

**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case No: 577/2022

In the matter between:

**MINISTER OF AGRICULTURE, LAND
REFORM AND RURAL DEVELOPMENT**

FIRST APPELLANT

CHIEF LAND CLAIMS COMMISSIONER

SECOND APPELLANT

**DIRECTOR-GENERAL OF THE
DEPARTMENT OF AGRICULTURE, LAND
REFORM AND RURAL DEVELOPMENT**

THIRD APPELLANT

**REGIONAL CLAIMS COMMISSIONER:
KWAZULU-NATAL**

FOURTH APPELLANT

and

**BONGANI CYPRIAN NDUMO
(obo EMDWEBU COMMUNITY)**

RESPONDENT

Neutral Citation: *Minister of Agriculture, Land Reform and Rural Development and Others v Ndumo (obo Emdwebu Community)* (Case no 577/2022) [2023] ZASCA 136 (19 October 2023)

Coram: ZONDI, CARELSE, MOTHLE and MATOJANE JJA and SIWENDU AJA

Heard: 15 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 19 October 2023 at 11h00.

Summary: Land claim – Restitution of Land Rights Act 22 of 1994 – whether family or community claim – whether the second and fourth respondents impliedly granted condonation to receive the claim form as a community claim and whether they by law can do so.

ORDER

On appeal from: Land Claims Court, Randburg, (Potterill J sitting as court of first instance).

- 1 The appeal succeeds with no order as to costs.
- 2 The order of the Land Claims Court dated 8 February 2021 is set aside and substituted by the following:
‘The application is dismissed with no order as to costs.’

JUDGMENT

Mothle JA (Zondi, Carelse and Matojane JJA and Siwendu AJA):

[1] This appeal arises from a *mandamus*¹ application, heard on 29 March 2021, by way of urgency in the Land Claims Court, Randburg (LCC), to compel the Land Claims Commission (Commission) officials to sign the accepted offer of settlement of a land restitution claim. The crisp issue in this appeal is whether it is legally permissible for a claim for restitution of rights in land, lodged by a person or family, to be converted into a community claim by the Commission.

[2] The respondent, Mr Bongani Cyprian Ndumo (Mr Ndumo), acting as chairperson of the Emdwebu Community, sought a *mandamus* and consequential relief in the LCC, against the first appellant, Minister of Agriculture, Land Reform and Rural Development (the Minister); the second appellant, the Chief Land Claims Commissioner (the Chief Commissioner); the third appellant, the Director-General of the Department of Agriculture, Land

¹ A mandamus is a form of relief seeking to compel an official to perform certain obligations.

Reform and Rural Development (the DG of the Department) and the fourth appellant, the Regional Land Claims Commissioner: KwaZulu-Natal (RLCC). The appellants, mainly the second and fourth appellants will collectively be referred to as the Commission, in this judgment.

[3] The *mandamus* sought by Mr Ndumo was for a court order compelling the appellants to 'settle the Applicants' claim for monetary compensation within 14 days of the granting of the order'. The LCC granted the order as per the notice of motion. The appellants, aggrieved by the decision of the LCC, successfully applied for leave to appeal. In granting leave to appeal to this Court, the LCC formulated the grounds of appeal, limiting the issue on appeal as follows:

- '1. Leave granted to the SCA on compelling reasons as to whether the second and fourth respondents with their actions granted condonation to receive the claim form as a community claim and whether they by law can do so.
2. Costs of the Application is costs in the appeal.'

[4] The background facts are that on 31 December 1998, Mr Bongani Cyprian Ndumo (Mr Ndumo) lodged a claim for restitution of rights in land, in respect of 'Emdwebu-Ntabamhlophe, Estcourt Ukhahlamba' in the province of KwaZulu-Natal. The claim was lodged with the RLCC in terms of the Restitution of Land Rights Act 22 of 1994 (the Act). In his founding affidavit deposed to on 27 November 2020, and filed in support of the application before the LCC, Mr Ndumo avers that he duly represents the Emdwebu Community (the community), having been appointed chairperson of the community on 5 June 2017.

[5] In 2017, the Project Manager in the RLCC's office, after investigating the land claim in terms of s 12 of the Act, read with Rule 5 of the LCC Rules (Rule 5 report), submitted a Rule 5 report which described Mr Ndumo's claim as 'a community claim for the Emdwebu Community'. The RLCC signed the Rule 5 report as a community claim on 13 October 2019. The following year the RLCC published a notice in the Government Gazette 43015 of

14 February 2020 (the gazette), describing the claimant as ‘Bongani Cyprian Ndumo, on behalf of the Emdwebu Community (the community).’

[6] After publication of the gazette, the Commission made an unsigned settlement offer for monetary compensation to the community. On 6 March 2020, 289 members of the community signed the offer for payment, with each member of the community to receive R321 140, as monetary compensation for restitution of land rights. The Commission was yet to sign. I digress to state that during the hearing of the appeal, counsel for Mr Ndumo made a submission that he had in his possession a copy of ‘a settlement agreement’, signed by the Commission, including the Minister. He undertook to submit the said document to the Court, within two days. I will revert to this aspect later in this judgment.

[7] The Commission avers that when the memorandum recommending settlement and a total payment of R92 million in terms of s 42D of the Act,² was being prepared for submission to the LCC, it was subjected to an audit by the Legal Unit and Quality Assurance (Legal Unit). The audit revealed that the information on the claim form lodged by Mr Ndumo in 1998, did not make any reference to the claim being lodged as ‘a community claim on behalf of the Emdwebu Community’. Consequently, on 6 June 2020, the Chief Commissioner issued a letter to Mr Ndumo, which reads as follows:

‘I wish to advise that it has been an oversight on my office to convert your individual family claim to a community claim. In terms of the case law, I am bound by the claim form that was submitted and I don’t have an authority to substitute one claim for another or expand on the claim form.’

Having reached that conclusion, the Commission informed Mr Ndumo that the matter would be referred to the LCC in terms of s 14(1)(b) of the Act. Section 14(1)(b) authorises a regional land claims commissioner to issue a

² Section 42D of the Restitution of Land Rights Act 22 of 1994, allows the Minister to enter into an agreement of settlement with the claimants for a suitable form of restitution, including alternative land, payment of compensation award or both.

certificate that ‘it is not feasible to resolve any dispute arising from such claim by mediation and negotiation’ and then refer the matter to court.³ On 6 October 2020, the LCC’s Registrar received a notice of referral of the claim to the LCC in terms of s 14(1)(b), but the hearing was overtaken by the urgent application which resulted in this appeal.

[8] The LCC in the urgent application dealt with the questions, first, whether the claim was a family claim or a community claim. Second, whether the referral notice in terms of s 14(1)(b) of the Act was appropriate in this case. Since the appeal is limited to the first question, the referral in terms of s 14(1)(b) will not be dealt with in this judgment, save to state that the appropriate referral to court should have been in terms of either s 14(3A) or a review in terms of s 33 of the Act. In the latter case, the Commission would have to set out the grounds supporting a review of its own decision. However, the Commission raised the invalidity of the gazette as a collateral challenge in defence of the urgent application before the LCC.⁴

[9] At the hearing, the LCC found and concluded in para 26, thus:

‘Twice the authority to act on behalf of the community was requested by the Respondents and received. Requesting the authority to act from Ndumo has only one inference: the Respondents needed the authority for the claim that they were processing as a community claim. It is gazetted as a community claim, it is settled as a community claim and there are lists setting out who is to receive monetary compensation. There is no prejudice to any party, there are no competing rights, it is not the wrong land or “new claimants” “piggybacking” on the claim. Most importantly, all the acceptance criteria in the Act and Rules were complied with. This application must be granted.’

[10] Before dealing with the question posed in this appeal, it is apposite to return to the issue of the ‘settlement agreement’ I intimated earlier in this

³ The LCC correctly found that s 14(1) was not applicable in this case. No dispute had arisen between the parties. The RLCC had erred in converting a family claim into a community claim.

⁴ *Merafong City Local Municipality v AngloGold Ashanti Limited* (CCT106/15) [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) para 22 et seq.

judgment. During the hearing of the appeal, counsel for Mr Ndumo submitted that he had in his possession a settlement agreement that had been concluded and signed by both parties. However, he was unable there and then to produce it. He could only do so two days after the hearing of the appeal. The submission concerning the existence of a 'settlement agreement' ignited a spectre of mootness, looming large over the fate of the appeal.

[11] The document which counsel for Mr Ndumo referred to as a 'settlement agreement', turned out to be a copy of a signed route form, with an internal memorandum attached thereto. The route form, we were informed by the Commission, is a means of internally circulating a document to a hierarchy of officials of the Department and the Commission, in this instance including the Minister and her Deputy for approval or disapproval. The explanation from the Commission is that these were confidential internal documents, which were leaked by a former member of the Commission staff, who had since resigned.

[12] It appears from the reading of the document that it is an internal recommendation to the hierarchy of officials, ending with the Minister, and duly signed by all officials, to authorise the RLCC to conclude and sign the settlement offered to Mr Ndumo and the Emdwebu Community. It further recommends to the Minister to make funds available to pay the compensation, after the settlement has been submitted to the LCC in terms of s 42D of the Act. In addition, that it should authorise the RLCC to sign the settlement offer. The Commission's Legal Unit in conducting an audit, objected to the implementation of the recommendation to settle, which objection resulted in the RLCC not signing the settlement offer. Consequently, the community instituted the *mandamus* application. For the purpose of this appeal, it became clear that the matter is not settled as no agreement was concluded in terms of s 42D of the Act. The appeal is therefore not moot.

[13] Returning to the issue in this appeal, in *Gamevest (Pty) Ltd v Regional Land Claims Commissioner: Mpumalanga and Others*⁵ (Gamevest), this Court identified four procedural phases in the processing of claims for restitution of land rights. Stated in sequence, each phase refers to the applicable sections of the Act. Briefly stated, these phases are: the first phase, which deals with the lodgement of a claim for restitution of land rights (completion of the claim form, in terms of s 10, on a form prescribed in terms of s 16 of the Act; the second phase deals with acceptance and publication of the claim in the gazette by the RLCC in terms of s 11(1) applying the jurisdictional requirements stated in s 2 of the Act; the third phase involves the investigation of the claim and filing the report in terms of ss 11(6), (7), (8), 11A, 12 and 13; and the fourth phase involves the referral of the claim to court in terms of s 14 and s 42D.

[14] The claim filed by Mr Ndumo was not dealt with in accordance with the sequence of the four phases identified in *Gamevest*. After the claim was lodged in December 1998, there was an inordinate delay of 22 years, before the RLCC accepted and published it in the gazette in 2020 as envisaged in phase two. During this period of delay, the claim was researched and investigated prior to it being gazetted. This process did not follow the sequence as outlined above. Thereafter the Project Officer filed a Rule 5 report. Therefore, in exercising his powers in terms of s 11(1) of the Act as in phase two, the RLCC had the benefit of the phase three Rule 5 report at his disposal. Significantly, during the period of delay, in 2014 an amendment to the Act was effected, allowing new claims to be lodged between 2014 and 2019, while Mr Ndumo's claim was pending. The community did not lodge a separate claim.

[15] Three sections of the Act are relevant in determining whether Mr Ndumo's claim for restitution of land rights could be converted into a community claim through condonation. These are ss 2, 10 and 11 of the Act.

⁵ *Gamevest (Pty) Ltd v Regional Land Claims Commissioner: Mpumalanga and Others* 2003 (1) SA 373 (SCA) at 374D-H.

Section 2(1) which deals with the jurisdictional requirements for 'Entitlement to restitution', provides:

'A person shall be entitled to restitution of a right in land if-

(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or

(b)...

(c)...

(d)...

(e) *the claim for such restitution is lodged not later than 30 June 2019.*'

In the original version of the Act, the cut-off date for lodgement of claims was 31 December 1998. In 2014, Parliament provided for a new cut-off date, being 30 June 2019, through an amendment in terms of s 1 of Act 15 of 2014. A distinction should be drawn between the old claims (1998) and the new claims (2019). (Own emphasis.)

[16] Section 10 of the Act provides for the details required to be filled on the prescribed form, at the time the claim for restitution of rights in land, is lodged. Most importantly, it requires the claimant to indicate the capacity in which the claim is lodged, that is whether the claim is for an individual, or in a representative capacity for a family, community, or a trust. In particular, s 10(3) of the Act provides:

'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 any appropriate resolution or document supporting such contention shall accompany the form at the time of the lodgement: Provided that the regional 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.'

[17] Section 11(1), which provides for the procedure after lodgement of the claim, reads:

'(1) If the regional land claims commissioner having jurisdiction is satisfied that-

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

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

(c) the claim is not frivolous or vexatious;

He or she shall cause notice of the claim to be published in the Gazette . . .and shall take steps to make it known in the district in which the land in question is situated.'

[18] Mr Ndumo completed a claim form on 31 December 1998, claiming the restitution of his rights in land, belonging to his late father, Nokhenke Ndumo. The information contained in the claim form is at the centre of this appeal. For that reason, it is necessary to refer to the relevant parts of the claim form as they appear in the original text, a copy of which was attached to Mr Ndumo's founding affidavit. The answers Mr Ndumo provided in the claim form are stated in this judgment in italics, and itemized titles of the claim form in bold, as follows:

'1. Property description: Rural/Urban (Delete which is not applicable)

1.1 If it is rural land, the portion(s), name(s) and number(s) of the farm and district in which it is situated

EMDWEBU-NTABAMHLOPHE, ESCOURT UKHAHLAMBA

...

2.3 Was any land/housing allocated as compensation R60.00 Rand

Remarks (additional information) *Buildings only.*

*The land was lost through land act (1924),
Under the chieftan of "Chief Faku Mabaso
Though the land was lost but was still
developed by generation until 1964 whereby
"forced removals/relocations applied"*

3. Full particulars of person who lost the right in land:

-Name/Community/Trust: *NOKHENKE NDUMO*

-ID number of individual claimant:

-Male/Female (Delete which is not applicable)

4. Full particulars of applicant, if not the person who lost the right in land:

Name/Community/Trust

BONGANI CYPRIAN NDUMO

Male/Female (Delete which is not applicable)

If you are acting on behalf of a community/Trust, please give your:

Name: *BONGANI CYPRIAN NDUMO*

ID Number: *5[...]*

Male/Female Delete which is not applicable)

In what capacity are you acting?

DESCENDANT (SON) OF THE LATE NOKHENKE NDUMO

5. Do you know about any other family member that might have an interest or Claim on the land? YES

5.1 If so, please give details

MR MICHAEL ISRAEL NDUMO

50 E[...]M[...] STREET

PIETERMARITZBURG

3200

TEL: (033) 4[...]

[19] Apart from the fact that some questions in the claim form, such as those requiring an indication whether the claimant is male or female were not responded to, Mr Ndumo only mentioned 'Emdwebu' in item 1.1 in response to the request for location or description of the property he claimed. There is no reference at all to the 'Emdwebu Community' in the claim form. The language of s 10(3) of the Act is explicit. '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...*'. In response to item 4 of the claim form, Mr Ndumo stated that he is acting in his capacity as a 'Descendant (son) of the Late Nokhenke Ndumo', significantly, not as a representative of the 'Emdwebu Community'.

[20] Attached to the Rule 5 report of investigation, as Annexure D is a letter from Mr Ndumo to the Commission dated 7 August 2013, in which he allegedly told Ms Mfeka of the Commission in 2012, that the claim must be called Emdwebu Community Land Claim instead of Ndumo claim. Also attached in Annexure D is a copy of a hand-written affidavit, deposed to by Mr Ndumo in 2013, before a member of the South African Police Service, with an illegible date stamp. In the affidavit Mr Ndumo stated thus:

'I made a land claim in 1998 December for compensation on forceful removal by Apartheid Government. Since we suffered damages and a loss of cattle during

removal for [Ma]khenke Ndumo my late father. *And it was called "Ndumo Land Claim". Now it should be "Emdwebu Claim."*

In 2013 I thought it was to include all people [A] Emdwebu who also suffered forceful removal. As a result it should not only for 'Ndumo Claim' I should be called "Emdwebu Land Claim" so that all people of Emdwebu should be compensated.' (Own emphasis.).

[21] The documents attached in Annexure D support the Rule 5 investigation report, which recommended to the RLCC to condone the conversion of the Ndumo Land Claim to Emdwebu Community Land Claim. Section 11(2) of the Act empowers or authorises the RLCC thus:

'The regional land claims commissioner concerned may, on such conditions as he or she may determine, condone the fact that a claim has not been lodged in the prescribed manner.'

[22] In considering whether he was satisfied that the claim meets with the jurisdictional factors in s 11(1) of the Act, the RLCC had before him Mr Ndumo's claim form lodged in December 1998 and the Rule 5 report. On the face of it, the claim for Mr Ndumo, apart from not providing a clearer description of the location of his late father's farm, was lodged as a family claim in the prescribed manner.

[23] In the present case, the LCC held that it was permissible for the RLCC acting in terms of s 11(2) of the Act, to condone the conversion of the claim. However, in *Minaar N.O. v The Regional Land Claims Commissioner: Mpumalanga (Minaar)* which was confirmed by a line of similar cases in the LCC,⁶ the LCC held that it was not permissible to condone a conversion of a claim. What transpired in *Minaar* is that the claimant, Mr Nkosi Menzani

⁶ *Minaar N.O v Regional Land Claims Commissioner, Mpumalanga* (LCC 42/2006) [2006] ZALCC 12 (8 December 2006); *Bouvest 2173 CC & Others v Commission on Restitution of Land Rights and Others* (LCC 68/2006) [2007] ZALCC (7 May 2007); and *Shongwe N.O & Others v Regional Land Claims Commissioner, Mpumalanga* (LCC 46/2009), an unreported case where judgment was delivered on 27 July 2012 by Meer AJP; *Illovo Sugar Ltd and Another v Regional Land Claims Commissioner and Others* (LCC 122/2014) para 18 and 21; *Mahlangu Family v Minister of Rural Development and land reform and Others* (LCC 48 /2011) para 27.

Rainslee, had completed a claim form in which he indicated that he was acting in his capacity as a family representative. A project officer had prepared a report for the RLCC in which he stated that the claimant had lodged a claim on behalf of the Community of Daisy Kopje. The reason advanced was that he found evidence of the graves of the claimant's relatives 'scattered' in the area. He therefore recommended that that claim be published in the Gazette as a community claim. The RLCC accepted the recommendation and stated in the gazette that the claim had been lodged by 'Mr Nkosi Menzani Rainslee ... acting in his capacity as a Chairperson of Daisy Kopje Community'.

[24] The applicants (owners of the property) in that case objected to the report which conveyed a wrong statement that the claim covered a wider area. The applicants further contended that the graves referred to, were confined to a Portion of the land referred to in the report. After all internal representations were unsuccessful, the matter was taken on review. The LCC in paras 27 and 28 stated thus:

'As I have indicated, there is no rational connection between the information available to the first respondent (the RLCC) and the administrative act he performed by concluding that the restitution claim is a claim for the entire farm Daisy Kopje, and that it is a claim made by the fourth respondent (the Community)'

...In the present case, the first respondent (the RLCC) was not authorised under the Act to add additional subdivisions of Daisy Kopje to the single subdivision claimed, nor to replace the third respondent (Nkosi family) by the fourth respondent (the Community).'

[25] The facts in *Minaar* strikingly resemble those in the present case. Mr Ndumo's claim form remained as it was completed on 31 December 1998, even though 15 years later he requested by letter and affidavit that it be changed from 'Ndumo claim' to 'Emdwebu Community' claim. This request found favour with the researcher and Project Officer, who in the report, requested the RLCC to condone the manner in which the claim was lodged. The reason advanced for the condonation, arose from an allegation by the Project Officer that there were documents missing in the file, including a Rule 5 report that was approved in 2015 and followed by a name verification report in

2018. The Project Officer recommended that in that regard, the claim be condoned as a community claim. The RLCC accepted the claim as recommended by the Project Officer and published the claim as a community claim in the Gazette in 2020, 22 years after it was lodged. The Gazette stated that the claim was lodged by 'Bongani Cyprian Ndumo on behalf of Emdwebu Community,' which does not appear in the claim form.

[26] The allegation in the report that there are documents in the file which went missing, is not satisfactorily explained. The Project Officer writes in the last two sentences of para 2.3 of the Rule 5 report thus: 'Upon reading the records of the Regional Land Claims Commission it appeared that the claim is called Ndumo Claim instead of Emdwebu claim. Hence it was regarded as a family claim although he had submitted an affidavit with the claim form (see Annexure 2)'. Such 'Annexure 2' is not referred to in, nor attached to, the claim form. It is also not attached to the Rule 5 report. The only affidavit attached to the Rule 5 report is the one deposed to by Mr Ndumo in 2013. It could not have been attached to the claim form in December 1998.

[27] The LCC erred in finding that at the time Mr Ndumo lodged the claim in 1998, he intended it to be a community claim. The LCC failed to consider Mr Ndumo's affidavit of 2013, which conveys that the idea to include the community only came to him in 2013. Further, Mr Ndumo claims that in item 1.1 of the claim form, reference to 'Emdwebu-Ntabamhlophe, Estcourt, Ukhahlamba' as the location of the land that is claimed is proof that it was for the community. If indeed it is so, this statement is contradicted by the response to para 3 of the claim form, where Mr Ndumo states that the person who lost the right in land is Nokhenke Ndumo, his father, and not the community. His late father could not have owned the community land described in the claim form.

[28] These inherent contradictions are at the heart of the RLCC's contention that the gazetting of the claim as a community claim was not in terms of s 11(1) of the Act. The conversion of the claim occurred in 2013. On Mr Ndumo's version, 15 years after lodging a Ndumo family claim, a rather noble manifestation of intent, belatedly came to him to include people of Emdwebu

Community in the claim. The benevolent idea of converting a family claim to a community claim was for all intents a belated inclusion of people who had not met the cut-off date, in the Ndumo family claim. In *Re Former Highlands Residents*⁷, the LCC held thus:

'The Restitution Act limits the benefit of restitution to persons who have lodged their claims with the Commission by 31 December 1998. The intervening claimants endeavoured to ride home on the fact that other claimants have timeously lodged claims with the Commission in respect of the same property. I fail to appreciate how the fortuitous circumstances of other claimants in respect of the same property can relieve the intervening claimants from complying with the threshold requirements of the Restitution Act. Late demands cannot gain validity just because other lodged timely claims for restitution in respect of the same property. I conclude that the intervening claimants do not have a right to restitution and that their statement of claim must be struck out.'

[29] The RLCC's decision to accept and gazette the Ndumo family claim as a community claim was not authorised by the Act. That is so because there was no rational connection between the contradictory information made available to the RLCC, and the administrative act he performed in terms of s 11(1) of the Act. Thus, on the facts of this case, the conversion of a family claim to a community claim after the cut-off date, could not have been effected through condonation in terms of s 11(2). The appeal must therefore succeed, with no order as to costs.

⁷ In *RE: Former Highlands Residents* (LCC116/98) 2000 (1) SA 489 LCC at para 11.

[30] In the result, I make the following order:

- 1 The appeal succeeds with no order as to costs.
- 2 The order of the Land Claims Court dated 8 February 2021 is set aside and substituted by the following:
'The application is dismissed with no order as to costs.'

SP MOTHLE
JUDGE OF APPEAL

APPEARANCES:

For appellant: MS Khan SC and GZ Gumede

Instructed by: State Attorney, Durban
State Attorney, Bloemfontein.

For respondent: WS Gabela

Instructed by: Gabela Wilson & Associates, Westville
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