

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: TO BE ALLOCATED

SCA CASE NO: 410/16

LAND CLAIMS COURT CASE NO : LCC 49/2012

In the matter between:

THE MAMAHULE COMMUNAL PROPERTY ASSOCIATION	First Applicant
MAMAHULE COMMUNITY	Second Applicant
MAMAHULE TRADITIONAL AUTHORITY	Third Applicant
THE OCCUPIERS OF THE FARM KALKFONTEIN	Fourth Applicant

and

THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Respondent
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FOUNDING AFFIDAVIT

I, the undersigned,

LESIBA EZEKIEL MATSAUNG

hereby make oath and state:-

1.

1.1 I am an adult male resident at 649 Zone A, Mankweng, Limpopo. I am employed as a Professor and Head of Department in the Department of Languages and Educational Management Sciences at the University of Limpopo. I am also the Chairperson of the First Applicant in this matter.

1.2 I am duly authorised to depose to this affidavit and the facts herein fall within my personal knowledge unless is otherwise apparent and are both true and correct. Where I make legal assertions or submissions in respect of the record before the Land Claims Court, I do so on advice of the Applicants' legal representatives.

2. **THE JUDGMENTS AND ORDERS IN THE LAND CLAIMS COURT:-**

2.1 The purpose of this application is to seek leave to appeal against the whole of the judgment and order of the Land Claims Court (**LCC**) (per Mpshe and Canca AJJ) handed down on 1 August 2014.

2.2 I annex a copy of the judgment hereto as Annexure “**LM1**”. I further annex a copy of the order as Annexure “**LM2**”. It should be noted that the judgment seems to be missing a page between pages 6 and 7, as the paragraph numbers jump from 7 to 11. Our attorney, Ms du Plessis made enquiries about this, but it would appear that there are no missing paragraphs, and that it is merely a case of erroneous numbering.

2.3 A subsequent application for leave to appeal was heard and decided on 30 November 2015. Leave to appeal was denied on the same day on the basis that an appeal had no prospects of success. No further reasons were given.

2.4 A subsequent application for leave to appeal to the Supreme Court of Appeal (**SCA**) was also denied on 7 July 2016, which order was communicated to our attorneys on 12 July 2016. I annex hereto annexure “**LM3**” in this regard.

2.5 The SCA refused the application on the basis that condonation for the late filing was denied. I briefly wish to explain what the delays in the SCA were and their causes, to the extent that such these

facts may be relevant to this honourable court. I shall do so succinctly. The application was filed five months and ten days late.

2.6 Out attorney, Ms du Plessis, explained that on no less than three occasions the registrar of the **LCC** provided her office with the incorrect orders in respect of the main application. The attachment of that order is compulsory in terms of the rules of the **SCA**.

2.7 In addition, further delays were caused by the uncertainty whether the judgment was complete. Ms du Plessis indicated that of the delays, eighty per cent was caused on the side of the registrar's office. She acknowledged some delays in her own office. I refer to her confirmatory affidavit attached.

2.8 A further basis advanced for condonation was that the delays were insignificant in the context of the matter. The parties had been involved in litigation against each other since 2006. The details thereof appear below.

2.9 I therefore respectfully submit that the delays in the **SCA** should not be a factor in the consideration of this matter.

THE PARTIES:-

3. The First Applicant is **THE MAMAHULE COMMUNAL PROPERTY ASSOCIATION**, an association registered in terms of the Communal Property Associations Act, 28 of 1996. It is the legal entity which the Mamahule community established to own land which is restored to it. It was cited as First Respondent in the **LCC**.

4. The Second Applicant is **THE MAMAHULE COMMUNITY**, an indigenous community that exists in terms of Customary Law and who previously occupied the land which forms the subject matter of the community's land claim in terms of the Restitution of Land Rights Act 22 of 1994. It was cited as Second Respondent in the **LCC**.

5. The Third Applicant is **THE MAMAHULE TRADITIONAL AUTHORITY**. There presently does not exist any recognised Mamahule Traditional Authority. This was the name used by the community when it commenced with its restitution claim in the mid-1990s, before communities had the option of establishing Communal Property Associations.

6. The Fourth Respondents in the Court *a quo* were cited as “*Unlawful Occupiers of the farm Kalkfontein*”. Although we denied that any of the occupiers being referred to were *unlawful* occupiers, the occupiers as there were, were all members of the Mamahule community. They are therefore here cited simply as “The Occupiers”.
7. In preceding High Court proceedings which I refer to below, certain interim agreements were reached in respect of those persons that had already occupied an area within Kalkfontein by April 2012, being some fifty such occupiers. These proceedings took place in the Gauteng Provincial Division, Pretoria (Case no 21067/2012), then still the North Gauteng High Court. Since these High Court proceedings were settled, the number of occupants have remained at fifty and these persons should be regarded as the Fourth Applicants herein.
8. The Respondent is **THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM**. The Respondent instituted the 2012 proceedings in the High Court and the present proceedings in the Land Claims Court (**LCC**) in his capacity as the Minister

responsible for the administration of the Restitution of Land Rights Act, 22 of 1994 (the Restitution Act).

BACKGROUND TO THE LITIGATION IN THE LCC:-

9.

9.1 I respectfully submit that it is necessary to consider the background to the present litigation. The background will respectfully show that the proceedings in the Court *a quo* (**LCC**) constituted an abuse of legal process in addition to the fact that the application had no merits.

9.2 Furthermore, despite only declaratory relief being granted in the LCC, it is evident that the Respondent wishes to use the findings and the resultant orders as the basis for future eviction proceedings in the High Court. The Respondent has already instituted such proceedings under case no 34458/2015 in the Gauteng Division, Pretoria of the High Court

10.

10.1 The Second Applicant, the Mamahule community, lodged a land claim in terms of the provisions of the Restitution of Land Rights Act, 22 of 1994 (*The Restitution Act*) on 18 May 1996.

10.2 The land claim involved an area covering five different, but contiguous, farms, one of these being Kalkfontein 1001 LS.

10.3 The land under claim lies approximately 15 kilometres east of Polokwane on the Polokwane-Tzaneen road.

11. After many delays in the processing of our community claim, the Regional Land Claims Commissioner for Limpopo eventually agreed to restore most of the portions which presently comprise the farm Kalkfontein to our community. This happened approximately during 2005 and in consequence of this undertaking a so-called Section 42D Memorandum and Agreement was drafted for the settlement of the land claim. This is a reference to section 42D of the Restitution Act. I annex a copy of this memorandum as Annexure “**LM4**”.

12. As far as we are aware, a large number of the portions have in fact been purchased and paid for by the State, however, this did not include the three cadastral portions of land on which the Fourth Applicants settled. The only basis for spending state money, could have been for the settlement of our claim. As a result, in terms of Section 42E of the Restitution Act the land must be transferred to the claimant community. Unfortunately, the Land Claims Commission refused to finalise the settlement.

13. For reasons that are not relevant for purposes hereof, the Land Claims Commission refused to transfer the portions acquired by the State to our community. This led to a whole series of legal proceedings in the Land Claims Court during the period 2005 to 2012.

14. Relevant for purposes hereof, is that the Land Claims Court made certain orders during 2009 in terms of which the Land Claims Commission, more particularly the Regional Land Claims Commissioner for Limpopo was obliged to take certain steps in the furtherance of our land claim, more specifically to gazette the entire claim and to process it further in terms of the Restitution Act.

15. These directives were issued during the latter part of 2009. I annex a copy of such directives as Annexure “**LM5**” issued on 19 November 2009. From these directives it is clear that the directives of 3 September 2009 had not been complied with.

16. When the directives of the LCC had not yet been complied with by 2012, we, as claimant community, instituted further legal proceedings against the Regional Land Claims Commissioner for Limpopo (RLCC) to declare the RLCC to be in contempt of Court and in which application we further sought his committal to prison.

17. These proceedings, instituted on 22 March 2012 under case number LCC100/2006 was responded to not only by opposition in the LCC, but also by the launch of an urgent application by the present Respondent, the Minister of Rural Development and Land Reform, instituting interdict and eviction proceedings against me personally together with other members of our community as well as the “*Mamahule Traditional Authority*” (as Fifth Respondent) in the then North Gauteng High Court under case number 21067/2012.

18. The eviction relief sought in that matter was the same as the relief sought in the present matter in the Land Claims Court. Although the parties were not exactly the same, the litigation in both the High Court and the LCC were against the Mamahule community and in the High Court against a number of the community's leaders, including myself. The litigation all concerned the occupation of Kalkfontein 1001 LS, or certain portions thereof.

19. The High Court case under case number 21067/2012 was settled on 3 May 2012 in terms of a written interim settlement which provided for certain undertakings from our side as the community as well as other ancillary issues. I annex a copy of this agreement hereto as Annexure "**LM6**". As can be noted from the settlement agreement, the settlement was placed on the Court file but not made an order of Court.

20. The contempt of court proceedings came before the LCC in September 2012. At that point, the RLCC acknowledged its obligation to process our land claim further. An order was made by agreement, a copy of which I annex hereto as annexure "**LM7**".

21. It should be noted, as appears from the record in the present matter, that the Applicants (Mamahule community) have at all times denied that a land invasion was taking place during 2012. In fact, we alleged that our presence on the land had been a fact since 2005, by agreement with the then RLCC, and that the proceedings instituted in 2012 were an abuse of the process as a response to the contempt proceedings.
22. Without any further notice being given, the Respondent, as Applicant in the High Court proceedings, appeared to be unhappy with the result and the settlement reached, and subsequently filed a notice of “*withdrawal of application*” during May 2012. At the time we were advised that the withdrawal can be ignored as it constituted a legal nullity. The matter had been settled and the settlement was binding *inter partes*.
23. The next thing that happened was that the Respondent instituted the present proceedings in the Land Claims Court under case number LCC94/2012.
24. I deposed to the affidavit in answer to this **LCC** application, which was also brought on an urgent basis, in similar terms as I had

answered to the High Court proceedings. Our defences raised were as follows:

24.1 The proceedings constituted an abuse of Court process as the issues had been settled in the High Court. The High Court settlement made provision for the further conduct of the matter and the further management of any disputes between the parties;

24.2 That the Land Claims Court had no jurisdiction to entertain proceedings which were expressly stated to be eviction proceedings in terms of the PIE Act (Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998);

24.3 That the State was not the registered owners of the land occupied and could therefore not institute such proceedings ;

See: para 21 and 22 of the judgment of **LCC**

24.4 That the State had failed to prove that any of the occupation occurred on portions of land that were in fact owned by the State. I refer to my concluding allegations in respect of intervening facts since judgment in this matter. The community is now the owners of the land being occupied after purchasing it from the actual owners.

The state was never the owner of the land. The problem remains that the matter is not moot because the PIE Act allows any organ of state to bring eviction proceedings in respect of land of which it is not the owner (section 6 of the Act);

24.5 That the State was in fact obliged to transfer the land to the Mamahule community in terms of the provisions of Section 42E of the Restitution Act. Money had been made available for the settlement of the land claim, and the state had no discretion in the matter ;

24.6 That the occupation was, in any event, not unlawful as members of the community were given permission to settle on certain portions of the land as far back as 2005 by the then RLCC.

25. After long delays in the Land Claims Court, the application was eventually heard on 17 March 2014 and judgment handed down on 1 August 2014.

26. After judgment an application for leave to appeal was timeously lodged at the **LCC**, and after further long delays in that Court, the application was finally set down by the Registrar and heard on 30

November 2015. As noted above, that application for leave to appeal was dismissed.

THE ERRORS OF LAW AND THE CONSTITUTIONAL ISSUES

INVOLVED:-

27. I am advised that the questions of fact raised in this matter do not constitute constitutional issues. However, the legal issues in this matter are central, especially the issue whether the **LCC** has jurisdiction to make orders in terms of the PIE Act.

28. The **LCC** respectfully has no jurisdiction to grant orders in terms of the PIE Act. Doing so is an impermissible extension of ancillary jurisdiction provided for in section 22(2)(b) and (c) of the Restitution Act.

See: paras 11 to 17 of the judgment

29. The LCC clearly found that it has no jurisdiction to order an actual eviction in terms of the PIE act, but nevertheless made an order that the occupation be declared unlawful in terms of the PIE Act (para 7 of the amended Notice of Motion as granted by the court).

30. The reference to section 3 of the Restitution Act (para 10 of the judgment) is with respect erroneous. Our claim has at all times been a section 2 claim. Section 3, dealing with nominee claims, is not at issue in this matter. Section 3 deals with a certain type of land claim, it does not deal with the ambit of the **LCC**'s jurisdiction.

31. Even if the **LCC** is correct in this regard, then the extended jurisdiction represents an issue of such public importance that it constitutes compelling reasons to have this matter heard by this court, as it constitutes a completely new application of the **LCC** jurisdiction.

See: section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013

32. I respectfully submit that a legal question concerning the jurisdiction of a Superior Court, will in and of itself constitute a constitutional matter. In addition, it is trite law that the interpretation of the Restitution Act and the PIE Act involves a constitutional matter.

33. The **LCC** has in recent times exercised extended jurisdiction in ways not done since its inception in 1995.

See: *Normandien Farms v Mathimbane and others*
(unreported) LCC 196/2013 at paragraphs 25 to 42

34. For this reason also, it is important that this honourable Court deal with the ambit of the **LCC**'s jurisdiction.

35. The parties had entered a settlement agreement in the **High Court**. Any problems that may have been encountered, could, and should, have been dealt with in terms of that agreement. In fact, by the time the **LCC** matter was heard, it was common cause that the settlement had not grown beyond the 50 occupants provided for in the original High Court agreement.

36. The application in the **LCC** was therefore an abuse of process and the defence of *res judicata* or *lis pendens* should have been upheld. The **LCC** failed to deal with issue at all, despite it being raised pertinently.

INTERVENING FACTS

37. I am advised that I should inform the court that the community has, since judgment, purchased the three portions (ptns 146, 147 and

153) of land on which the occupation took place. It was purchased from the owner, the estate late Mabina.

38. This fact proves that the allegations made by the Minister of Rural Development and Land Reform that the state was the owner, was not correct. I am informed that this fact may lead to an argument that the matter has become moot.

39. I am advised that the matter is unfortunately not moot as the Respondent is still armed with an order which it wishes to use as the basis for eviction. As stated above, the Respondent has already launched such proceedings.

40. The Respondent will certainly not stop with the eviction proceedings brought in the High Court. Only if this appeal is upheld, will it have to abandon those proceedings. The matter is therefore not moot and the Applicants face serious prejudice in the High Court, where the Respondent seeks an eviction in terms of PIE based on the declaratory order of the **LCC**.

CONCLUSION AND INTERESTS OF JUSTICE

41. As a result of the above, I respectfully submit that this matter raises an important constitutional question relating to the jurisdiction of the Land Claims Court.

42. I also respectfully submit that the LCC judgment is based on a number of central legal errors as outlined above, and therefore it is appropriate that this court overturns the judgment and orders.

43. The matter is also of broader public importance as the LCC order represents an unjustified extension of the jurisdiction of the LCC, and as such it is in the interests of justice to grant leave to appeal.

44. I therefore pray that the relief sought in the notice of motion be granted.

Deponent

SIGNED and SWORN to BEFORE me at _____ on this the ____ day of July 2016, the deponent having acknowledged that he/she understands the contents of this affidavit, has no objection to taking the prescribed oath, considers the oath binding on his/her conscience and that the provisions of the regulations as contained in Government Notice No R1258 dated 21 July 1972 and Government Notice R1648 of 19 August 1977, as amended, have been complied with.

COMMISSIONER OF OATHS

Full names:

Capacity:

Address: