

IN THE CONSTITUTIONAL COURT OF OF SOUTH AFRICA

CC CASE NO: TO BE ALLOCATED

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LAND CLAIMS COURT CASE NO: LCC 49/2012

In the matter between:-

**THE MAMAHULE COMMUNAL PROPERTY
ASSOCIATION**

First Applicant

MAHULE COMMUNITY

Second Applicant

MAMAHULE TRADITIONAL AUTHORITY

Third Applicant

THE OCCUPIERS OF THE FARM KALKFONTEIN

Fourth Applicant

and

**MINISTER OF RURAL DEVELOPMENT AND LAND
REFORM**

Respondent

RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

K.S. 

JULIUS SHIKO MASHAPHU

do hereby state under oath as follows;

1. I am an adult male Chief Director, employed as such in the Department of Rural Development and Land Reform, ("the Department") and stationed at 70 Hans Van Rensburg Street, ABSA Building, Polokwane, Limpopo Province.
2. I have been employed in the Department since 2014.
3. I am duly authorised to depose to this affidavit on behalf of the respondent by virtue of my position and to oppose the relief sought by the applicants.
4. The facts contained herein are, except where the context indicates otherwise, within my personal knowledge, and are to the best of my belief, both true and correct.
5. Where I make submissions of a legal nature, I do so on the advice of the legal representatives of the Respondent. Where I rely on information gleaned from the records of Respondent, I do so in the belief that the records are what they purport to be.

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6. The Applicants brought this application for leave to appeal against the whole of the judgment and order of Honourable Justice Mpshe and Canca AJ handed down on 1st August 2014 in the Land Claims Court.
7. This Court's jurisdiction is governed by section 167(3) which provides that the Constitutional Court is the highest Court of the republic; and may decide constitutional matters and any other matter if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court and makes the final decision whether a matter is within its jurisdiction.
8. As will appear below the Applicants failed to comply with these requirements in many respects. It does not set out the specific criticisms of specific findings made by the Court *aquo* and which it seeks to raise on appeal. By and large the application for special leave is but a regurgitation of its arguments before the Court *aquo* with little treatment of the basis upon which that Court rejected the Applicant's arguments and/or found in favour of the Respondent's argument.
9. Before I deal in detail with the application, I intend to deal with the background of the application.

FACTS BEFORE COURT A QUO



10. In 1995, land claim was lodged in terms of the Act in respect of a farm known as Kalkfontein 1001LS ("the farm"), on behalf of the Mojapelo, Mothiba, Mothab, Tholongwe, and Mamahule Communities for the purpose of restitution. Pursuant to the submission of a memorandum for the settlement of the above claims, some of the potential beneficiaries disputed the correctness or veracity of the list of beneficiaries as contained in the claimants' verification list. That challenge is still pending before the Land Claims Court. I attach hereto as annexures "A", "B", "C", "D" and "E".
11. The owners of the farm were duly notified of the claims to the farm and referred to the provisions of section 6(3) of the Act.
12. The Claims were duly published as appears from annexure "F" hereto.
13. After investigation of the claims a settlement was reached which was subject to the Minister's approval. However, pending to the approval of the memorandum for the settlement of the above claims by the Minister, a copy of which is annexed hereto marked "G", some of the potential beneficiaries disputed the correctness or veracity of the list of legitimate beneficiaries as contained in the claimants' verification list. The correctness of the list was therefore challenged in Court and the settlement was postponed. That challenge is still pending before the Land Claims Court.
14. Pending the disputes referred to in the preceding paragraph, the farm was purchased by the State during 2005 for the purpose of eventual restitution.

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15. The affected properties, in particular the farm, are still held by the Department.
16. No settlement agreement in relation to the claims to the farm has been signed to date. In the result the farm still belongs to the Respondent and therefore falls under the authority, custody and control of the Respondent.
17. The purpose of the land restitution in issue in respect of the farm is for agricultural and farming operations, as per its registered zoning use, and not for residential purposes. Lawful beneficiaries to whom the land will be transferred may use the farm for settlement only upon obtaining approval from the Minister and/or Municipality through the necessary processes. Thereupon the farm has to be re-zoned by the relevant Municipality, and there has to be a planning process. This has not been done.
18. The farm has not been restored to its lawful beneficiaries for agricultural, farming or residential purposes or at all.
19. In January 2012, it was brought to the attention of the Limpopo Provincial Department of Rural Development and Land Reform through, *inter alia*, letters dated 19, 23 and 25 January 2012 and addressed to the Department, from the Mothapo Royal Council, Bakgaga Traditional Council and Mojapelo Community Council respectively, that certain persons are

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demarcating, allocating and selling stands on various portions of the farm to certain individuals. The said letters are annexed hereto marked **H, I and J**.

20. Officials of the Department investigated same, and on the 26th March 2012 officials of the Regional Land Claims Commission, Limpopo, Dikeledi Tselane and Motlatsi Lebea attended at the farm. Upon arrival at the farm, the said officials found that a group of persons calling themselves the Mamahule Traditional Authority had established an office in an old building on a portion of the farm called Orange Grove, from which they were selling stands on the farm.
21. On another area of the farm, the officials found unknown persons demarcating and allocating sites to those members of the public who had bought stands.
22. On 27th March 2012 the office of the Regional Land Claims Commissioner, Limpopo released a media statement advising members of the public to cease buying stands or sites illegally from members of the mamahule Traditional Authority. A copy of the media statement is attached as annexure L.
23. Despite thereof, the Mamahule Traditional Authority and/or the applicants have not stopped demarcating, selling and allocating stands on the farm, and members of the public have not stopped buying the stands and erecting housing structures thereon.



24. The Respondent accordingly approached the North Gauteng High Court by way of urgency and sought an order, *inter alia*, interdicting the sale and purchase of the stands on portions of the farm and also interdicting the erection of any shacks and/or dwelling house or other structures on the farm.

25. On 2nd May 2012 which was the day of the hearing of the urgent application referred to above, a written interim settlement agreement, a copy of which is annexed hereto marked K, was reached between the parties, in terms of which:

25.1 The Mamahule Traditional Authority undertook not to settle any further structures or persons on the farm, pending finalisation of proceedings instituted by the Mamahule Communal property Association in the Land Claims Court.

25.2 The Parties were to determine the number of informal structures presently on the property and to record the *status quo*; and

25.3 The settlement was to be filed in the court file and be part of the record, but shall not be made an order of Court.

26. Pursuant to the interim settlement, the parties thereto agreed that the counting of structures would take place on Monday the 7th May 2011.

27. In contravention of the aforesaid settlement agreement, the first, second, third and/or applicants have continued to demarcate and sell stands on the farm and the purchasers thereof continue to erect shacks and/or building on the farm.
28. This state of affairs came to the knowledge of Respondent on 5th and 6th May 2012, when an official of the Department visited the property and found members of the public busy erecting corrugated iron structures on the property.
29. Detailed information with regard to the structures will form part of the record.
30. In compliance with the interim settlement agreement referred to above, and on 7th May 2012 officials of the Department and representatives of the Manmahule Traditional Authority proceeded with the counting of structures on the farm.
31. Save for the old brick structures that had been on the farm during the previous ownership of the farm, the parties counted 119 corrugated structures, and 449 illegally demarcated and fenced –in stands.

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32. An inspection of the farm done on the 8, 9, 10 and 14 May 2012 by an official from the Department and found that the buyers of stands are continuing to erect structures thereon.
33. The first, second, third and/or fourth Applicant have now erected a fence enclosing certain portions of the farm, and have started erecting housing structures on an adjacent property belonging to the Mabo Community. Owners of the property have since filed a complaint with the Department.
34. None of the purported buyers of stands are currently residing on the farm. They have however erected corrupted iron housing structures on the farm. Some have fenced in vacant stands or sites.
35. Therefore the first, second, third and/or fourth applicants in this matter are in unlawful occupation of the farm. The Respondent has not granted any of the applicants' permission to occupy the farm nor are they entitled to do so by virtue of any other legal right. They are in unlawful occupation of the farm and all efforts by the Respondent to ensure their removal or eviction and the removal of structures erected on the farm have been in vain. The Respondent therefore had no alternative remedy other than to approach Court for the relief as prayed for in the notice of motion.
36. The Land Claims Court granted a judgment in favour of the Respondent for reasons which are fully dealt with hereunder.

LACK OF MERIT

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37. The Applicants' first contention is that the Land Claims Court has no jurisdiction to grant orders in terms of PIE Act and doing so is an impermissible extension of ancillary jurisdiction provided for in section 22(2)(b) and (c) of the Restitution of Land Rights Act 22 of 1994. This Ground lacks merit in that the Court *aquo* never indicated that it has a jurisdiction to grant orders in terms of PIE neither did it granted any order in terms of PIE.
38. The Court *aquo* stated that "the definition of the Court as defined in PIE Act as being "Court means any division of the High Court or the Magistrates' Court in whose area of jurisdiction the land in question is situated." It is clear that from the definition that the Land Claims Court is not included and it is not a division of the High Court.
39. The Court further stated that the provisions of section 6(3) of the restitution of Land Rights Act are meant to protect the interest of the claimants and therefore it does not clothe this Court with eviction jurisdiction.
40. In essence the Court has ruled that it does not have jurisdiction to make any order of eviction, be it, in terms of PIE or ESTA.
41. Conversely, the Court correctly pointed out that section 6(3) of the Act which gives powers to the Respondent, on reasonable notice to interested parties, to apply to the Court for an interdict prohibiting the sale, exchange,

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donation, lease, subdivision, rezoning, or development of the land, and the Court may, subject to such terms and conditions and for such a period as it may determine, grant such an interdict or make the order it deems fit.

42. Of relevant to this matter is that the claim has already been lodged on behalf of the Mamahule Community, Mofhibe Community, Tholongwe Community, Mofhapo Community and Mojapelo Community for the purpose of the restitution and the owners of the farm were duly notified of the claims in respect of the farm and were referred to the provisions of section 6(3) of the Act. So there is proper compliance with section 6(3) of the Act.
43. It is for this reason that the Respondent has *locus standi* to approach this Court. for as long as the claim is still pending, the Applicant has the responsibility to approach the Court if there is a contravention of section 6(3) of the Act in order to ensure that the farm is handed to the beneficiaries in good condition.
44. The second issue that the Applicants raised as the ground for appeal is the Court's referencing to section 3 of the Restitution of Land Rights Act. This ground is not factual as there is nowhere in the judgment the Court ever made such reference.
45. The third issue is *res judicata*. The Applicants alleges that the matter was settled at North Gauteng High Court. As indicated already, the application was made in light of the continuation of the settlement, selling of stands and

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others activities on the farm. The essence of the High Court settlement between the parties was to ensure that the applicants do not erect any further structures on the farm pending finalisation of the proceedings instituted by the Mamahule Communal Property Association in the Land Claims Court and also to determine the number of informal structures presently on the farm and to record the *status quo*.

46. The reason why the Respondent approached the Land Claims Court for interdict is because the applicants contravened the settlement agreement by continuing to demarcate and sell stands on the farm and the purchaser thereof continued to erect shacks and/or building on the farm.
47. The Respondent was left with no choice, bearing in mind that the settlement agreement was not made an order of the Court, but to approach the Court for appropriate relief.
48. The Applicants further allege dispute of facts as a ground of their application. I submit that such dispute of facts is not genuine as the Applicants only alleges that they were given authority to occupy the farm by official of the Department. Their denial, however, does not address the basis on which the application was brought, which is section 6(3) of the Restitution of Land Rights Act, which empowers the Respondent to approach Court for an interdict if there is a contravention.

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49. I further submit that the dispute so alleged by the Applicant, if there is one, is not a genuine one.
50. I now deal with the Applicant's founding affidavit.

AD PARAGRAPH 1

51. Save to admit the name of the Deponent, the Respondent has no knowledge of the remainder of the allegations, and accordingly does not admit them and put the Applicant to the proof thereof.

AD PARAGRAPH 2

52. I wish to state that in terms of section 17(3) of the Superior Courts Act "an application for special leave to appeal under section 16(1)(b) may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed, and the provisions of subsection (2)(c) to (f) shall apply with the changes required by the context."
53. Of paramount importance, the Applicant was represented throughout by same lawyers who previously represented them in respect of other cases they brought to various Courts. The date on which the application for leave to appeal was refused, the Applicants were represented by their Senior

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Counsel. It is therefore improbable that the applicant did not know that they had a recourse, in light of their application for leave to appeal having been dismissed, to urgently file their application for special leave to appeal with the registrar of the Supreme Court of Appeal

54. The application for leave to appeal was heard on 30 November 2015 and judgment was handed down on the same day, dismissing the application. Calculating from that date to 9th May 2016, the date on which it was served on the Respondent's Attorney, is more than five months.
55. More than five months to file application for special leave to appeal is inordinate more so on the basis proffered in the Applicants' affidavit. Further that such application for condonation should have been substantive application in order to enable the Respondent to deal with the averment therein.
56. I therefore submit that the Supreme Court of Appeal was correct in dismissing the application.

AD PARAGRAPH 3 to 6

57. I admit the contents of the paragraphs to the extent that they do not contradict the version of the Respondent.

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AD PARAGRAPH 7 and 8

58. Save to deny the contents of paragraph 7 in its entirety, more particularly the averment that since High Court proceedings were settled, the number of occupants have remained at fifty and these persons should be regarded as the forth Applicant, the rest of the allegations are admitted.
59. In terms of the settlement agreement in the High Court, the officials of the Respondent and representatives of the applicants visited the farm in order to mark the structures and found that save for the brick structure that had been on the farm during the previous ownership of the farm, the parties counted 119 corrugated structures, and 449 illegally demarcated and fenced-in stands. In contravention of the settlement agreement, the applicants continued to erect structures and sell stands.

AD PARAGRAPH 9

60. I deny that the proceedings in the Court *a quo* constitutes an abuse of legal process. The reason why the Respondent approached the Court is simply because there was contravention of section 6(3) of the Restitution Land Rights Act.
61. I am empowered by the above section to approach Court whenever there is contravention.

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AD PARAGRAPH 10

62. I admit the content of paragraph 10.

AD PARAGRAPH 11-12

63. I admit that the Regional Commissioner made a recommendations to the Minister and such recommendations were approved. However the transfer was intercepted by some potential beneficiaries who disputed the list of beneficiaries in the memorandum. Therefore, the Minister in this instance, is indispose to transfer the land whilst there is a dispute of this nature more so when the dispute has been referred to Court for adjudication.

AD PARAGRAPH 13 and 14

64. Save to state that the claim was gazetted and due process was being followed to finalise the claim, the Respondent denies the content of paragraph 13 and 14 and put the Applicants to the proof thereof.
65. I further re-iterate the basis on which the minister relied upon for halting the process pending the final determination of the issue by a Court of law.

AD PARAGRAPH 15

66. I admit the content of paragraph 15. Be that as it may it does not assist the Applicants for the purpose of this appeal.



AD PARAGRAPH 16

67. I admit the content of paragraph 16.

AD PARAGRAPH 17

68. I admit that the Applicant instituted legal proceedings in the Land Claims Court against the RLCC to expedite the process of land restitution.

69. The said proceedings have nothing to do with the unlawful occupation of the land which is a subject matter of the appeal before this court.

70. The current litigation against the Applicant has to do with contravention of the Settlement Agreement reached in the High Court which provided *inter alia*, Applicants undertake not to settle any further structures or persons on the farm, pending finalisation of the proceedings instituted by Applicants in the Land Claims Court together with the provision of section 6(3).

AD PARAGRAPH 18

71. I admit the content of paragraph 18.

AD PARAGRAPH 19

72. I admit the content of paragraph 19.

AD PARAGRAPH 20 and 21

73. Save to deny that the Applicants were given a consent and have been staying on the land since 2005, I admit the contents of paragraph 20 and 21. Some of the averments herein have been dealt with in the preceding paragraphs.

AD PARAGRAPH 22

74. I deny the contents of paragraph 22 and put the applicants to the proof thereof.

AD PARAGRAPH 23 and 24

75. Save to admit that I instituted application in the Land Claims Court, I wish to state that I have already dealt with the basis on which the application for special leave to appeal is made.

AD PARAGRAPH 25 and 26

76. I admit the contents of paragraph 25 and 26 respectively.

AD PARAGRAPH 27-36

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77. Save to state that the applicants failed to deal with the facts which bring this case within section 167(3) of the Constitution and therefore falls to be dismissed on this basis alone, I wish to state that I have already canvassed the basis of my opposition to the grounds enumerated herein.

AD PARAGRAPH 37-40

78. I wish to state that I do not have any information with regard to the alleged purchase save to state that if it is the position, to the extent they prove same, they are well within their right to occupy the land. However this is not a matter for the appeal or to challenge the Court *aquo*, because it cannot be expected that the Court *aquo* would have known about the purchase that occurred after the judgment and rule accordingly.
79. It is noteworthy to state that the allegations that they have purchased the farm remain bald and unsubstantiated.
80. I am empowered to approach Court In terms of Section 6(3) of the Restitution of Land Rights Act which provides that Department has the right to approach the court if there is any contravention of the section. The Court *aquo* indicated with regard to this provision that it provides the Respondent with the necessary *locus standi* to challenge any act by the Applicant which is in contravention with the said section. I submit that the Department is not

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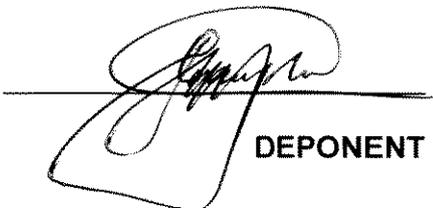
required to prove ownership in order to challenge actions as indicated in Section 6(3).

AD PARAGRAPH 41-44

81. I deny that this matter falls within section 167(3) of the Constitution. The applicants' argument is premised on wrong interpretation of the Court *aquo's* judgment and I have already indicated same in the preceding paragraphs.

WHEREFORE I humbly pray that:

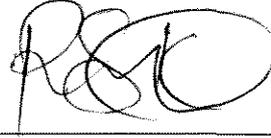
82. The Application be dismissed with costs.


DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at POLOKWANE on this the 8th day of **AUGUST 2016**, the regulations

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contained in Government Notice NO. 1648 dated 19 August 1977 (as amended)
having been complied with.



COMMISSIONER OF OATHS

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