agree

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**BERTELSMANN J**

**S P HLAHANE**

**ASSESSOR**