OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD IN RANDBURG

CASE NUMBER: LCC147/2010

Before: Loots AJ
Heard: 12 October 2018
Delivered: 19th March 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO
19/3/2019 DATE
SIGNATURE

In the matter between

CHRISTOPHER CHARLES DE MOWBRAY NIEHAUS	Applicant
and	
THE REGIONAL LAND CLAIMS COMMISSIONER	1st Respondent
THE CHIEF LAND CLAIMS COMMISSIONER	2nd Respondent
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	3rd Respondent
MOSIMA COMMUNITY	4th Respondent
MAJADIBODU COMMUNITY	5th Respondent
MABULA-MOSIMA COMMUNITY	6th Respondent

JUDGMENT: MERITS

LOOTS, AJ

[1] The applicant brought an application to this court for an order declaring that there are no claims in respect of his two game farms, which are situated in Limpopo (the applicant's

properties), and an order that the Regional Land Claims Commissioner (the first respondent) should amend its database to reflect this. In a judgment delivered on 6 September 2013,[1] I dismissed the application. The applicant took this decision on appeal to the Supreme Court of Appeal, which was persuaded, at a hearing on 15 March 2015, that it should refer the matter back to this court.

[2] The Supreme Court of Appeal made the following order in this respect –

> *3. The matter is referred back to the Land Claims Court for it:*
> *3.1 To afford all the Respondents an opportunity to address the Court on the question whether or not the Fifth Respondent (or any other person) had, prior to 31 December 1998, lodged any valid claims in terms of section 10 of the Restitution of Land Rights Act, 22 of 1994 against the properties; and*
> *3.2 Consider any other issues properly raised in the papers before Court.*[2]

[3] When the application was argued before me in 2013, the fifth respondent, the Majadibodu Community, which asserts a claim in respect of the applicant's properties, did not participate in the proceedings because the State had failed to provide funding for its legal representation, despite having been ordered by the court to do so.[3] Counsel for the Majadibodu Community did, however, appear before the court on the day of the hearing to explain his position. I decided to proceed to hear argument from the applicant and the State respondents,[4] but gave an undertaking to counsel for the Majadibodu Community that I would not make any order that would prejudice his client without giving him an opportunity to present argument at a later date.

[4] After hearing argument from counsel for the applicant and counsel for the State respondents, I dismissed the application for a declaratory order. The reason I gave was that I

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[1] *Niehaus v Regional Land Claims Commissioner & others* (LCC 147/2010) [2013] ZALCC 14 (6 September 2013) (the judgment under appeal).
[2] Judgment of the Supreme Court of Appeal : *Niehaus v The Regional Land Claims Commissioner and others* (116/2014) [2015] ZASCA 51 (27 March 2015).
[3] See paragraph 13 of the judgment under appeal and *Majadibodu Community v Commission on Restitution of Land Rights and Others* (LCC 147/2010) [2011] ZALCC 19 (5 October 2011).
[4] The Regional Land Claims Commissioner (first respondent), the Chief Land Claims Commissioner (second respondent) and the Minister of Rural Development and Land Reform (third respondent).

was of the opinion that a declaratory order to the effect that there are no claims in respect of the farms is not appropriate relief for a number of reasons.[5] This was a decision on a preliminary issue, in respect of which I believed that I could make a decision without hearing argument from counsel for the Majadibodu Community. The Supreme Court of Appeal did not deal with the issue of whether a declaratory order is appropriate relief, or my reasons for saying that it would be an inappropriate order. Instead it focused on a submission made by the applicant that it was premature and impermissible for me to have dismissed the application without hearing argument from counsel for the Majadibodu Community[6] and accepted the suggestion that the matter should be referred back to the court of first instance.

[5] The Supreme Court of Appeal delivered its judgment referring the matter back to this court in March 2015. The matter was set down for hearing only on 19 July 2016. On that day the Majadibodu Community was once again not properly represented and the matter had to be postponed. In the two and a half years after that there were numerous pre-trial conferences[7] and two hearings. At the hearing which took place on 28 March 2018, I requested the parties to address me only on the procedure which should be followed to enable me to fulfill the mandate of the Supreme Court of Appeal. After that hearing I gave a judgment on 18 July 2018 which details the procedural history of the matter and culminated in the following order:

1. *The matter must be set down by the applicant for a hearing at which all the parties will have an opportunity to address the court –*
   (a) on the question whether or not the fifth respondent (or any other person) had, prior to 31 December 1998, lodged any valid claims in terms of section 10 of the Restitution of Land Rights Act, 22 of 1994 against the two properties belonging to the applicant which are the subject matter of these proceedings; and
   (b) whether the declaratory order claimed by the applicant is appropriate relief.
2. *The fifth respondent is to address the court first, followed by counsel for the State respondents and then counsel for the applicant.*
3. *Heads of argument for the respondents must be filed ten court days before the hearing.*

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[5] See para 22—25 of the judgment under appeal.
[6] Para 16 of the Supreme Court of Appeal judgment.
[7] Rule 30 of the Land Claims Court Rules provides that '[t]he presiding judge may, of his or her own accord or at the request of any party before or during the hearing of any case, convene one or more conferences of the participating parties to promote the expeditious, economic and effective disposal of the case'.

4. *Heads of argument for the applicant must be filed five court days before the hearing.*
5. *The costs of the hearing on 28 March 2018 will be costs in the cause.*

That judgment will be referred to as 'the procedural judgment of July 2018'.[8]

[7] I now proceed to consider whether the respondents have established that the Majadibodu Community (or any other person) has lodged a valid claim in terms of s 10 of the Restitution Act, as directed by the Supreme Court of Appeal.

Have the Respondents established that a valid claim was lodged?

[8] The Supreme Court of Appeal said in its judgment -

> *'Regarding the dismissal of the declarator, counsel for the respondents capitulated and accepted that no acceptable proof had been presented to date that there are claims which have been properly lodged ...'*[9]

It was not clear to me whether this reference was to counsel for the State respondents or counsel for the Majadibodu Community, or both. I have been unable to obtain a transcript of the proceedings from the Registrar of the Supreme Court of Appeal in order to ascertain which respondents made such concession. This was of concern to me because it is important to know on which parties' behalf such a concession was made. Only during argument presented during the recent hearing on the merits was I informed that the Majadibodu Community was not represented in the Supreme Court of Appeal and that it was accordingly not party to the 'capitulation'.

[9] The fact that counsel for the Regional Land Claims Commissioner conceded during the appeal proceedings that no acceptable proof had been presented that claims had been lodged against the applicant's properties is important because it is the Regional Land Claims Commissioner who has the duty to give effect to the claim by publishing notice of it in the *Gazette*. In terms of s 11(1) of the Restitution of Land Rights Act[10] (the Act), 'before causing notice of a claim to be published in the *Gazette*, the regional land claims commissioner having jurisdiction over the land must be satisfied that –

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[8] *Niehaus v The Regional Land Claims Commissioner and Others* (LCC 147/2010 (2013) ZALCC(14).
[9] Para 20 of the Supreme Court of Appeal judgment.
[10] Act 22 of 1994.

(a) the claim has been lodged in the prescribed manner;

(b) the claim is not precluded by the provisions of section 2[11]; and

(c) the claim is not frivolous or vexatious'.

[10] At the time when this application was instituted the Regional Land Claims Commissioner for Limpopo (hereinafter referred to as the RLCC) had not published notice of any claims over the applicant's properties, but after an affidavit was delivered on behalf of the Majadibodu Community alleging that they had lodged claims against the applicant's properties, the RLCC consented to an order that it would publish notice of the claim if it was satisfied that the requirements of s 11(1) of the Act were met.[12] A notice was published but it was set aside by this court because it was done in terms of the wrong section.[13] At a later stage the RLCC did publish a notice, which still stands.[14] However, it is important to note that at the time when counsel for the RLCC conceded before the Supreme Court of Appeal (hereinafter referred to as the SCA) that '*no acceptable proof had been presented to date that there are claims which have been properly lodged*', the Majadibodu Community's affidavit was already before the court, so the RLCC was effectively conceding that it contained no allegations of fact which proved that claims had been lodged .

[11] The applicant's heads of argument detail the facts prior to the hearing before the SCA which demonstrate that no claim has been lodged against his properties. Presumably this is the same argument which prompted counsel for the RLCC to concede that '*no acceptable proof had been presented to date that there are claims which have been properly lodged*', and which prompted the SCA to make a finding that there was no such evidence. I accept the correctness of the historical facts as set out in the applicant's heads of argument[15] and the finding of the SCA[16] in this regard.

[12] The applicant submits that in the absence of any new evidence having been placed

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[11] Section 2 prescribes the parameters within which a claim may be made in terms of the Act and precludes a claim if just and equitable compensation was received at the time of dispossession.
[12] Court order of 4 December 2012 par 2.1 at page 615 of the appeal record.
[13] Paragraph 2of the order of 6 September 2013 at page 562 and 563 of the appeal record.
[14] This notice was published as Government Notice 1082 on 23 September 2016 (page 82 of the second part of the appeal record) following a court order made on 19 July 2016 in terms of which the RLCC was required to either exercise his/her powers on terms of ss 11(1) and 11(2) of the Act or proceed, in terms of s 11(4) of the Act, to advise the claimant of his or her decision not to publish the claim (page 25 of the second part of the appeal record). This was pursuant to the order to which all parties had consented on 4 December 2012.
[15] Paragraph 9—29 of the applicant's heads of argument in respect of the hearing on 12 October 2018.
[16] Paragraphs 30 and 31 of the applicant's heads of argument in respect of the hearing on 12 October 2018.

before this court since the matter was referred back to it by the SCA, I am bound to find that there is no proof of the lodgement of any claims against the properties.[17] The applicant then proceeds to set out facts which, it submits, demonstrate that no new evidence has been placed before the court which constitutes proof of any claims against the properties. The applicant therefore submits that there was no basis for the inclusion of his two properties in the list of properties to be Gazetted as being under claim. The applicant's heads of argument include reference to a progress report filed by the RLCC in June 2017, after it had published notice of the claims in respect of the applicant's properties on 23 September 2016. In this report the Director of Operations of the RLCC states that the claims in respect of the applicant's two properties were Gazetted to honour the court order. It is important to point out that the court order referred to did not order the RLCC to publish the claim. It ordered the RLCC to exercise his or her discretion in terms of s 11(1) of the Act.[18]

[13] A full report on the Majadibodu Community claims, dated 2 August 2017, (the Rule 5 Report[19]) was subsequently filed. This report lists the applicant's properties as being included in the land claimed, but still fails to provide any evidence directly relevant to these farms or any proof that the land claims to which the report refers were intended to include the land encompassed by the applicant's farms. Other farms were specifically referred to in the report (some in affidavits by members of the community) as being part of the land claimed by the Majadibodu Community, but not the applicant's farms. The applicant's farms are also not specifically referred to in inspection in loco report which is attached to the Rule 5 Report.

[14] Of particular importance is that in this report the RLCC stated that the claimants lost rights as labour tenants and not as a community.[20] The reason given was that the claim could not be regarded as a community claim as defined in the Act because investigations had revealed that the claimant had ceased to exist as a community in the 1800s when they were defeated by the Langa Tribe from Moçambique.[21]

[14] This startling change to the whole basis of the claim was a game changer because a labour tenancy claim depends upon a relationship between the land owner and individual

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[17] Paragraph 32 of the applicant's heads of argument in respect of the hearing on 12 October 2018.
[18] See fn 12 above.
[19] Rules Regarding Procedure of Commission (GN R703 in *GG* 16407 of 12 May 1995).
[20] Paragraph 1.12.3 of the report at page 139 of the second part of the Appeal Report.
[21] See the affidavit of Rantsetse JohannesMajadibodu at page 274 of the second part of the Appeal Record.

labour tenants, not between the land owner and a community of labour tenants.[22] At a pre-trial conference following the delivery of this report, I made an order which gave the respondents an opportunity to file supplementary affidavits. I adopted an interventionist approach[23] in that I explained in the order what kind of evidence would assist the court. Paragraphs 4 and 5 of the order read as follows:

1. *Noting that the report of the first respondent, signed by the Regional Land Claims Commissioner on 20 July 2017, concludes that 'the claimants were dispossessed as labour tenants and not as a community as lodged', the first respondent is required in any supplementary affidavit it may file to include the information required by Rule 39 with specific reference to the applicant's two properties, detailing the relationships between the claimants and the then landowners of those properties. The first respondent should provide such information both in respect of the claim of the fifth respondent and in respect of 'any other person', as referred to in paragraph 3.1 of the order of the Supreme Court of Appeal.*

2. *The fifth respondent should include in its supplementary affidavits, if any, the information required by Rule 44(2)(a) with specific reference to its claim in respect of the applicant's two properties, detailing the relationship between the claimants and the then landowners of those properties. The information so supplied must include the material facts relied upon and evidence to support such allegations of fact.*[24]

[15] Only one affidavit was delivered on behalf of the Majadibodu Community in response to this order. In that affidavit no facts linking the claimants to the applicant's properties were disclosed. Instead the deponent (the Chairman of the Board of Trustees of the Majadibodu Community) said that he had been advised that the issue of labour tenancy was a matter that should be reserved for the trial court.[25] I find it unacceptable that an issue identified by the court as being important should be side-stepped in this way. The claim forms on which the respondents rely are extremely vague. They do not sufficiently identify the land under claim or the nature of the claim. The order I made gave the respondents the opportunity to cure this

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[22] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 46.
[23] Land Claims Court Rule 30 empowers the court to promote the expeditious, economic and effective disposal of the case.
[24] Order of 10 November 2017. The rules referred to are the Rules Regarding Procedure of Commission (GN R703 in *GG* 16407 of 12 May 1995).
[25] See page 411 of the second part of the appeal record.

defect, but they chose not to respond in a positive way. This raises a strong inference that they are unable to provide facts which create a nexus between members of the Majadibodu Community and the applicant's properties.

[15] I have already referred to the arguments presented by the applicant's counsel at the hearing on the merits as to why I should find that there is no proof of the lodgement of any claims over the applicant's properties. I will now turn to the arguments presented by counsel for the respondents. Counsel for the State respondents persisted in arguing that there is a dispute of fact as to whether any claims have been lodged over the applicant's properties, despite the fact that I had already made a decision not to refer the application to oral evidence.[26] Counsel for the Majadibodu Community rejected the argument that there is a dispute of fact. He submitted that the applicant has failed to discharge the onus which he bears to prove his case and that the application should accordingly be dismissed. I will deal first with this submission.

Has the applicant failed to discharge the onus which he bears?

[16] In support of his argument that the applicant has failed to discharge the onus which he bears, counsel for the Majadibodu Community cited Schmidt and Rademeyer's *Law of Evidence*[27] in which it is stated that the basic rule of evidence in civil proceedings is that 'he who asserts must prove'. Counsel appears to have failed to note, however, that in the third paragraph under the heading setting out this basic rule, the authors explain that the rule is not that the plaintiff always bears the burden of proof, but that it is the party who asserts who bears the onus.[28] If a respondent does not dispute the facts stated by the applicant, but avers facts which raise other issues, then the respondent has the onus of proving those facts.

[17] In summary, the facts alleged by the applicant in his founding affidavit were that

- the Regional Land Claims Commissioner published notice of a land claim in the area where his two farms are situated, but that notice did not include his two farms;
- he subsequently enquired from the RLCC whether there was a claim in respect of his two farms and was told that no record of any such claim could be found;

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[26] See the procedural judgment *Niehaus v The Regional Land Claims Commissioner and Others* (LCC 147/2010 [2013] ZALCC 14.

[27] CWH Schmidt and H Rademeyer *Law of Evidence* (2003) at pages 2–10ff, subparagraph 2.2.1.1.

- a few years later an estate agent, to whom he had given a mandate to sell the properties, was advised by the RLCC that his two farms were subject to a land claim or claims;
- in response to an application brought by the applicant's attorneys in terms of PAIA a bundle of documents relevant to the alleged claim or claims was furnished by the RLCC, but there was no reference in these documents to the applicant's farms;
- the Applicant was told by the office of the RLCC that, despite there being no relevant documentation, the database of the RLCC reflected his farms as being subject to a land claim;
- the applicant then instituted proceedings against the State respondents claiming a declaratory order that there were no land claims in respect of his two farms and an order directing the RLCC to remove reference to any land claims on his farms from its database.

[18] The applicant proceeded from the disadvantageous position that the facts concerning the lodgement of claims over the properties were within the knowledge of the respondents, not within his personal knowledge. Despite that, his founding affidavit and annexures were extremely detailed, running to more than 200 pages. In response, the Acting Chief Land Claims Commissioner, who was also at the time the Chief Director for Land Restitution in Limpopo and had formerly been the Regional Land Claims Commissioner for that province, stated on affidavit that while the applicant's farms appeared to have been on the Commission's database since 2002, the Commission had not been able to find any documents on which the entry of the farms on the database was based.[29] None of the allegations made by the applicant was denied by the State respondents, nor could they allege any facts to prove that any claims had been lodged over the applicant's properties.

[19] The Majadibodu Community became a party to the case when it responded to a rule *nisi* calling upon certain communities who had lodged claims in the relevant area in Limpopo to show cause why the order claimed by the applicant should not be made. In responding to the rule *nisi* it incurred an onus. While the opposing affidavit alleged that the community had lodged claims in the area where the applicant's farms are situated and went into some detail as to the attempts its attorneys had made to try to obtain information from the RLCC as to the

[29] See paragraphs 10.6–10.11 of the affidavit of Tele Alfred Maphoto at pages 328—9 of the appeal record.

identity of the farms affected, it does not contain any evidence that claims were lodged, or intended to be lodged, in respect of the applicant's farms. In fact, it seems clear from this affidavit that the Majadibodu Community depended upon the office of the RLCC to identify the farms included in its land claim but, unfortunately, they received little or no response to their queries.

[20] After the matter was referred back to this court, the Majadibodu Community was given every opportunity to amplify the facts stated in its initial affidavit, particularly after the RLCC reported that the claim was based on labour tenancy and was not a community claim, as it had initially stated. The Community placed no further facts before the court and its counsel adopted the attitude that they were not obliged to do so because the applicant had not proved his case. In his heads of argument counsel submitted that 'the Applicant does not even make it out of the stumbling (sc starting) blocks, in the sense that the Applicant has not discharged his burden of proof on the balance of probabilities.' Counsel is not correct. His client had the onus of proving that it lodged a valid claim against the applicant's properties and the bare allegation that claims were lodged in respect of land in the area does not suffice in circumstances where neither the Majadibodu Community nor the RLCC has been able to produce a copy of an acceptable relevant claim form or to allege any facts in support of a claim based on labour tenancy.

Is there a dispute of fact which requires referral to oral evidence?

[21] Counsel for the State respondents maintained the stance that there is a dispute of fact emerging from the affidavits which requires referral to oral evidence, despite having conceded before the Supreme Court of Appeal that no evidence of the lodgement of a valid claim had been placed before the court. The heads of argument for the State respondents refer to the principle laid down in the *Plascon Evans*[30] case, which requires a court that must decide whether there is such a dispute of fact to consider the allegations made by the applicant in the founding affidavit which have been admitted by the respondent together with the facts alleged by the respondent and determine whether the relief sought by the applicant is justified by such facts. If one considers the facts alleged by the applicant, as summarized in paragraph [17] above together with the facts alleged by the respondents, as summarized in

[30] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–635D.

paragraphs [18]–[20] above, it is clear that, on an application of this test, there is no real dispute of fact as between the applicant and the respondents.

[22] The affidavit filed on behalf of the Majadibodu Community, in response to the rule *nisi,* might have raised a dispute of fact, but the bald and vague reference to a claim having been lodged over 'rural land' seems clearly to have been viewed by the Supreme Court of Appeal as not being sufficient to discharge the onus resting on the Majadibodu Community to prove that a valid claim had been lodged in respect of the applicant's two properties. It accordingly did not refer the matter back to this court to hear evidence because there was a dispute of fact. It simply directed this court to hear 'representations' from the respondents as to whether a valid claim had been lodged. The respondents have not placed any facts before this court which give rise to 'a real dispute of fact'.[31]

Conclusion on the issue of whether a valid claim has been lodged

[23] For the reasons set out in the preceding paragraphs, I have come to the conclusion that the respondents have not established that the Majadibodu Community had, prior to 31 December 1998, lodged any valid claims in terms of s 10 of the Restitution of Land Rights Act 22 of 1994 against the two properties belonging to the applicant. It is important to note that this is not a finding that no valid claims were lodged by the Majadibodu Community. It is a finding that no evidence has been placed before this court which proves that the applicant's properties were intended to be included in their claims. Land claims have been *Gazetted* in respect of a large number of farms in consequence of the claims allegedly lodged by the Majadibodu Community and, as far as this court knows, all or many of those claims have been accepted. The RLCC has advised the court that some of those claims are already settled. What sets the applicant's case aside is that his farms were not listed in the initial notice which was published in the *Gazette*. Since the time when the RLCC advised the applicant that his properties were also under claim, neither the State respondents nor the Majadibodu Community has placed evidence before this court which convinces it that this is so. What one would have expected in the light of the assertion by the RLCC that that the Majadibodu Community's claims are based on labour tenancy is affidavits from persons or the family members of persons who lived and worked on the applicant's two farms. Nothing like this

[31] See *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13.

has been forthcoming. I now proceed to the second issue.

Is a declaratory order appropriate relief in these circumstances?

[24] I requested the parties to address me on the question as to whether declaratory relief is appropriate in the circumstances of this case because the *ratio decidendi* of my judgment in terms of which I dismissed the applicant's claim in September 2013[32] was that I was of the opinion that the declaratory order sought by the applicant was not appropriate relief; yet, as I have stated in paragraph 4 of this judgment, the Supreme Court of Appeal did not deal with this issue.

[25] In the applicant's heads of argument it is submitted that this question was answered by the Supreme Court of Appeal and that I am bound by what the Supreme Court of Appeal has said. In support of this submission, applicant's counsel argues as follows:[33]

> 81. The Supreme Court of Appeal found it was both necessary and appropriate for the Applicant to approach this Honourable Court for such relief as explained by Bosielo JA as follows:
> *"[24] Given the uncertainty regarding the correct status of the properties, I have no doubt that it is in the best interests of the appellant as well as the fifth respondent or any other interested persons that the question whether there is a valid claim lodged by fifth respondent in respect of the properties be expeditiously and finally determined. The potential prejudice caused to both parties by this uncertainty is self-evident."*
> 82. This statement was made in the context of the other statements in the judgment such as those at paragraphs [18] and [19] as follows:
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> *"[18] It is clear that the question whether any claim has been registered in terms of s 11(1) against the appellant's two properties is still not answered. The respondents have not been able to give a clear an unequivocal response to the appellant's numerous enquiries. This is notwithstanding the undisputed fact that the appellant's enquiries span a period of not less than 10 years. What is worse*

[32] The judgment which went on appeal to the SCA.
[33] Paragraphs 80—82 of the Applicant's heads of argument.

is that the respondents have proffered contradictory versions on the status of the claim. The appellant's position has been compounded by the uncooperative attitude and unexplained failures by the respondents to respond to his concerted enquiries. Regrettably, this uncertainty is still persisting to date.

[19] ***There should be no doubt that this uncertainty over the properties has caused the appellant anxiety****. For instance, in terms of s 11(7) of the Restitution Act, once a notice has been published in respect of any land, no person may deal with that land either by way of sale, exchange, donation, lease, subdivision or development, without having given the regional land claims commissioner one month's written notice of his or her intention to do so.*

Furthermore, s 11(7)(b) and (c) also place onerous restrictions on the owner and other persons to deal with his or her property. ***The prejudice suffered by the appellant is, in my view, self-evident as he is at present effectively hamstrung. Any further delays in finalising this matter will exacerbate his prejudice.****"* [Emphasis added]

[26] I do not accept that this constitutes a finding by the SCA that the declaratory order claimed is appropriate relief. The issue of whether the declaratory order claimed is appropriate relief in the circumstances of this case is simply not addressed in the appeal judgment. The fact that the court of appeal expressed itself in favour of the applicant being entitled to an answer to its question as to whether valid claims had been lodged against its properties does not and cannot mean that it made a decision that the declaratory order claimed is appropriate relief. On the other hand, it is hard to argue against the fact that the SCA did not appear to have any problems with the relief claimed.

[27] The main problem that I have with the declaratory order claimed by the applicant is that it is far too wide in its ambit. The applicant has persisted in claiming an order declaring that there are no valid claims as defined in s 1 of the Act which have been lodged against his two properties. When the application initially came before this court on 1 December 2010, Judge Gildenhuys told the applicant's counsel in no uncertain terms that he would not grant the declaratory order claimed because it would potentially prejudice any persons who may have lodged a claim.[34] After an extremely robust argument the learned Judge was persuaded

[34] Appeal record pages 244–316.

to issue a rule *nisi* calling upon three communities which had been identified as possible claimants (presumably by the Land Claims Commission) to show cause why an order should not be made declaring that none of them had lodged a claim for restitution against the properties.[35] Presumably, if none of the communities had come forward and opposed the relief sought, the learned Judge would have granted the declaratory order in the more limited form which referred specifically to claims made by those three communities. This did not happen because the three communities indicated on the return day of the rule *nisi* that they intended to oppose the application, but required funding to do this.[36] Eventually only the Majadibodu Community did oppose by filing an answering affidavit asserting that relevant claims had been lodged on their behalf.

[28] On the return date of the rule *nisi* the applicant amended paragraph 1 of his notice of motion to claim the following order:

> *'1. declaring that there are no valid claims as defined in section 1 of the Act which have been lodged against Star 567 LR and Onskuld 568 LR, forming part of Onschuld 551 LR ("the properties") including no such claims lodged by the Mosima Community, the Majadibodu Community and the Mabula-Mosima Community;'*

It should be noted that this is different from the more limited declaratory order that Judge Gildenhuys contemplated since it still refers generally to 'no valid claims' and then includes the three communities instead of referring specifically to claims by the three communities.

[29] I am not prepared to grant an order declaring that there are no valid claims which have been lodged against the properties. I repeatedly told the applicant's counsel that I believed that the order claimed was too widely framed. After the completion of argument I gave the applicant a period of one week within which to amend its notice of motion if he saw fit, but he did not do so. When I raised this issue on completion of argument, the applicant's counsel suggested that I should grant what I believe to be appropriate relief by virtue of the prayer for other or alternative relief.

[30] I have accordingly decided that I will grant the order in the form that Judge

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[35] Appeal record pages 223–225.
[36] See paragraph 5 of the order made by Judge Gildenhuys on 3 March 2011 page 301 of the appeal record.

Gildenhuys would presumably have granted it had none of the communities who were given notice to show cause responded and opposed the relief sought.[37]

[31] The next question which arises is whether I should set aside the notice in terms of which the RLCC proclaimed the applicant's properties as being under claim.[38] This would really be in the nature of an administrative review of the decision made by the RLCC. It was argued at times that the applicant should have proceeded by way of judicial review of administrative action or amended his claim to include such relief, but he chose not to do so. If I do set aside the notice, I may be accused of granting relief that no party claimed, or of making an order in the absence of evidence which would have been before the court had the usual procedures for review of administrative action been followed. In the circumstances of this case, I have decided not to set aside the notice. If the RLCC does not withdraw the notice then the applicant can approach this court for further relief.

Costs

[32] I have decided to make no order as to costs because I disapprove, to a certain extent, of the way in which all the parties have conducted this litigation. My reasons are set out in the following paragraphs.

[33] While the applicant has been substantially successful, I disapprove of the fact that he persisted in claiming a declaratory order in the widest possible terms, even in the face of two judges of this court making it clear that they thought the relief inappropriate. Judge Gildenhuys went to great lengths to explain to the applicant's counsel the realities of the land restitution process and the difficulties encountered by landowners and communities alike because of the lack of capacity of the Land Claims Commission. He explained that, in these circumstances he could not grant such a wide order because he could not rule out the possibility of claims emerging.

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[37] See the order at pages 248–250 of the first part of the appeal record.

[38] Government Notice 1082 of 23 September 2016 (page 82 of the second part of the appeal record) .This notice was published in response to a court order made on 19 July 2016. It has been suggested by the State respondents that this notice was published because the court ordered that it must be done. That is not correct. The earlier order directed the RLCC to publish the claim, but this was a consent order. The RLCC must have made its decision to exercise its discretion (which it subsequently did) when it consented. This was set aside. Eventually, the notice which is currently in place was made as a consequence of an order which directed the RLCC to exercise his discretion in pursuance of the earlier consent order (see para [10] of this judgment).

[34] Much criticism has been directed at the failure of the Land Claims Commission to perform its functions properly in this case, and the history has been dismal. However, the RLCC did initially make the correct decision not to publish notice of claims in respect of the applicant's properties. The Acting Land Claims Commissioner was honest with the court when he explained in detail the Land Restitution process and admitted that the Commission had been unable to find any proof of the lodgement of claims in respect of the applicant's properties. It was only under the pressure of this litigation that the notice which presently stands was *Gazetted*. If it were not for these reasons, I would have ordered the Land Claims Commission to pay all the costs.

[35] I believe that the Majadibodu Community was unreasonable in pursuing a claim in respect of the applicant's two properties in circumstances in which the RLCC had failed to publish a notice in the *Gazette* in respect of these two properties and where the State subsequently initially refused to fund their litigation aimed at pursuing this claim because it could find no evidence of such claims having been lodged. Ultimately, the Majadibodu Community failed to provide evidence in support of its allegation that it had lodged claims in respect of the applicant's properties, despite being given generous opportunity to do so. For these reasons I believe that it is not entitled to a costs order against the State.

ORDER

Having considered all the documents before the court and the arguments presented to the court by counsel for the parties, I make the following order –

1. **It is declared that none of the Mosima, Majadibodu and Mabula-Mosima communities have lodged a claim for the restitution of land rights under the Restitution of Land Rights Act No 22 of 1994 in respect of the following two properties, registered in the name of the applicant: Star 567 LR and Onschuld 551 LR (the latter property being a consolidation of portion of Eyzerbeen 553 LR and Onschuld LR).**

2. **No order is made as to costs.**

C E LOOTS
Acting Judge
Land Claims Court

APPEARANCES

For the Applicants:	Adv B Leech SC
Instructed By:	Werksmans Attorneys, Johannesburg

For the First and Second Respondents: Adv M Majozi

Instructed by:	The State Attorney, Pretoria

For the Fifth Respondent:	Adv. P W Makhambeni
Instructed by:	Denga Inc Attorneys, Johannesburg