IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NOS: LCC206/2010

LCC 20/2012

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**

28 July 2021 **(Signed)** ……..
SIGNATURE

CASE NO: LCC206/2010

In the matter between:

THE MOLETELE COMMUNITY First Claimant

HEIR PRINCE-MAEKANE TRIBAL COMMUNITY Second Claimant

KGOSI LACKSON ABUTHI CHILOANE

on behalf of **MOLETELE TRIBE** Third Claimant

MOLETELE-BLYDEPOORT COMMUNITY Fourth Claimant

concerning

CERTAIN FARMS IN THE MARULENG REGION AS LISTED IN ANNEXURE "NR1"

CASE NUMBER: LCC 20/2012

MNISI, KHOZA, SBUYANA and MUNISI COMMUNITIES/TRIBE MEMBERS/FAMILIES Competing Claimants

concerning

CERTAIN PORTIONS OF THE FARMS FLEUR DE LYS and MORIA

IN RE:

THE MOLETELE COMMUNITY First Claimant

HEIR PRINCE-MAEKANE TRIBAL COMMUNITY Second Claimant

KGOSI LACKSON ABUTHI CHILOANE

on behalf of **MOLETELE TRIBE** Third Claimant

MOLETELE-BLYDEPOORT COMMUNITY Fourth Claimant

v

CHIEF LAND CLAIMS Commissioner First Respondent

THE STEYN GROUP LAND OWNERS Second Respondent

JUDGMENT
RE:
REVIEW OF s 29(4) FUNDING DECISION BY CHIEF LAND CLAIMS COMMIONER
AND
STAY OF PROCEEDINGS

SPILG, J

PREFACE

1. This is a case about the provision of funding for litigation out of State resources.

The facts are straight forward:

The applicants have an annual revenue stream of over R20 million

They have accumulated reserves (in other words undistributed after tax profits built over time) of close on R141 million[1]

The applicants also have perhaps the most precious and economically valuable of resources in abundance; access to almost a third of all allocatable water that flows into the Blyde River Dam

Despite this, they continue to also receive funds earmarked for indigent communities and individuals

The fund which provides the finances for litigation is not a trough; it is taxpayers money intended by legislation for a remedial purpose.

The applicants' decision makers should have known better and have no excuse.

They are members of a community which itself has known hardship and was rendered indigent through the greed and racial oppression of others and itself sought and obtained funding which enabled the members to secure what they have now.

I repeat; if anyone should know better it is them.

2. This case is therefore also about avarice, taking what is not meant for the applicants and about violating our constitutional construct of ubuntu.[2]

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[1] This is prior to a questionable book-entry write down, albeit that the write down represents less than 8% of total reserves held *via* the Moletele Community Property Association. The write down was of some R10 million which the applicants refused to explain.

[2] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 237 per Madala J; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) per Ncgobo J (at the time) at paras 51 and 73; Everfresh *Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para 71 per Moseneke DCJ. See also *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC) at paras 17 and 35 and especially Victor AJA at para 207 to 210 citing *Makwanyane* and *Everfresh* in relation to the constitutional value of ubuntu permeating the general body of our law.

BACKGROUND TO APPLICATION FOR REVIEW

3. In October 2010 the Regional Land Claims Commissioner ("RLCC") referred the claim of the first to fourth claimants to this court. This group of claimants have come to be referred to as the *Moletele Community*. They are also the applicants in the present proceedings and will be referred to as such.

4. The applicants had applied to the Chief Land Claims Commissioner ("*the Commissioner"*) for legal representation under the provisions of s 29 (4) of the Restitution of Land Rights Act 22 of 1994 ("*the Act"*). The Commissioner acceded to the request and directed that such representation be at the expense of the Land Claims Commission ("*the Commission*").

   The Commissioner is the first respondent in the present application.

5. On 9 July 2020 the respondent effectively withdrew funding for the applicants' litigation. On 16 September, and pursuant to a request, the Commissioner provided reasons for her decision.

6. The applicants bring the present review to challenge that decision. It was also agreed at an earlier pre-trial conference that the applicants would simultaneously bring an application to stay the proceedings pending the final outcome of the review. [3]

[3] Although the applicants did not identify the basis under which they brought the review it can only be on the grounds of a want of legality or rationality under s 36 of the Act. In the heads of argument presented on behalf of the Commissioner reference was made to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 at para 27 where the Constitutional Court admonished the failure to identify both the facts and the legal basis on which a party approached the court on review

AFFECTED PARTIES

7. Although the immediate parties to the review application are the applicants and the Commissioner, the applicants quite properly cited the competing claimants who have come to be referred to interchangeably as the Mnisi or Munisi claimants. They collectively form the second respondent and will be referred to as the *"competing claimants"*.

   In addition a group of landowners, who are identified as the Steyn Group, had contended that they were prejudicially affected by the continued provision of funding to the applicants who were now litigating at leisure against them while they were obliged to have recourse to their own financial resources. [4]

8. The further application, for a stay of proceedings, arose because the applicants refused to continue with the referral until the issue of funding was resolved. They refused to attend future pre-trial conferences or comply with any of the terms of the detailed litigation plan, in respect of which they had played an important role and which had previously either been agreed to or ordered by this Court on 9 July 2020. [5]

   The stay is sought pending the final outcome of the review proceedings and in the alternative, the applicants apply for an order requiring the Commission to continue funding the litigation until the review is finally determined.

   In either event the application for a stay affects all the other litigants in both the main claims brought by the applicants and the competing claimants. Aside from the Steyn Group, there

[4] The Steyn Group had in fact raised the issue which resulted in the Commissioner withdrawing the applicants' funding under s 29(4) of the Act

[5] See *Moletele Community and others v Mnisi, Khoza Sbuyana and Munisi Community and* others [2020] ZALCC 11

are a number of other groups of affected landowners represented by some three or more sets of additional attorneys and counsel.

THE ISSUES ON REVIEW

9. The essence of the applicants' contentions is that the Commissioner's decision to withdraw funding;

    a. is not competent as she does not have the power to do so;

    b. is irrational.

    These are the substantive issues between the parties.

10. In addition, the applicants challenge the entitlement of the Steyn Group to oppose the review application while the Commissioner (and the competing claimants) contend that the applicants have not set out a cognisable ground for review.

BACKGROUND

11. The applicants' land claim involves some 1300 individual farms covering a total land area of 500 000 hectares. At the heart of the issue before me is that a not inconsiderable part of their claim concerned an area of land owned by the State which it had agreed to settle and in fact had subsequently restored to the applicants

    The balance of the applicants' land claim is contested in the main by private farmers, of which the Steyn Group comprises the largest collective body. In addition, numerous other farms are also subject to the applicants' land claim. There are also other non-competing claims by the

Mnisi Community which have been consolidated with the referral of the applicants' claim for trial (and would therefore be affected by any stay of proceedings).

To date no land parcels have been settled in favour of the competing claimants.

Finally there is a claim made by the applicants to Telkom owned land used for telecommunication purposes. The disputes arising out of this claim has been hived off for separate adjudication, but falls within the stay of proceedings sought by the applicants if this court does not find in their favour in respect of the review .[6]

12. Initially the applicants had successfully secured legal representation at the Commission's expense under s 29(4) of the Act.

Section 29(4) reads:

> *Where a party can not afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the State legal aid system or, if necessary, at the expense of the Commission.*

13. It is evident that a claimant, in order to obtain legal assistance, must itself have been unable to pay for such representation. In the present case it is common cause that the Commissioner was satisfied that the Moletele Community, at the time of the request made under s 29(4), was unable to afford its own legal representation and that she elected to make such representation available at the expense of the Commission. A firm of attorneys as well as senior and junior counsel were then appointed. It is clear that the main substantive issues merit the engagement of senior and junior counsel.

[6] *Moletele Community and others v Telkom SA SOC Ltd* [2020] ZALCC 9

14. On 9 July 2020 the Commissioner addressed a letter to the applicants' attorneys advising that she had revoked or otherwise varied her earlier decision to provided funding for litigation. The main ground for the decision was that the applicants could now afford to pay for their own legal team.

15. The Commissioner's decision has its genesis in representations made by the Steyn Group in March 2019. It had requested that legal assistance be withdrawn from the applicants because, according to the Steyn Group;

    a. pursuant to the *gazetting* of its claim the applicants had received State owned land to the value of more than R266.25 million;

    b. the applicants through the Moletele Community Property Association ('*the CPA"*) had in addition obtained, pursuant their land claim, licences to use water from the Blyde River Dam for a land area of some 2849 hectares. It contended that this represented an allocation of 31.65% of the total water available for irrigation from the Dam;

    c. the water was being used for extensive farming which the Steyn Group alleged "*yields massive turnovers each year"*

16. The Steyn Group contended that on the facts it presented to the Commissioner, the applicants no longer qualify for further financial assistance under s 29(4)

17. At this stage it is necessary to mention that the applicants had been obliged to constitute themselves in terms of the Community Property Association Act, 28 of 1996 ("*the CPA Act")* as the Moletele Community Property Association. This is one of the permissible juristic

vehicles which land claimant communities must form in order to acquire, hold and manage property settled on them pursuant to a successful land claim.[7]

There may be those who are sufficiently familiar with the Blyde River to appreciate the amount of water which the applicants are entitled to extract from the Dam commercially under their licences. What will be readily apparent to all is that 2849 ha equates to just under 29 square kilometres of land area that has access to that water.

The Steyn Group's attorneys had also copied the applicants' attorneys in on their letter to the Commissioner. The applicants responded with both factual averments and legal submissions. The court will deal first with the applicants' statements of fact.

Through their attorneys, the applicants stated unequivocally that they cannot afford to pay for their legal representation despite land having been restored to them. They added that

> "*As you are aware, the properties restored to them are not liquid assets and <u>are essentially utilised for resettlement</u>"*
>
> (emphasis added)

The intended meaning which the applicants sought to convey is clear and unambiguous.

18. The legal ground raised by the applicants was that the Commissioner's initial decision to grant financial assistance was purely administrative in nature and therefore could not be unilaterally revoked. It could only be revoked if the applicants consented. During argument it became evident that this part of the issue boiled down to whether the Commissioner was *functus officio.*

[7] See generally s 2 of the CPA

19. The Steyn Group again wrote to the Commissioner repeating that it would commence application proceedings before this Court if the Commissioner refused to take a decision on whether funding should be withdrawn from the applicants. It is evident that the Steyn Group's interest is that the continued provision of outside funding to a community that was cash flush while individual landowners had to finance their own litigation amounted to an unconstitutional inequality of arms, an unfairness in the trial process and, according to them, would result in their being out-litigated financially.

    In turn the Commissioner, through the State Attorney, advised the applicants of the Steyn Group's position and that she did not wish to engage in any legal debate at that stage but requested the relevant annual financial statements ("*the financials*") for the previous three years to confirm the applicants' earlier assertion regarding their illiquidity and that the land already handed over was being used for resettlement.

20. The Steyn Group continued to put pressure on the Commissioner to take a decision on the representations it had made, failing which it threatened to approach this Court to compel her to take a decision.

    This resulted in the Commissioner placing the applicants on terms to reply by 15 September 2019. The applicants did not respond by that date either and shortly after that, on the date at which a scheduled pre-trial conference was held, *Mr Dodson* on behalf of the Commission proposed that the applicants provide the information by 23 September and, with the Steyn Group agreeing not to approach the court at that stage, undertook to take a decision within a month after that.

    Mr Notshe on behalf of the applicants agreed to provide the financials by 23 September after which the Commissioner would form a *prima facie* view and the applicants could then

make representations to her should the need arise. This was clearly without prejudice to the applicants' entitlement to raise their legal contentions in due course.

21. Despite such undertaking the applicants failed to provide the financials in time, nor did they provide the financials despite written and telephonic requests after that. On 30 October the applicants' attorneys requested clarity on behalf of their clients regarding the nature of the contemplated decision and the source of the Commissioner's power. Despite a response which sought to explain the situation and the pressure the Steyn Group was exerting to approach court if a decision was not taken, nothing further materialised.

22. By 25 November 2019 it was evident that the applicants would not provide the financials, contending that there was no lawful basis upon which the Commissioner could again consider the question of funding. The applicants persisted with this position right through to the pre-trial conference of 28 February 2020. At the pretrial they required the court to make a decision as to whether the financials were to be produced. The following order was then made:

a. *The Moletele Community is ordered to produce the following documents before this court:*

    a. *The audited financial statements of the Moletele Community Property Association for the last four years, the last such year ending at the end of the relevant month in 2019; or,*

    b. *Should there not be audited financial statements up to the financial year ending in 2019, the last four audited financial statements of the Moletele Communal Property Association,*

up to and including the financial statements for the last financial year in which audited statements were prepared; or

c. *Should there be are no audited financial statements whatsoever;*

   i. *the provisional financial statements of the Moletele Community Property Association for the last ten years, the last such year being the financial year ending at the end of the relevant month in 2019, and*

   ii. *the bank statements of the Moletele Community Property Association for the last two years, up to 31 January 2020.*[8]

23. On 23 March 2020 the applicants purported to provide the financials for the 2016 to 2019 year ends as well as a bank statement for one month from 5 January to 5 February 2020. I should have added that since the financials provided were not properly audited the applicants were obliged, in terms of the order, to produce bank statements for the previous two years up to 31 January 2020, not a bank statement for a single month only.

[8] The order was drawn in conformity with the draft I had verbally provided at the pretrial. The terms of the order were to ensure that if the financial statements were unaudited up to the 2019 year end, then the best alternative was to obtain the set of documents directed in the second part of the order with the real evidence being provided by independent bank originated statements showing 24 months of cash flow through the CPA's banking accounts. The orders were formulated so as also to take into account the obligations of the responsible committees of the CPA to maintain an effective recording of its transactions.

PROCEDURAL REGULARITY

24. It is not disputed by the applicants that:

a. The detailed income statements for 2016, 2017 and 2019 were not properly audited;[9]

b. The 2019 financials revealed that the CPA had equity of over R131.5 million;

c. The actual revenue stream was not less than R20 million a year

d. The State attorney, on behalf of the Commissioner, afforded the applicants an opportunity to explain some 15 queries raised.

25. The queries raised are repeated in order to demonstrate that they go to the Commissioner's ability to make a legitimate decision regarding the veracity of the financials; and that the applicants were afforded ample opportunity to make representations to the Commissioner enable her to determine the factual issue raised; namely, whether income was being derived by the applicants through its CPA, if so what the annual turnover figure and total available reserves were, and whether the Commissioner could then determine, at least on the facts presented, whether the applicants were unable at that stage to themselves "*afford to pay for legal representation"* as envisaged by s 29(4) of the Act.

The enquires concerned the following:

"4.1 With reference to page 2 of the 2019, 2017 and 2016 financial statements, it is recorded that the detailed income statement appearing at pages 25 and 26 are not part of the financial statements and are unaudited. The detailed income statement

[9] The income statements attached to the financials were not audited, an auditor can purport to do so but without a signed off income statements it is not competent to claim that the financials have been properly audited.

includes information of fundamental importance. On this basis, the financial statements presented for these years are not the audited financial statements because a significant component of them is unaudited, unless a satisfactory explanation can be provided.

4.2 *How was the auditor able to express an unqualified opinion on the financial statements in each of these years, when he had not audited an important component of them?*

4.3 *At page 7 of the 2019 financial statements, there is included as a component of the equity of the CPA an amount of R131 578 055. On what basis is the CPA no longer able to pay its legal fees itself, if it has retained income in this amount?*

4.4 *What is the basis and nature of the "Fair value adjustments" referred to in the statement of comprehensive income on page 8 of the 2019 financial statements? Precisely which assets have been subject to value adjustment and by how much has each asset's value been adjusted?*

4.5 *What accounts for the sudden swing from being a profit-making entity for all of the years preceding 2019, including a profit of R15 501 763 in 2018, to making a loss of R9 375 474 in 2019?*

4.6 *On what basis is the CPA not able to cover its own legal costs from the "cash at end of year" of R4 723 281 referred to in the statement of cash flows on page 10 of the 2019 financial statements?*

4.7 *What constitutes the "Transfer out" of R16 048 806 in note 3 of the notes to the 2019 financial statements on page 15?*

4.8 *With reference to the detailed income statement on page 26 of the 2019 financial statements –*

4.8.1 How is the amount of R11 568 283 in respect of "employee costs" made up?

4.8.2 Given that this component of the financial statements is unaudited, documents and/or records evidencing this expenditure are requested, along with documents and/or records evidencing the corresponding amount in the 2018 financial statements, R2 152 749.

4.8.3 What accounts for the increase of R9 415 534?

4.8.4 How is the amount of R5 495 746 in respect of "promotions" made up?

4.8.5 Given that this component of the financial statements is unaudited, documents and/or records evidencing this expenditure are requested, along with documents and/or records evidencing the corresponding amount in the 2018 financial statements, R2 394 049.

4.8.6 What accounts for the increase of R3 101 697?

4.9 Why were the financial statements for 2018 only prepared in March 2020 (see date of 18 March 2020 on page 3), the same date as the 2019 financial statements (see the same date on page 3)

4.10 Why are the 2016 financial statements undated?"

25. The applicants' attorneys requested time to respond as the Covid hard lockdown was in progress. This was on 29 April 2020. Their subsequent email beggars belief. The attorneys

declined on behalf of their clients to respond, no doubt after taking instructions. The letter stated that the applicants, and I quote:

> *""deny that there is an order, apart from a draft which the Registrar has indicated as not confirmed by the judge, entitling your clients to an endless interrogation of our clients regarding the financial statements furnished in accordance with such directive."*

26. There can be no doubt that the legal representative who drafted the email well knew that the contents of the letter being replied to was a necessary consequence of the applicants' failure to provide properly audited financial statements (let alone the documents required under the order if no properly audited financials were produced), and that its purpose was to enable the Commissioner to consider the factual issue raised. And let there be no misunderstanding; the queries raised by the Commissioner were eminently reasonable and could not be brushed aside.

    I therefore consider the applicants' response to be disingenuous and a gross impertinence on their part. It displays a marked failure to appreciate not only the function of the Commissioner and the nature of legal aid which comes out of taxpayers' money but, as the Court will demonstrate, also the scrutiny the Moletele CPA lays itself open to from the Director-General and the Auditor-General.

    Furthermore, in light of what preceded it the court also considers the response to be a deliberate stratagem to frustrate the process that the Commissioner had commenced, and if such conduct continues to manifest itself then, unless the general body of the CPA sanctions it, the executive body of the applicants or its CPA and the legal representatives will find themselves having to justify why legal costs should come from the applicants' community members or out of its CPA itself and not be awarded *de bonis propriis* against

those found responsible for any delay or obstruction in the fair and expeditious resolution of the two main referrals.

27. Once the court had made its order in July 2020, and despite the legal argument which was going to be dealt with in due course, there was an obligation on the part of the applicants to produce the financials so that the Commissioner could make what should be a straight forward factual determination from the audited financials of whether;

    a. revenue had come in as alleged by the landowners;

    b. there was no such revenue as alleged by the applicants because they had no liquid assets and that the land was being used for resettlement purposes.

28. The applicants should have known, and if they did not then their legal representatives ought to have advised them, that the information was relevant so that the Commissioner could properly consider the veracity of the financials as she was obliged to; at least insofar as the factual matrix was concerned.

    It would have enabled her to simply inform the Steyn Group, who were determined to approach the court if no decision was taken, that on considering the financials she was satisfied that the applicants could not afford to pay for their own defence. However in the proper performance of her functions she was obliged, at the minimum, to satisfy herself that this was indeed so. Both the applicants and their legal representatives ought to have appreciated this. Had the applicants received no revenues, as their initial letter indicated, then surely they would have supplied the information with alacrity.

29. It is also of significance that the applicants were alive to the correspondence leading up to the request; namely that they were being given an opportunity to make representations and to clarify. They would have understood that this was their *audi* and could not later be heard

to say that they were not afforded a hearing. They were, and made their choice not to co-operate; a decision from which the Commissioner was quite entitled to draw inferences and proceed on the basis of the applicants' failure to explain the incongruities and their failure to produce properly audited annual financial statements.

At no stage did the applicants suggest that the Director-General waived compliance with the requirements of a properly and independently verified set of annual financials sufficient to satisfy the prescripts and foundational protection provided to claimant communities under the provisions of the CPA. It is necessary to note that these have to be adhered to so that the Minister can table the report before Parliament for its consideration as required under the provisions of the CPA Act (to which I will return in some detail later).

More importantly for present purposes, the Court finds that the position taken by the Commissioner is correct; namely, that the documents presented did not comply with the terms of the court order made on 9 July 2020.

30. Having expressly directed the applicants to her concerns and having afforded them ample opportunity to respond, on review the Court can only have regard to the information which the applicants elected to place before the Commissioner as well as the reasonable inferences to be drawn from their glaring omission to deal with critical aspects of the financials and bank statement despite being given ample opportunity to do so. In the present case, an added factor is that the Commissioner was obliged to working off the documents which the applicants had elected to provide.

In the circumstances the Court finds that the procedural regularity of the process cannot be faulted.

WHETHER THE DECISION WAS IRRATIONAL

31. It is unnecessary to traverse the alleged irrationality of the decision taken by the Commissioner in any detail.

    The answer is plain; the conclusions reached by the Commissioner from the documentation the applicants was prepared to place before her cannot be second guessed by the court. A review is not an appeal, but a consideration of whether the conclusions reached based on the facts known to the Commissioner at the time were rational, as that term is understood in administrative law or executive decision making.

32. Not only is it the courts view that the decision was rational, but it would have been irrational if the Commissioner had not made the decision to terminate the provision of legal representation at State expense. As a court sitting on review, I would have had no hesitation in setting aside a decision not to terminate State funding by reference to the financials actually presented and the deliberate failure to respond to perfectly straight forward questions which sought clarity and explanation. Furthermore, I do not believe that semantics alters the position; a court is concerned with the substance and effect of the decision and whether it could be lawfully taken; not the form a party wishes to wrap it in.

33. For sake of completeness, the Court will identify some of the conclusions which the Commissioner drew from the financials presented which demonstrated that the applicants are well able to litigate without funding because of a fundamental improvement in their fortunes.

    Before doing so, it should be noted that Mr Notshe on behalf of the applicants was not able to show why the conclusions were erroneous let alone irrational. On the contrary the applicants dug their own grave. In reality it was common cause that the applicants are in a

very strong financial position despite the introduction of some questionable entries and the extraordinary movement of funds for which no rational business or commercial explanation has been provided - let alone one that gives any comfort that the requirements of the CPA Act have been complied with and which may raise concerns for the Director-General and Auditor-General.

The Commissioner informed the applicants that the financials revealed that:

a. During the financial year ending 28 February 2015 the applicants had recorded revenue of R 22 032 524, other income of R 58 615, profit before taxation of R 14164 497 and profit after taxation of R 13 347 024;

   At the end of the 2015 financial year, the applicants had accumulated assets of R 246 421 077, liabilities of R 180 830 115, retained income of R 65 590 962 and cash and cash equivalents of R 6 757 783.

b. By the end of the 2018 financial year, the applicants' assets had grown by some R 36 million to R 283 075 343, liabilities were a little lower but stable at R 142 121 814 while retained income had more than doubled in the three short years to R 140 953 529. Cash and its equivalent was up by some 40% to R9 474 281.

c. The glaring anomalies in the February year end financials which the applicants had refused to explain were that;

   i. Despite an increase over the previous year of revenue to R 24 520 679, other income of R 7 447 716, and gross profit of R 23 151 020 a loss was recorded for the first time of R9 375 474.

Furthermore, the assets had been depleted by some R22 million to R 260 871 869 while retained income had also dropped by some R10 million to R 131 578 055 (liabilities were within previous levels at R129 293 814 and cash and its equivalents were now R 4 723 281.

ii. The unaudited income statements for 2019 reflected some questionable line items, including:

1. A downward adjustment of R16 138 223 for fair value which the applicants declined to explain;

2. A fivefold increase in Employee costs from R2 152 749 in the previous year to R11 568 283 in the 2019 financial year.

The Court pauses to point out that the failure to explain this is particularly disturbing because, while the previous item is a journal entry, employee costs represents actual money going out to the potential prejudice of community members and should be accounted for in IRP5 or provisional taxpayer returns

d. Despite these questionable items the auditor nonetheless confirmed that there was no material uncertainty about the ability of the applicants' CPA to continue as a going concern nor was there any fundamental concern about any adverse changes to its fortunes.

34. The January 2020 bank statement, being the only bank statements provided showed a credit balance at the beginning of the month of R5 159 982.34. By the month end it was reduced to R3,163,397.63 despite credits of R1 136 534.89. This indicated that substantial payments were made during the month. Of concern was that a number of cheques, all

identified as payable to "*Chief*", had been encashed on the same day. Despite requesting an explanation none was provided.

35. Moreover, notwithstanding the obviously large enterprise undertaken by the applicants' CPA, no draft balance sheet, trial balances or monthly analysis were provided to fill the gaps.

36. The Commissioner had therefore concluded from factors such as the strong revenue stream, the extent of retained earnings, and the auditor's report as at the February 2019 year end, that there had been a material change in the financial affairs of the applicants and that they were well able to carry their own legal expenses.

SUBSTANTIVE LEGALITY

37. Turning to the essential legal argument raised:

At the best of times attempting to clarify a determination as purely administrative, purely legal or quasi- one or the other has been discouraged since at least the mid-1960s[10]. Administrative law now has a more flexible meaning and is used much more loosely, presumably in no small measure due to the definition of "*administrative action"* in the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*").[11]

Moreover, to have described the issue as involving a purely administrative issue begs the question because it fails to correctly characterise the legal nature of the dispute. The issue is simply the interpretation of the legislation relating to the provision of funding. Is s 29(4) to be interpreted as a once off decision that is to be made, or is funding to be provided for as

[10] See Baxter *Administrative Law* (1984) at pp344-348
[11] See s 1 of PAJA

long as the claimant is unable to afford its own legal representation (in other words while the occasion requires it)?[12]

38. The answer appears to be obvious from a straight forward reading of the provision, which presupposes that circumstances do not materially change. I should have added; the corollary is that implicit in the legislation is that funding endures only for so long as the situation does not materially change. It is therefore by nature temporary and qualified; and being so, the beneficiary could never have understood that he or she acquired an enduring entitlement.

I add further that a decision to revoke the funding when the trigger for qualifying (being the applicants' inability to themselves afford legal representation) no longer applies by reference to any materiality test, cannot impact on any vested right since no such enduring vested right could be possibly have been created by the initial decision.

In my respectful view the distinguishing features between an entitlement by an official to revoke or vary a valid act previously taken and one that cannot be undone and renders the authority *functus officio* is that; in the former case it could never have been understood or interpreted to have permanent effect and therefore did not establish a vested right. Since it does not establish a vested right, the grant can be undone by the official concerned, provided the legislative basis (i.e. the condition precedent) entitling the initial favourable exercise of the power has materially changed and no longer exists.

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[12] See s 10(1) of the Interpretation Act 33 of 1957 which provides that:

> *When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed <u>from time to time as occasion requires</u>.* (emphasis added)

In common parlance; the beneficiary could never claim that its rights are prejudicially affected or that it can have an enduring vested right once it can well afford to fund its own legal representation.

39. Any doubt that this must be so is dispelled by considering the legislation as a whole, the purpose of the provision (or put another way the mischief which is sought to addressed) and of course other legislation relating to fiscal discipline and the obligations of organs of State, their executive and other officials.

    In the latter regard, reference may be had to the Public Finance Management Act, 1 of 1999 ("*the PFMA"*) , which requires transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities from the institutions to which that Act applies[13]; such institutions include the Commission.[14]

40. It is also a fundamental principle, as referenced earlier, that even if legislation is silent a necessary and ancillary power to authorise something to be done temporarily or appoint someone to a position or to delegate that person temporarily comes with the implicit and ancillary power to undo what has been done, whether by termination, revocation, withdrawal or variation, unless of course there is a clear indication the other way. In short the conferring of a temporary or conditional power to grant is coupled with an ancillary implicit power to vary or take away.[15]

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[13] See s 2 which is the objects provision of the PFMA
[14] Id, s 3
[15] *Brown v Leyds NO* (1897) 4 OR 17 at 39 per Kotze CJ "*The general rule is that the same authority which introduces anything may abolish it ...".* See also s 10(1) of the Interpretation Act at ftn11.
See generally Baxter at 371-2. In the case of a conditional power, then the entitlement to vary or revoke arises once the condition required to be met for the exercise of the power falls away, at least in cases where the benefit is not a once off.

There is however a *caveat* in relation to decisions that fall under PAJA or common law review; namely that the exercise of the power to terminate must satisfy the requirements of both rationality and legality (i.e. is procedurally fair and within the four corners of the enabling legislation).

41. Other relevant considerations which reinforce the position are set out in the following paragraphs.

42. The first is that s 29(4) of the Act envisages that funding will be provided by either legal aid or by the Commission itself. In principle selecting one route, which appears to be the Commissioner's prerogative, cannot result in inequality of treatment.

    While the Legal Aid Act is all about providing legal assistance, only under Regulation 33 (of the Regulations promulgated under that Act) is the contingency of termination catered for. If delegated legislation permits it, then *a fortiori* the enabling statute does so within its four corners.

    Under Regulation 33:

    > *"Legal Aid South Africa may terminate a legal aid recipient's legal aid on account of the conduct of the legal aid recipient, which may include that the legal aid recipient—.*
    >
    > *(a) ceases to qualify under the means test;"*

43. Also of significance, in the context of who will compete for ongoing legal aid funding, are some of the other Regulations which make funding available for litigation to those affected not only by the Act but also by the Land Reform (Labour Tenants) Act, 1996, the Extension of Security of Tenure Act, 1997 and the Prevention of Illegal Eviction from and Unlawful

Occupation of Land Act, 1998; all being remedial legislation to secure constitutionally protected rights in relation to occupation or other rights in land.[16]

Following on from the broader public interest factor: Both with legal aid and money budgeted by the Commission for legal assistance under the Act there are many claimant communities who are indigent with the consequence that one is therefore dealing with "scarce *public funds …. made available to lawyers in the context of a relationship of trust and good faith as between the lawyers and the legal aid grantor*."[17]

44. Thirdly, s 29(4) adopts the terminology:

> "Where *a party can not afford to pay for legal representation itself …. ", the Chief Land Claims Commissioner may take steps to arrange legal representation for such party …. "*

Implicit is that as long as the person is unable to afford it, legal representation will continue to be provided. The situation may have been different if the grant was by way of a once off lump sum. That is not the case with land claims litigation which involves a process of submitting accounts for fees and disbursements only as and when they are incurred, which are then scrutinised, and only after that is payment made in respect of each specific account.

Since litigation can stretch over many years, and in the present case it has run for twelve years since the referral with still more skirmishes ahead, an absurdity arises if a litigant strikes gold and continues to feed off the limited resources of the *fiscus* while indigent

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[16] Baxter refers at p 372 to the necessity of a public authority being able to take amending action where the public interest infers it, even in cases where an administrative act appears to have permanent effect (which I have found is not the case under s 29(4))

[17] *Singh and others v North Central and South Central Local Councils and others* [1999] 2 All SA 578 (LCC) at para 17 (Full Bench)

claimant communities who are standing in line to qualify are unable to get their referrals out of the starting blocks.

The law is not an ass and legal representatives should have let their common sense dictate for otherwise the unfortunate impression may be given that the applicants believe they are entitled to compete with the indigent. Had the draftsperson been asked what would happen in such event the answer would be an unqualified "*of course not!*" The mischief which the provision clearly seeks to address is that of the indigent claimant who may be outlitigated because of a financial inability to engage qualified legal representatives and which endures for so long as the qualification for the entitlement has not materially changed.[18]

This is not a situation where a once-off payment is to be determined. A once and for all situation differs materially from the ongoing provision of funding. Implicit is that it can endure for only as long as the circumstances of the beneficiary has not changed materially.

Where a recurring obligation is undertaken pursuant to a power that can only be exercised provided a specific pre-condition is first satisfied then it seems clear that the pre-condition must continue to be satisfied, failing which the decision becomes *ipso jure* subject to revocation or variation by the authority provided the beneficiary is first given an opportunity to make representations with regard to whether the requirements of the pre-condition are still being met or whether there has been a material change in circumstances.

45. One should not have to belabour the point. Common sense dictates the answer to the question: "*On what basis can scarce resources required for funding impecunious litigants be deprived to them or unfairly limited while another litigant who has struck gold can insist on continued funding despite no longer needing it?*"

[18] See earlier footnote re Baxter at p 372

In the present case it will be recalled that the referral took place in 2010, which is over a decade ago, and from the financials it is clear that considerable assets have been amassed since then through the applicants' CPA[19] with net annual profits after tax generally amounting to over R20 million and being retained in reserves (although recent anomalies indicate a need for scrutiny by a professional oversight body or regulator).

APPLICATION FOR STAY

46. This can be dealt with perfunctorily. It comes down to the clear ability of the applicants to fund litigation at the present level indefinitely and if they are ultimately correct they will be reimbursed. This is also a salutatory outcome because I am concerned that the applicants have adopted an unnecessarily rigid approach which may have driven costs up unnecessarily. By way of illustration the engagement of Telkom appears to have resulted in costs that could have been readily avoided, as too with the present application which has no merit and was ill advised

47. Equally important in respect of the application to stay proceedings is that the competing claimants have had none of their claims determined while the landowners have been prejudiced as a result of the uncertainty of the litigation which has dragged on for such a lengthy period. Time is also no one's ally in litigation save for those who suffer no adverse consequences.

48. It is evident that the competing claimants and all the landowners are prejudiced by delay and since there is no prejudice to the applicants, and none has been raised by them, the objective appears to lie somewhere else and is yet to be explained.

[19] Not less than R260 million on the applicants' own reckoning

49. I do not believe it is necessary to deal with any of the other arguments on this score. The brief reasons given suffice and trump any other consideration.[20]

REFERAL

50. The financials of a CPA must be provided to the responsible Director-General so that he or she can submit to the Minister in terms of s 17 of the CPA Act on an annual basis the statutorily required report "*concerning associations and provisional associations and the extent to which the objects of this Act are being achieved".* The report must then be tabled by the Minister in Parliament (also in terms of s 17).

51. In order to enable the Director-General to perform his or her duties, including those under s 17, Regulation 8 of the regulations promulgated under the CPA Act provides *inter alia* that:

> *A communal body must, annually and within two months of the date on which its body's Annual General Meeting is held, furnish the following information and documents to the Director-General—*
>
> *(a) the names and where readily available the identity numbers, and the addresses of the members of the body's governing body elected at the Annual General Meeting indicating what office (if any) is held by each of them;*

[20] Section 173 of the Constitution provides for a stay of proceedings if it is in the interests of justice to do so.

In determining whether that is the case, a court will have regard to whether there are reasonable prospects of success in relation to the ultimate determination of the review and to the balance of convenience, which is answered in the present case by reference to the prejudice the applicants would suffer if a stay was not granted (which is none for reasons already given) and the prejudice all the other litigants would suffer if the case was to be held up until a final decision (which could be an appeal right up to the Constitutional Court). It must be born in mind that the competing claimants' entitlement to proceed with their land claims and even the question of non-restorability of certain land would all be held up. As submitted by Mr Dodson for the Commissioner, a stay impacts on the right of access to the courts under of s 34 of the Constitution. This is particularly egregious in the context of land claims because it impacts on the risk that original members of land claimant communities, who are generally elderly and who have already waited for over two decades for a determination of their right to restitution, may never realise the exercise of their constitutional right under s 25(7) should the court finds that the land claim is good.

(b) the names and where readily available the identity numbers and the addresses of all new members whose names do not appear on the most recent membership list previously furnished to the Director-General;

(c) copies of—

(i) the body's annual balance sheet or financial statements which have been independently verified as approved by the Director-General; and

(ii) the minutes of all general meetings of the members of the body which were held since the registration of the body or the previous Annual General Meeting, including the minutes of the last Annual General Meeting;

(d) a list of all dealings in land or rights to land involving the body during the period since the registration of the body or the previous Annual General Meeting, which created, altered or extinguished any right to land held by the body itself or by any of its members;

52. The Court has wrestled with the issue of referring the financials provided by the applicants to the Director-General and Auditor-General.

53. I do not believe that such a referral would amount to descending into the arena or demonstrate any inability to be impartial and decide the matter without fear, favour or prejudice.

I say this because a referral of the financials to the Director-General and Auditor-General is unrelated to the merits which have to be tried.

Quite the contrary; a referral arises from this Court's concern to ensure that the actual members of the applicant communities are not prejudiced and that their rights and entitlements under the CPA are protected so that they are assured of enjoying the benefits to which they may be entitled under law.

54. In view of the following provisions of the CPA I believe that the Court has a duty to refer this judgment accompanied by the letter of the Commissioner and the financial statements and bank records provided by the applicants to the Auditor-General and to the Director-General for consideration.

55. Firstly, the preamble to the CPA Act explains that the establishment of CPAs is necessary

a. *to ensure that such institutions are established and managed in a manner which is non-discriminatory, equitable and democratic and that such institutions be accountable to their members;*

b. *to ensure that members of such institutions are protected against abuse of power by other members*

56. Furthermore s 9(1) requires that the constitution of an association shall be consistent with the following general principles:

"(c) democratic processes, in that all members have the right—

(iv) to inspect and make copies of the financial statements and records of the association; and

(d) fair access to the property of the association, in that—

(iii) the association may not sell or encumber the property of the association, or any substantial part of it, without the consent of a majority of the members present at a general meeting of the association;

(e) accountability and transparency, in that—

(i) accountability by the committee or committees to the members of the association is promoted;

(ii) the financial records of the association are subject to an annual independent verification, as approved by the Director-General;

(iii) all the cash of the association shall be deposited in an account opened in the name of the association with a bank registered in terms of the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank registered in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993), or with the Post Office Savings Bank contemplated in section 52 of the Post Office Act, 1958 (Act No. 44 of1958), or such other institution as may be approved by the Director-General;

(iv) the association may not purchase or acquire for consideration shares other than shares which are listed on a licensed stock exchange as defined in the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985);

(v) there shall be effective financial management and recording of the transactions of the association;

(vi) the committee members shall have fiduciary responsibilities in relation to the association and its members, and shall exercise their powers in the best interests of all the members of the association, without any advantage to themselves in comparison with other members who are similarly placed."

(emphasis added)

COSTS

57. What I have said, and am about to say, is with a heavy heart. I have come to know this relatively small community of legal practitioners and believe that the working relationship with the Court is a good one. Nevertheless, I cannot shirk my responsibilities to litigants generally and more particularly the individual members of the applicants' communities going forward.

58. A cost order against the applicants depletes the amount available for distribution to each member and, exponentially, the next generation of a claimant community.

59. The options available to a court are few.

A court can hold to account those within the applicants' communities responsible for this wholly unnecessary litigation while debarring them from having recourse to the applicants' funds whether held *via* the CPA or otherwise.

A court can also consider holding one or more of the legal representatives to account. This would entail a separate enquiry as to whether the obdurate attitude of the client was the real cause. And if it was, whether despite their responsibilities as officers of the court the lawyers were bound by the instructions, and whether any one or more of those responsible for persisting with this irresponsible challenge to the Commissioner's decision should be deprived of their costs aside from paying the costs of the other litigants *de bonis propriis*- or whether on circumspection such orders would stifle vigorous and independent representation.

60. Each of these considerations are raised in light of a fundamental concern on the part of this Court; that the ordinary members of the applicant communities should not be prejudiced by sanctionable conduct taken in their name, but not necessarily with their approval.

61. I have weighed all this up with the hindsight of scrutinising with a finer toothcomb the facts which led me to make the costs order at the time.

    This Court does not wish to belabour the point on this occasion as it was not asked to consider these issues and the applicants were not required to respond.

    The Court however has a greater responsibility to the applicants' individual members and looking forward both the decision makers and the legal representatives are implored not to embark on spurious litigation. If the court in the future finds on the merits that spurious litigation has been embarked on by any party, then it will enquire as to who is responsible and determine whether a party is obliged to pay for the folly of others or whether the individuals responsible should do so personally.

CONTINUED FUNDING PENDING FINAL DETERMINATION OF REVIEW

62. I understand this alternative prayer both to mean that the legal representatives;

    a. are to be paid out of the fund irrespective of whether the review before me was successful or not and possibly until all appeals are exhausted.

    b. are to be paid out of the fund for all other legal work required to be undertaken in both the referrals.

63. The reasons given by this Court ought to make it plain that this alternative prayer is a non-starter. The applicants have enough resources to readily fund not only the review proceedings through to the apex court if they are given leave but also the referrals as a whole.

64. Moreover if the applicants are given leave and are successful in any appeal then it will only be a cash flow issue: This Court has found that the applicants are well able to pay for all future litigation and it follows that, if ultimately successful in appealing my refusal to set aside the Commissioner's decision, they are well able to use their own finances until they are reimbursed.

    The court should also have mentioned another important factor, at least in respect of the current applications for review and stay. I believe the earlier comments in the context of the Court's concern regarding personal accountability for costs applies, and it would be unconscionable for legal representatives to be reimbursed out of the Commission's funds for their own fees which have arisen from mounting such spurious applications on behalf of the applicants against the Commissioner. They must look to their own clients for these fees.

ORDER

65. The following order was handed down in respect of the review and stay applications:

    1. *The application brought by the first claimant, being the Moletele Community, to stay the proceedings under the above case numbers pending the outcome of its review application is dismissed.*

    2. *The application to review the decision of the Land Claims Commissioner of 9 July 2020 withdrawing the arranging of legal representation for the first claimant at the expense of the Commission on Restitution of Land Rights under section 29 (4) of the Restitution of Land Rights Act 222 of 1994 is dismissed.*

3. *The first claimant is to pay the opposed party and party costs of the Land Claims Commissioner and the Steyn Group of landowners, and in the case of the Land Claims Commissioner such costs shall include the costs of two counsel.*

(Signed)

SPILG, J

DATE OF JUDGMENT:	28 July 2021
DATE REVISED:	5 August 2021
FOR APPLICANTS:	Adv. V S Notshe SC
(The Moletele Claimants)	Adv. Z Madlanga
	Ngoepe Attorneys
FOR FIRST RESPONDENT:	Adv. A Dodson SC
(The Commissioner)	Adv. M Manetje
	Maluleke Attorneys
FOR STEYN GROUP:	Adv. R du Plessis
(certain landowners grouping)	Steyn Attorneys