



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 4 November 2024

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Mluleki Martin Chithi and Others v Minister of Rural Development and Land Reform and Others* (1203/2021, 1334/2021 & 261/2022) [2024] ZASCA 149 (4 November 2024)

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Today the Supreme Court of Appeal (SCA), in a consolidated matter consisting of three appeals emanating from the Land Claims Court, Randburg (the LCC), made an order as follows: (a) in case number 1203/2021, which was an appeal against the order of the LCC dismissing the Mavundulu Community's land claim, it dismissed the appeal with no order as to costs; (b) in case number 1334/2021, which was against the order of the LCC disallowing the fees of the legal practitioner appellants in the matter and directing them to repay the fees they had already received from the State, it upheld the appeal with no order as to costs and; (c) in case number 261/2022, which was against the LCC dismissing the recusal application with costs, it dismissed the appeal with costs.

The appeals concerned a land claim lodged by Mr Sipho Cebekhulu (Mr Cebekhulu), on 30 December 1998, on behalf the Mavundulu Community (Community appellants/claimants) for the restitution of rights in land of which they were allegedly dispossessed in terms of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). Mr Cebekhulu was authorised to do so by the Community claimants in terms of a resolution dated 9 August 1998. The claimed land comprised certain portions of the farms Spitzkop No. 1129 (Spitzkop) and Mooiplaats No. 1315 (Mooiplaats), situated in the Magisterial District of New Hanover, KwaZulu-Natal. The Regional Land Claims Commissioner: KwaZulu-Natal accepted and investigated the claim as a community claim. The claim was accepted in terms of s 11 of the Restitution Act and investigated as such.

The third to twenty-eighth respondents are the landowners (the landowner respondents). The first and second respondents (the State respondents) are the Minister of Agriculture, Rural Development and Land Reform (the Minister) and the Regional Land Claims Commissioner (RLCC), respectively. Mr Mluleki Martin Chithi (the first appellant), (Mr Chithi), Dlodlu Attorneys (the second appellant) and MC Ntshalintshali Attorneys (the third appellant) were the legal representatives of the claimant community (the legal practitioner appellants). The first and second appellants were appointed to represent the Community claimants in terms of s 29(4) of the Restitution Act.

During the hearing in the LCC in March 2020, at the close of the Community claimants' case (and that of the State respondents), Canca AJ ordered the separation of issues in terms of rule 57(1)(c) of the Land Claims Court Rules, directing the parties to file heads of argument to address, separately and before other issues, whether Mavundulu was a 'community', as envisaged in the Restitution Act. In

addition, he directed Mr Chithi to address him on why legal costs or the costs of the legal team for the claimants should not be disallowed. The parties filed heads of argument as directed.

On 25 May 2020, Canca AJ delivered the judgment in respect of the main case, in which he found that the Community claimants had failed to prove the existence of a community as defined in s 1(iv) of the Restitution Act. The judgment included an order that the legal fees of the legal practitioner appellants were to be disallowed and that any fees already paid to them had to be repaid, as well as ordering the State respondents to pay the costs of the landowner respondents.

The legal practitioner appellants applied for leave to appeal against the disallowance of their fees. Prior to the hearing of the application for leave to appeal and after heads of argument had been filed by the parties, the legal practitioner appellants applied for the recusal of Canca AJ from hearing the application for leave to appeal. This recusal application was opposed by the landowner respondents and ultimately dismissed with costs. No appeal was lodged against the dismissal of the recusal application, however, the legal practitioner appellants sought leave to appeal against the costs order in the recusal application. This leave to appeal was dismissed by the LCC on 22 November 2021.

On 16 August 2021, in a separate judgment, the LCC granted an application for leave to appeal against the disallowance of the legal practitioner appellants' fees. It dismissed the Community claimants' application for leave to appeal against the dismissal of their claim for restitution of land on the ground that they had failed to prove that they were a community as defined in the Restitution Act. On 11 November 2021, the SCA granted leave to the Community claimants to appeal against the LCC's order dismissing their claim.

In addressing whether the LCC was correct in deciding the 'community issue' separately in terms of rule 57(1)(c), the SCA held that Canca AJ was entitled to invoke the provisions of rule 57(1)(c) in determining whether the Community claimants had made out a case on the evidence at that stage of the hearing as the question of whether or not the Community claimants were a 'community', as defined in the Restitution Act, was a discrete legal point that was capable of being disposed of separately from other issues. In rejecting the contention that the Community claimants were prejudiced through the invocation of rule 57(1), the SCA pointed out that the LCC was vested with inquisitorial powers in terms of s 32(3)(b) of the Restitution Act to conduct any part of any of its proceedings on an informal or inquisitorial basis and to identify issues to be determined separately, which power may be invoked at any stage of the proceedings by the presiding judge.

When dealing with the issue of whether Mavundulu Community was a 'community' as defined in s 1 of the Restitution Act, the SCA deemed it necessary to investigate whether the members of the Mavundulu Community derived their possession and use of the land from common rules. This required the SCA to analyse the pleadings, including the Notice of Referral in terms of s 14 of the Restitution Act, the Community claimants' response thereto, and the evidence presented in support of the pleaded case. After evaluating the evidence, which included the pleadings, the respective parties' responses and the testimony of lay and expert witnesses at trial, the SCA found that it was clear from the evidence of the various witnesses who testified for the Community claimants, including those who testified for the State respondents, that, although the claimants' forebears may have existed as a community before the arrival of the white people, that community disintegrated before June 1913. The community members then continued to occupy the land as labour tenants who were subject to the rules and policies of the white landowners. Therefore, the rights which the community members enjoyed as labour tenants, and later, as farm workers were not derived from shared rules which determined access to land held in common by a group and the Community claimants failed to prove that they constituted a 'community' as envisaged in the Restitution Act.

With regards to whether the LCC misdirected itself in ordering that the legal practitioner appellants were not entitled to fees for the matter, the SCA, in setting aside this decision, stated that the LCC committed a material misdirection in disallowing the legal practitioner appellants to recover their fees for the work they had performed and also in directing them to refund the fees they had already received from the

State for representing the Community claimants as there was no legal basis for such an order, given that the legal practitioners were appointed in terms of s 29(4) of the Restitution Act and were thereafter expected to put forward the best case as was reasonably possible on behalf of the claimants at the hearing of the matter.

On the issue of Canca AJ's recusal application, which was brought by the legal practitioner appellants, the SCA held that the allegations of bias based on the adverse remarks concerning Mr Chithi allegedly made at the virtual meeting to which he had not been invited were totally unfounded and the grounds upon which they were based were unsubstantiated. In pointing out that the legal practitioner appellants had ample opportunity to support their allegations with affidavits from any of the participants at that meeting, which they failed to do, the SCA, on this ground, concluded that the recusal application was properly dismissed.

With regards to the submission that Canca AJ erred in deviating from the LCC's usual practice of not awarding costs unless special circumstances exist, the SCA was of the view that Canca AJ was justified in dismissing the recusal application with costs due to the fact that, in awarding costs against the legal practitioner appellants, Canca AJ was exercising his discretion and there was no suggestion that he had, in any way, misdirected himself in the manner in which he did so.

Lastly, the SCA disagreed with the contention by the legal practitioner appellants that the landowners did not have a direct and substantial interest in the recusal application and therefore a costs order in their favour was not warranted. In doing so, the SCA held that the landowners were parties to the case and that their land was the subject of the case and, in terms of the *audi alterem partem* rule, they were entitled to oppose the application and to make their views known in response to an ill-conceived application which was bad in law and on the facts.

In the result, the SCA made an order as detailed in the introductory paragraph above.

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