



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1310/2018

In the matter between:

MAZIZINI COMMUNITY

APPELLANT

and

MINISTER OF RURAL DEVELOPMENT

FIRST RESPONDENT

AND LAND REFORM

SECOND RESPONDENT

PRUDHOE COMMUNITY

THIRD RESPONDENT

T K FANI

FOURTH RESPONDENT

LAND CLAIMS COMMISSION

Neutral citation: *Mazizini Community v Minister of Rural Development
and Land Reform & others* (Case no 1310/2018) [2020]
ZASCA 57 (2 June 2020)

Coram: WALLIS, MBHA and DAMBUZA JJA and MOJAPELO and
EKSTEEN AJJA

Heard: 11 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 02 June 2020

Summary: Land restitution – meaning of ‘community’ as envisaged in s 2(1)(d) of the Restitution of Land Rights Act 22 of 1994 restated – no evidence of previous occupation of claimed land by the appellant community – appeal dismissed.

ORDER

On appeal from: The Land Claims Court – Port Elizabeth, Randburg and Port Alfred (Barnes AJ, Meer AJP and Professor Mqeke concurring, sitting as court of first instance):

1 The appeal is dismissed.

2 Annexure ‘G’ to the order of the Land Claims Court is altered to read as follows:

‘1 The land falling within the full Prudhoe claimed area as identified in Annexure “B” to the Judgment and handed in at the trial as Exhibit 3;

2 including, the Fish River Sun Farms, namely:

- 2.1 Remainder Farm 242, in extent 147 6693 hectares;
- 2.2 Portion 2 of Farm 235, in extent 10 5700 hectares;
- 2.3 Portion 23 of Farm 235, in extent 11 6870 hectares;
- 2.4 Portion 24 of Farm 235, in extent 12 4881 hectares;
- 2.5 Portion 25 of Farm 235, in extent 1 6033 hectares;
- 2.6 Portion 26 of Farm 235, in extent 6047 hectares;
- 2.7 Farm 243, in extent 41 0035 hectares;

3 but excluding:

- 3.1 Portion 2 of Farm 241, in extent 4 2203 hectares.
- 3.2 Portions 20 and 21 of Farm 261; and
- 3.3 the land in respect of which the second plaintiff has relinquished its claims for restoration, namely:
 - 3.3.1 Portion 13 of Farm 227;
 - 3.3.2 Portion 14 of Farm 227;
 - 3.3.3 Portion 15 of Farm 227;
 - 3.3.4 Portion 16 of Farm 227;

- 3.3.5 Portion 17 of the Farm 227;
- 3.3.6 Portion 18 of the Farm 227;
- 3.3.7 Portion 19 of Farm 227;
- 3.3.8 Portion 33 of Farm 227; and
- 3.3.9 Remainder of Portion 1 of farm 227, in extent 11 2824 hectares (excluding Portions of farm 227)'

4 Annexure 'F' to the order of the Land Claims Court is altered to read as follows:

'The land falling in the full Prudhoe claimed area as identified on Annexure "B" to the Judgement and handed in at the trial as Exhibit 4, including, the Fish River Sun Farms, namely:

- 4.1 Remainder Farm 242, in extent 141 6693 hectares;
- 4.2 Portion 2 of Farm 235, in extent 10 5700 hectares;
- 4.3 Portion 23 of Farm 235, in extent 11 6870 hectares;
- 4.4 Portion 24 of Farm 235, in extent 12 4881 hectares;
- 4.5 Portion 25 of Farm 235, in extent 1 6033 hectares;
- 4.6 Portion 26 of Farm 235, in extent 6047 hectares; and
- 4.7 Farm 243 in extent 41 0035 hectares

JUDGMENT

Dambuza JA and Mojapelo AJA (Wallis and Mbha JJA and Eksteen AJA concurring)

Introduction

[1] This appeal is against the judgment of the Land Claims Court (LCC, Barnes AJ, Meer AJP and Professor Mqoke (assessor) concurring) in terms of which rights in certain land located between the Great Fish and Mgwala

Rivers (the subject land), were awarded to the second respondent, the Prudhoe Community. The appellant, Mazizini Community (AmaZizi) obtained leave to appeal from this Court, albeit inadvertently, as the answering affidavit of the Prudhoe Community had not been brought to the attention of the judges due to an error on the part of the registrar. We shall return to this aspect later when we set out the long and tortuous history of the matter.

Historical Background

[2] The chiefdom of the AmaGqunukhwebe, which was part of the AmaXhosa Nation,¹ was established by King Tshiwo before 1700 AD. Before the Fourth Frontier War² of 1811 to 1812 the land of this chiefdom stretched along the south eastern coast of the Eastern Cape from the Keiskama River as far west as the Swartkops River. During the Fourth Frontier War AmaGqunukhwebe lost their land to the west of the Fish River, retaining only the land on the east of that river, up to the Keiskama River, which includes the subject land. With the Fifth Frontier War³ AmaGqunukhwebe were pushed further East to the Keiskama River. They however returned to their former territory as a result of intervention by a missionary, Reverend William Shaw, who negotiated with the colonial authorities and secured for them the return of the land that they had previously occupied. Apart from this re-settlement by AmaGqunukhwebe, this area (between the Fish and Keiskama

¹ A popular version of this part of history is that one of King Tshiwo's counsellors Khwane who was also a warrior, was entrusted with the role of executioner. But, instead of carrying out his duties, he hid the condemned people in a place where they intermarried with a Khoisan tribe (the Gqunukwas) and the population increased. Later, Khwane brought back the sons of the former condemned people to the King as warriors, together with the older men and women and lots of cattle. In appreciation of the cattle and the warriors that Khwane had brought, Tshiwo took to himself only a portion of the people and of the cattle, and gave the remainder to Khwane and bestowed upon him a territory on the seacoast, symbolically appointing him as the new son of the King. This was the birth of the AmaGqunukhwebe and that is how they came to settle along the east coast as part of the Nation of the AmaXhosa.

² These were a series of nine wars between the Kingdom of AmaXhosa and the Boer frontiersmen at first and European settlers later (1811), in the Eastern Cape Province during the period 1779 to 1879.

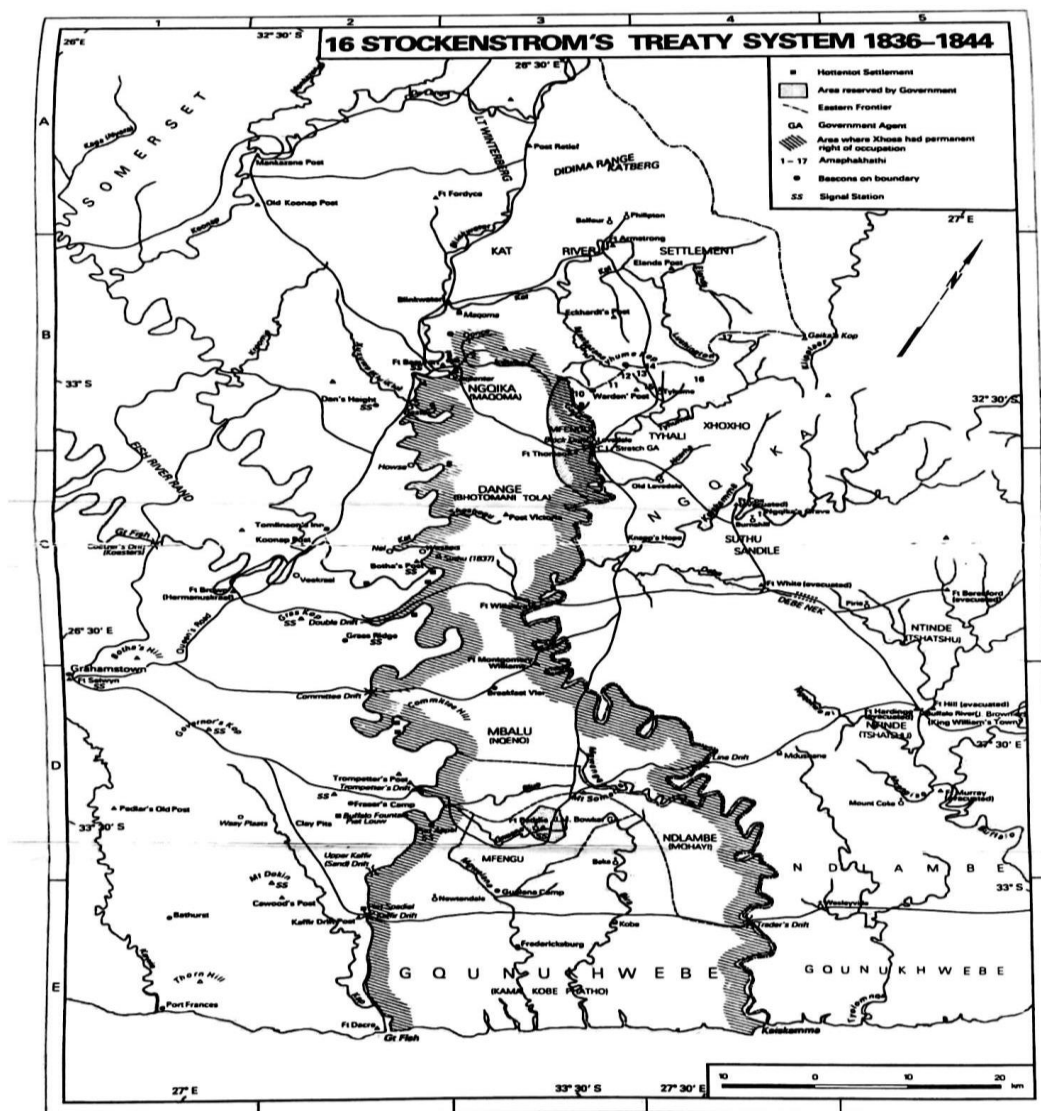
³ 1818-1819

Rivers) was left unoccupied and was designated a buffer zone between the British Settlers and the AmaXhosa. It became known as the ‘Ceded Territory’.

[3] ‘AmaMfengu’ (or ‘Fingoes’ as the British called them) is an umbrella term for various independent chieftainships of which AmaZizi is one. Following the Sixth Frontier War of 1835, AmaMfengu arrived in the Peddie District from Butterworth, east of the Kei River, and joined the British forces in fighting against the AmaXhosa. They were settled in the buffer zone within the Peddie District, as they were considered friendly to the British.

[4] During that period (the 1830’s) Lt.-Gov Andries Stockenström implemented a system of formal treaties as a means of guarding the colonial borders. Relevant for our purpose were the 1836 Stockenström Treaties concluded between the British Government, through Lt-Gov Stockenström, and various African indigenous chiefs, including AmaGqunukhwebe, on 5 December 1836. The 1836 Treaties recognised the Fish River as the international boundary between the Cape Colony and the various Xhosa territories.

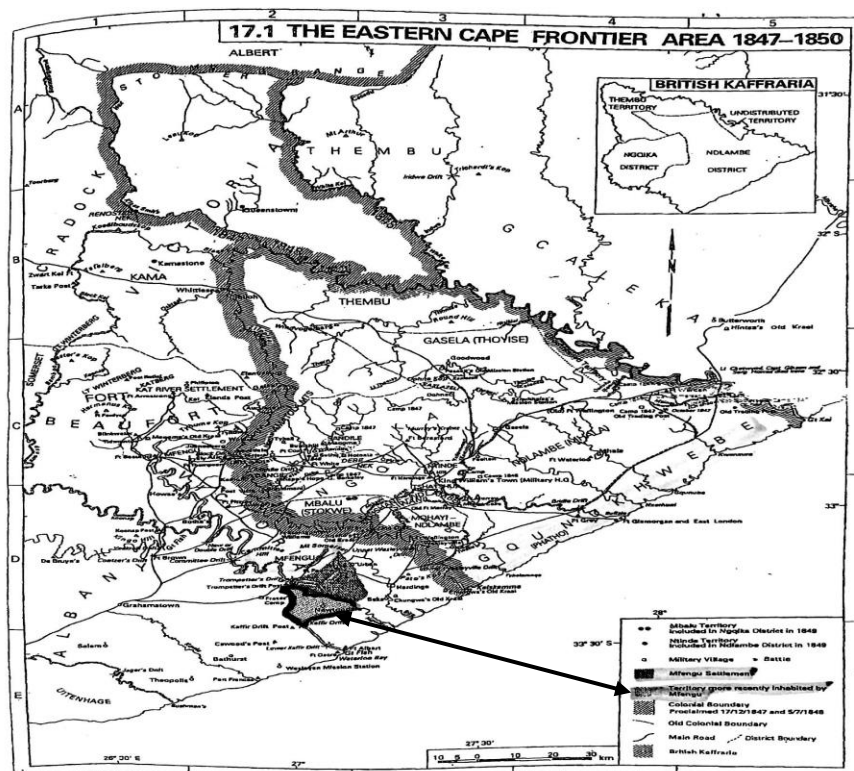
[5] The 1836 Stockenström Treaty granted the AmaGqunukhwebe the land on which they had long settled, on the east coast, between the Fish and Mgwalana Rivers. AmaMfengu were allocated the land inland of the AmaGqunukhwebe territory as shown in the contemporaneous map below.⁴ Within the AmaGqunukhwebe Territory, specific areas were assigned to Chief Phatho of AmaGqunukhwebe and his younger brothers Chiefs Kama and Kobe. In 1843, Chief Kama converted to Christianity. This led to tensions between him and his older brother, Chief Patho. As a result, Chief Kama



⁴ The map shows the allocation of land by Lt.-Gov Stockenström, clearly reflecting the division between the two groups.

moved inland to Hewu (Whittlesea). However, many of his subjects remained behind, on a portion of his land, under the leadership of Chief Phatho.

[6] Following Chief Kama's departure, Chief Phatho claimed the land vacated by his brother. However, Lt.-Governor Hare did not honour this claim. Instead he allowed the British resident agent, Theophilus Shepstone, to mark off a boundary extending the area of the AmaZizi into a portion of the land that had been under Chief Kama's rule (the area covered by the Newtondale mission).⁵ This was done on the basis that Chief Kama had relinquished the land to the colonial government. Shepstone then facilitated settlement of AmaZizi on part of Chief Kama's land, inland away from the coast. This allocation was described on a map of the Eastern Cape Frontier area from 1847 to 1850 as the 'Territory more recently occupied by Mfengu'. It did not extend into the territory where the remainder of Chief Kama's



⁵ Above Kaffir's Drift (See arrows - our emphasis in bold boundary).

people had stayed. The rest of Chief Kama's land remained in the hands of those of the AmaGqunukhwebe who had not followed their leader.

[7] In 1845 Governor Maitland replaced the 1836 Treaties with new treaties granting the respective communities the same areas occupied by them under the 1836 Treaties. The terms of the 1845 Treaty were identical to that of 1836, essentially allocating specific areas of land to the different African communities. The relevant part of the treaty provided that:

‘The said Governor doth hereby, in the name of her said Majesty, grant and confirm unto the said chiefs and their tribe[s], that part of the territory called the ceded territory which, since the making of the treaty of 5th of December, 1836, they have held and occupied – which territory shall be held by the said chiefs and tribe[s], their heirs and successors, in perpetuity, never to be reclaimed on behalf of her said Majesty, except in the case of hostility committed, or a war provoked by the said chiefs or tribe, in case of a breach of this treaty or any part thereof.’

The land granted to AmaZizi came to be described by the three tribal authority portions, which constituted the total area, namely the Dabi, Msuthu and Njokweni Tribal Authorities, in line with the names of the chiefs who held authority in the respective portions.

[8] Meanwhile, Chief Phatho had been so aggrieved by the colonial government's takeover of Chief Kama's land that, at the outbreak of the Seventh Frontier War (War of the Axe) in 1847, where the British forces were commanded by Sir Harry Smith who had succeeded Governor Maitland, AmaGqunukhwebe went into alliance with other groups of the AmaXhosa who fought against the settlers. On the other hand, AmaZizi fought on the side of the British, having been promised more land. AmaGqunukhwebe were defeated in the 1847 war and they lost their political power. They were eventually driven beyond the Keiskama River. In addition, in line with the

change of policy on the part of the colonial government, Sir Harry Smith signed a proclamation on 17 December 1847, which abrogated and annulled wholly ‘all Treaties and Conventions formerly subsisting between her Majesty the Queen and the [AmaXhosa Chiefs]’, effectively annulling the Maitland Treaties of 1845 and re-integrating the land previously granted to the Africans into British colonial territory. He also sold off all the African lands previously occupied by the AmaGqunukhwebe to white farmers, including land that had been promised to AmaZizi.

[9] Having been defeated and driven beyond the Keiskama River in 1847 AmaGqunukhwebe were dealt a further blow in 1858 with the Nongqawuse cattle killing debacle.⁶ They lost their remaining land and Chief Patho was imprisoned at Robben Island. The historic chiefdom was destroyed and divorced from its indigenous territory until 1975 when it was resurrected east of the Keiskama River by the Ciskei homeland government.

[10] Although the chiefdom of AmaGqunukhwebe had been destroyed and its people expelled from their territory, Chief Kama’s people continued to occupy their indigenous lands under the white landowners. They were familiar with the land and conditions along the coast and opted not to emigrate. According to Professor Peires, these remnants of Chief Kama’s people continued as best as they could to occupy their indigenous lands, but their right to do so was never legally recognised. Ownership rights passed to the

⁶ J B Peires: *The Dead Will Arise: Nongqawuse and the Cattle-Killing Movement of 1856-7*. The nub of the story, which has been told in many different versions is that during 1856 to 1857 the AmaXhosa, having suffered humiliating loss of land, cattle and people as a result of the Frontier Wars and a lethal cattle disease in 1853 (the lung sickness), heeded a call from a young prophetess, Nongqawuse, to kill all their cattle because they had been reared with hands that were sullied by witchcraft. The promise or hope was that the dead would arise and happy times would return. However, all that followed the killing of cattle and destruction of grain was famine, suffering, death, capturing of AmaXhosa leaders by Sir George Grey and their imprisonment on Robben Island.

white landowners. They lost their political status as a chiefdom and began to identify as a rural community, the Prudhoe Community, living under the authority of settler colonialism. Some became labour tenants under the white farmers, but many pretended to be labour tenants when in fact they rented the farms from the white farmers and farmed for their own benefit. Others were sharecroppers (also known as half-sowers or part lessees). Although subjected to colonial rule, they continued to live on this land, under tribal leadership of four headmen⁷ who performed certain administrative functions such as settling disputes and acting as intermediaries with landowners and government officials. The indigenous leadership role was hereditary, passing from father to son, until the 1990's when the community was moved to the Prudhoe Village. Although the Colonial Government attempted to restrict black farming by enacting various laws,⁸ it did not quite succeed. The archival records reveal that a good number of white landowners (at least 110) who leased land to black tenants failed to register their private locations.

The land claim and litigation history.

[11] During February 2008 the Regional Land Claims Commission (RLCC) referred to the LCC a land claim in which the AmaZizi claimed restitution of its rights in 27 896 hectares of land comprising 85 farms located in the area between the Fish and Mpekweni Rivers up to Gqutywa River (inland) in the Eastern Cape Province. Essentially, the claimed land covered the area on which AmaZizi had been settled within the ceded territory during the 1830's and 1840's, including the portion of land that used to be Chief's Kama's

⁷ The headmen were from four farms, namely, Slate, Lessendrum, Dunstan and Farm No 249.

⁸ For example, the Native Location Amendment Act 30 of 1899, The Private Locations Act 32 of 1909 and the Native Trust Land Act 18 of 1936.

territory, and the land formerly granted to AmaGqunukhwebe, including the portion of Chief Kama's land on which Chief Kama's people had remained.⁹

[12] The claim of the AmaZizi was an amalgamation of three different claims lodged as follows: (a) the Matiwane claim was lodged on 20 December 1998; (b) the claim lodged by Phumzile Magilidane on 19 December 1998 on behalf of Ntloko community; and (c) the claim lodged on 20 December 1998 by Fukweni Zolile on behalf of AmaZizi. The process of amalgamation did not happen at once and made its fair contribution to the delay in the finalisation of the claims. In the referral by the RLCC the claimed land was described as follows:

'From Heaton Farm, passing Pato's Kop, Ntabakaluzi, over the Fish River, the Mbokothwana Land, some given to Mgababa people by previous government, the farms from Patoskop up to [M]Gwalana River where Mphekweni Sun and Fish River are situated, the then Ulimocor area up to Singeni area including Prudhoe area.'

As is evident from this description two hotels, Mphekweni Sun and the Fish River Sun Hotels, then owned by Emfuleni Resorts, were located within the land claimed by AmaZizi.

[13] The following was recorded in the referral to the LCC:

'The claimants are part of the group of people referred to as AmaMfengu who were resettled in the Peddie area by the Cape Colonial Government from the Transkei Territories during and after the 1835 Frontier War. The claim is for the rights lost by Chief Njokweni and his people in the area that was under the leadership of Chief Njokweni...

...The dispossession was made in terms of the furtherance of the objects of a '*racially discriminatory practice*' by fulfilling the policy of a '*betterment planning*' in the Ciskei homeland.'

⁹ The land claimed included the tribal authority areas of Dabi, Jaji and Msuthu, in which members of the AmaZizi currently live.

According to that referral the dispossession occurred from 1979 to 1982 and the claimants never received just and equitable compensation at the time of dispossession.

[14] A portion of the land claimed by AmaZizi was, at the time of lodgment, the subject of a land claim by the Prudhoe Community. The Prudhoe claim had also been lodged timeously with the RLCC on 10 December 1998 in terms of the Restitution of Land Rights Act 22 of 1994 (Restitution Act). The land in relation to which these competing claims were lodged, is the territory which had been granted to AmaGqunukhwebe during the 1830's and 1840's. In Prudhoe's claim it was described as comprising 26 parent farms, spread over 10 540 ha as surveyed at the time of the original grant. This portion of land lies between the Fish River and Mgwalana River in the Peddie district of the Eastern Cape. At the time of lodgement of the claim the majority of members of the Prudhoe Community resided in the Prudhoe village which was situated on the Prudhoe Farm 203. Most of the land was state land, the farms having been expropriated from white owners during the 1970s for consolidation into the former homeland of Ciskei.

Investigation and referral of the claims by the LCC

[15] The competing claims have a long and unfortunate history characterised by apparent neglect, bias and/or incompetence on the part of the RLCC. There were also indications of favouritism towards AmaZizi by the RLCC. The delay resulted in the claims taking approximately 20 years from lodgement to reach the LCC and to be finalised by that court.

[16] The fact that there were competing claims over the subject land must have been known to the Land Claims Commissioner from as far back as 1998

when the claims were lodged. However, in February 2008 the RLCC referred only the AmaZizi land claim to the LCC in respect of the Sun farms. This resulted in a trial during 2008 in the LCC (before Bam JP) without joining Prudhoe as a party, and without the RLCC informing the court of its competing claim. On 12 March 2010 the LCC (Bam JP) ordered restoration of the Sun farms, including the Fish River Sun resort, to AmaZizi. As things turned out that trial was a waste of time and precious resources.¹⁰

[17] When Emfuleni Resorts appealed against the award of the Sun farms to AmaZizi the Prudhoe Community successfully applied to this Court to have the restoration award rescinded. This Court remitted the case to the LCC for rehearing and criticised RLCC for processing the claim of AmaZizi, ignoring the respondent's claim for 12 to 13 years. The conduct of the RLCC was described as an 'opportunistic and futile attempt to cover-up for the dereliction of duty by the officials concerned'.

[18] Even when it eventually referred both claims to the court, the RLCC purported to adjudicate Prudhoe's claim by dismissing Prudhoe's community claim and referring it only as claims of individuals who were 'ex-farm workers' on the subject land. Several other dilatory steps were taken by the RLCC and AmaZizi, including frivolous points *in limine*, which were rejected by the LCC, and applications for leave to appeal to this Court and the Constitutional Court, which were all predictably dismissed. The trial eventually resumed on 24 April 2017 but was further delayed by the failure of the RLCC to notify some of the interested parties of the date of resumption of the trial. After several further hiccups, the trial was finalised and judgment of the LCC was handed down on 11 April 2018.

¹⁰ Emfuleni Resorts v Mazizini Community [2011] ZASCA 139 (23 September 2011) at para 7.

[19] In its judgment the LCC found that AmaZizi were a community as envisaged in the Restitution Act and had established rights in the tribal authority land together with the Heaton Farm (described with more particularity in annexure E to the judgment of the LCC), of which it was dispossessed. The LCC, however found that AmaZizi had not proved any rights in the subject land and that it was the Prudhoe Community that was dispossessed of rights in that land (as described in annexure F to the judgment of the LCC).

[20] On 3 August 2018 the LCC refused AmaZizi leave to appeal against its judgment on 3 August 2018. On 5 September 2018 the appellant applied to this Court for leave to appeal, citing only three parties and omitting several interested parties. Although Prudhoe sought to oppose the application for leave to appeal and had prepared an answering affidavit, that affidavit was not filed with the registrar of this Court as the registrar had directed that the application be withdrawn and a new one filed citing all the interested parties.

[21] The application was never withdrawn despite the directions of the registrar. Instead, on 29 October 2018 the attorneys for Prudhoe learned by chance that leave to appeal had been granted on 24 October 2018 to AmaZizi, without it ever filing a fresh application in accordance with the directions of the registrar. Leave to appeal was therefore granted, clearly in error, without this Court having received and considered the Prudhoe answering affidavit. Despite being aware of the error, AmaZizi did not cooperate in having the order rescinded. The registrar of this court then advised the attorneys for Prudhoe that there was no statutory provision for rescission of an order granting leave to appeal, but only a reconsideration in terms of s 17(2)(f) of

the Superior Courts Act. It was then decided, for the sake of expedience, rather to allow the appeal to proceed.

[22] In its pleadings, Prudhoe asserted that it was a community that traced its roots back to AmaGqunukhwebe under Chief Kama, under whom they exercised their indigenous land rights, communally, in accordance with shared rules regulating the allocation and use of the subject land for their homesteads, grazing and cultivation. They maintained that after the land fell into white hands, during the period starting from 1847 until the 1970s they continued to function as a community on that land and to exercise their rights in the land in accordance with their indigenous rules, ‘to the reduced extent compatible with the extent of the assertion of ownership rights by the white farmers, which varied from farm to farm’. After the departure of the white farmers the community regained freedom to exercise their communal rights in the subject land as they had done previously.

[23] In addition to tracing their lineage as descendants of Chief Kama’s subjects and insisting that they were a community, the Prudhoe Community maintained that AmaZizi had led no evidence before the LCC to support a valid land claim in respect of the subject land. There was not a single member of the appellant’s community who was shown to have lived on the subject land before and after 1913. It was also submitted on their behalf that just as it happened with other indigenous communities that had been granted land under the 1845 Treaty, the annulment of previous land grants in terms of the 1847 Proclamation abrogated all rights the AmaZizi had held in the ceded territory. Further, the archival documentation on which the appellant relied predated the 1913 Act and did not, in any event, prove entitlement to the relief sought by AmaZizi.

[24] Both communities pleaded that they never received any compensation for dispossession of their rights. As already noted, in relation to the Prudhoe claim the Commissioner stated, amongst other things, that:

‘ . . . the Commissioner has determined that the claim by [the Prudhoe Community] does not constitute a community claim within the meaning and contemplation of the Act, but different claims by the persons all of whom are ex farm workers and whose names are set out in the first column to the table appearing below ‘

[25] A third claim (second competing claim) by the Tharfield Community, as the third plaintiff, in respect of a number of farms, was settled and is not part of this appeal.

On appeal

[26] The Mazizini and the Prudhoe claims remain the only competing claims in this appeal. The contested land includes the land on which the Fish River Sun Hotel is located (the Sun farms 242, 243 and 245). Although the Sun farms were previously owned by Sun International (Ciskei) Ltd, they have since been acquired by the Minister of Rural Development and Land Reform (the Minister) for restoration to the successful claimant in these proceedings.

[27] During the trial, both parties abandoned their claims in respect of some of the land. The AmaZizi abandoned thirteen farms and Prudhoe relinquished eight farms. The exact portion of the abandoned land does not appear on the record, save that the portions ultimately awarded to the Prudhoe Community appear in the order at the end of this judgment (the amended version of annexure G to the judgment of the LCC).

Contentions of parties on appeal

[28] In challenging the award of the subject land to Prudhoe, AmaZizi maintained that, firstly, Prudhoe was not a community as defined in the Restitution Act, and should therefore not have been awarded any land. They contended that the members of the Prudhoe Community were descendants of individuals who were farm labourers on the subject land. In essence AmaZizi disputed that part of the history that held the Prudhoe Community out as descendants of the subjects of Chief Kama. The second leg of the challenge by AmaZizi to the judgment of the LCC was that, because the 1847 Proclamation that terminated all land tenure rights enjoyed by Africans within the ceded territory prior thereto was not applicable to AmaMfengu. Instead they continued to enjoy rights both in their originally allocated land and in the subject land, until they were dispossessed thereof by the Ciskei Government during the 1970's. They maintained that they had proved that at some stage in the 1880's AmaZizi Community members occupied both public and private locations within the subject land until they were dispossessed thereof on establishment of the homeland of the Ciskei.

[29] AmaZizi also sought to appeal against what they regarded as a failure by the LCC to award to them 55 additional farms, together with a farm known as the Gosforth Farm, which fell outside the Prudhoe and Tharfield lands. They contended that the Minister, by admitting the validity of their claim in relation to these farms, consented to their claim in the LCC and the farms should have been awarded to them on that basis.

Failure by the LCC to award the 55 farms and Gosforth Farm to the Mazizini Community.

[30] It is convenient to first consider this part of the appeal. Firstly, although no mention is made of the 55 farms and Gosforth Farm in the Mazizini Notice

of Appeal, these farms (except the Gosforth Farm) were included in its application to this court for leave to appeal. From Mazizini's written Heads of Argument it was evident that the AmaZizi claim to these farms was also founded on the 1845 treaty concluded with the colonial government. As noted earlier the argument was that because the Minister had not opposed the AmaZizi claim to these farms in the LCC they should have been awarded to AmaZizi. The 1845 Treaty stood as proof that the subject land had been granted to AmaZizi, so it was submitted.

[31] However, as Counsel for Prudhoe submitted, the appeal against the 'omission' by LCC to award these farms was improper. As the record also reveals, indeed the farms had been part of the original AmaZizi land claim. At the start of the trial before the LCC, AmaZizi brought an interlocutory application seeking an order awarding these farms to them on the same basis that the Minister had not opposed the claim in this regard and had therefore accepted the validity thereof.

[32] In dismissing the interlocutory application, the LCC referred to opposition by the Prudhoe Community to that part of the AmaZizi claim. The LCC found that the application was vexatious. An application for leave to appeal against that order of the LCC failed, and was also dismissed by this court. So was a similar application to the Constitutional Court. All of this resulted in a seven month delay of the trial.

[33] In its statement, filed in terms of s14(1)(a) of the Restitution Act, the Prudhoe Community had pertinently refuted the AmaZizi claim to these farms, denying that AmaZizi families were entitled thereto (in particular, farms 235 and 242, including farm 243, which was a subdivision of farm 242).

Prudhoe asserted that these farms were formerly occupied by members of its community who had since been moved to Benton Farm. It stated that it intended to lodge a land claim in relation to these farms ‘upon the correction and passing anew of the [Restitution Act] set aside by the Constitutional Court in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*’.¹¹

[34] Against this background the LCC dismissed the application by AmaZizi for a declarator that its claim over the 55 farms together with the Gosforth Farm was valid and should be honoured. The issue was dealt with, conclusively at that stage and in the unsuccessful applications for leave to appeal the order of the LCC. There was no omission by the LCC. In addition, AmaZizi never led any evidence as the basis for this claim. The attempt to revive the matter on appeal was improper, to say the least. In addition, despite the indication, in the Prudhoe opposition, that there may be interested persons in a claim to these farms, there is no reference by AmaZizi to any current occupants of or interest holders in these farms. And, based on past conduct, one cannot rely on anything that the RLCC says or does not say as to the presence of interested parties who should have been alerted to this claim. Over a period of 20 years it had repeatedly and absurdly ignored interested parties in this matter. Insofar as it is properly before us, this part of the appeal must fail.

Expert evidence

[35] The RLCC commissioned five reports relevant to the competing claims. The first report pertained to the AmaZizi claim and was prepared in 2005 by

¹¹ *Land Access Movement of South Africa and others v Chairperson of the National House of of Provinces and the others* [2016] (5) SA 635 (CC).

Dr Luvuyo Wotshela, an established historian from Fort Hare University. Its contents were mostly informed by his interview with Mr Fumene Matiwane, one of the people who lodged the original three claims on behalf of AmaZizi. Interestingly, in his expert report Dr Wotshela expressed the view that AmaZizi ‘did not have any historical land rights that may have been infringed through discriminatory legislation’.

[36] The second report was compiled by Mr Tuswa in 2007. Notably, the RLCC never disclosed the Wotshela report to Mr Tuswa. It also did not disclose the Prudhoe competing claim to him. The third report was prepared by Outcomes Based Consultancy on the Prudhoe claim. That report recommended that ‘the claim by the Prudhoe Community be considered a valid claim in terms of the [Restitution Act]. The claim meets the restitution criteria’. Although this report was available to the RLCC when the matter was heard in the LCC it was not disclosed to that court.

[37] The fourth and fifth reports were prepared by Mr Tuswa for the retrial, subsequent to rescission of the first LCC judgment. The fourth report was an update on Mr Tuswa’s first report on the AmaZizi claim. And the fifth was in respect of the Prudhoe claim. It is these last two reports by Mr Tuswa which formed the basis of the second referral by the Commission to the LCC.

[38] There was also a ‘feasibility report’ prepared by Mr Piet Jonas on behalf of the State parties. Mr Jonas gave evidence favourable to Prudhoe on the feasibility of restoration of the subject land to that community.

[39] Two expert reports prepared by Professor Jeffrey Peires of Rhodes University and Dr Deborah Budlender¹² respectively, at Prudhoe's instance, were also part of the record. Prof Peires's evidence was largely uncontested and forms the core of the historical background set out above.¹³ It was common cause that he was a leading historian in the Eastern Cape and *'ha[d] an extraordinary amount of experience and expertise in relation to the ... amaMfengu and Xhosa people'*. Ultimately it was this report and Prof Peires' evidence on behalf of Prudhoe that carried the day.

[40] Although Mr Tuswa gave expert evidence on behalf of AmaZizi he could only establish expertise in soil science and geographical information systems, whereas Prof Peires, as already indicated, was a well-known historian, especially on the history of the indigenous communities of the Eastern Cape. Mr Tuswa was constrained to accept that on any disputed issue, he had to defer to Prof Peires. Despite this concession he still vacillated when giving evidence, between disputing the validity of Prudhoe's lineage and admitting it – also insisting, despite the contents of his own report, that members of the Prudhoe Community had only been labourers on the subject land. Be that as it may, in most part, the five experts' reports were mutually confirmatory on the history of the two contesting communities. Most of the evidence was drawn from the Government archives.

[41] Prof Peires referred in his report to a number of inaccuracies in the other reports. However, apart from the differences between him and Mr Tuswa, recorded in the joint minute prepared by them, these inaccuracies had no material impact on the determination of the issues before us. The two points

¹² Dr Budlender's evidence related to the value of loss suffered by the Prudhoe people as a result of the removal.

¹³ As recorded in the joint minute between Prof Peires and Mr Tuswa

of disagreement between Mr Tuswa and Prof Peires formed the basis of the competing claims and the basis for this appeal. They are encapsulated their joint minute as follows:

‘HISTORY

After discussion between Mr Tuswa and Mr Peires:

- I Points of disagreement
 - 1 Proclamation 3 December 1847 – did it put an end to the treaty between Government and AmaZizi?
 - 2 Relationship between AmaGqunukhwebe chiefdom and Prudhoe Community – is there a continuity or are they entirely different entities?
- II Points of agreement
 - 3 AmaGqunukhwebe confirmed in the possession of their lands following the Fifth Frontier War (1819) due to the intervention of Rev William Shaw.
 - 4 AmaZizi/AmaMfengu arrive in Peddie in 1835. Treaty signed with Governor Maitland in 1845.
 - 5 Chief Kama departs in 1843. AmaZizi move [to] part of his land, excluding however the land now in dispute.
 - 6 War of the Axe (1846 – 1847): AmaGqunukhwebe defeated and kingdom ends. Arrival of first white farmers in Peddie district.
 - 7 Dispute between white farmers and AmaZizi. Boundary line demarcated by Espinase and Edye in 1854, and this line was the basis of the Surveyor General demarcation.’

The law

[42] Each of the competing claimants had to show that it satisfied the requirements for a valid land claim under s 2(1)(d) of the Restitution Act, and prove entitlement to the remedy of restoration of the subject land in terms of s 35(1)(a) of the Restitution Act, having regard to the factors listed in s 33 of that Act.¹⁴

¹⁴ Section 33 of the Restitution Act sets out factors to be taken into account by a court when considering any matter in terms of that Act. These include the desirability of providing for restitution of rights in land to any

[43] Section 2 of the Restitution Act provides that:

- ‘(1) A person shall be entitled to restitution of a right in land if –
- (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
 - (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
 - (c) he or she is a direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who-
 - (i) is a direct descendant of a person referred to in paragraph (a); and
 - (ii) has lodged a claim for restitution of a right in land; or
 - (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws and practices; and
 - (e) the claim for such restitution is lodged not later than 31 December 1998.’¹⁵

[44] Therefore, in line with their pleadings in relation to the subject land each party had to show that it was a community or part of a community that after 19 June 1913 was dispossessed of rights that it had enjoyed, as a result of past racially discriminatory laws or practices, and that it had lodged a claim for restitution of such rights not later than 31 December 2008. It was common cause that each party had complied with the stipulated lodgement date. The Prudhoe Community took no issue with the status of AmaZizi as a community. The only issues were whether Prudhoe was a community as envisaged in the Restitution Act and whether each party had proved previous enjoyment of land rights, after 19 June 1913, of which it was dispossessed as a result of racially discriminative laws or practices.

person, desirability of remedying past violations of human rights, considerations of equity and justice, feasibility of restoration, and avoidance of major social disruption.

¹⁵ The date in the amended Act is 30 June 2019.

[45] In s 1 of the Restitution Act ‘community’ is defined as ‘any group of persons whose rights in land are derived from shared rules determining access to the land held in community by such group, and includes part of any such group’. The meaning of ‘community’ is not rigid. The important factor is an accepted, co-ordinated way of life amongst a group of people that guides their access and utilisation of the land and natural resources within their environment – what the Constitutional Court described as ‘an established orderly settlement pattern, common traditional practices, pooling of resources for farming purposes, economic activity and leadership structure’.¹⁶

[46] Previously, in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*¹⁷ the Constitutional Court said the following about the meaning of ‘community’ in s 2(1)(d) of the Restitution Act:

‘There is no justification for seeking to limit the meaning of the word “community” in section 2(1)(d) by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy. Where it is appropriate, as was the case in *Ndebele-Ndzundza*, the “bonds of custom, culture and hierarchical loyalty” may be helpful to establish the group’s shared rules related to access and use of land. The “bonds” may also demonstrate the cohesiveness of the group and its commonality with the group at the point of dispossession ...

... the legislation has set a low threshold as to what constitutes a “community” or any “part of a community”. It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a community. . . .’¹⁸

Discussion

Was Prudhoe a community as envisaged in the Restitution Act?

¹⁶ *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46; 2018 (3) SA 1 (CC) para 104.

¹⁷ *Department of Land Affairs and Others v Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007(6) SA 199 (CC) para 40-41.

¹⁸ Paragraphs 40 – 41.

[47] AmaZizi led the evidence of Mr Matiwane on this issue. He sought to prove that members of the Prudhoe Community were, in fact, all members of the AmaZizi Community and fell under the leadership of Chief Njokweni. According to him most members of the Prudhoe Community attended school in the AmaZizi Tribal Authority areas. They only started to identify with AmaGqunukhwebe during the preparations for the lodging of this claim. According to him, this was borne out by the fact that Mr Tom, a witness for Prudhoe, had a Zizi clan name. His further evidence was that when the Prudhoe Village was established it was Chief Njokweni who allocated plots to the Prudhoe members. He also asserted that members of the Prudhoe Community or their forebears were tenant workers on the white farms who only formed into a community when they voluntarily moved to the Prudhoe Farm, a somewhat inconsistent version with the Prudhoe people having only formed themselves into a distinct community when they were preparing for this claim. Mr Matiwane also highlighted the short distance, which he estimated at about five kilometers, between the AmaZizi and Prudhoe Community areas. All these factors, according to him, were evidence of a single community – AmaZizi.

[48] However, during cross-examination Mr Matiwane conceded that the Prudhoe Community was part of AmaGqunukhwebe¹⁹ but insisted that AmaXhosa and AmaMfengu were always one and the same people, with the term ‘AmaMfengu’ being just a ‘nickname’. He also admitted that neither he nor his parents had ever lived on or leased land on the subject land. They had lived in the Tribal Authority areas all their lives. He further admitted that

¹⁹ It will be recalled that Prof Peires’ evidence was that AmaGqunukhwebe ceased to exist as such but the remnants left after the War of the Axe and the Great Famine formed a community that maintained, so far as possible, given their circumstances, the patterns of life and traditions of the community from which they had come. This was reflected by and large in their clan names and the role they gave to traditional leadership and customs. Mr Matiwane’s concession was therefore consistent with this evidence.

members of the Prudhoe Community attended school in and frequently visited the Tribal Authority areas because the only schools available and administrative offices for processing of official documents, such as identity documents, were located there. More significantly, he conceded that it was the Prudhoe headmen who allocated plots in the Prudhoe Village and not Chief Njokweni. And further that in March 2011, when Chief Njokweni sought to have his daughter accepted as the traditional leader of Prudhoe, his suggestion was emphatically rejected by the Prudhoe Community.

[49] On behalf of the Prudhoe Community, Mr Gladman Tom and six other witnesses testified on the history of the community on the subject land, including their historical links to Chief Kama and the AmaGqunukhwebe. They testified to their settlement on and use of the land, their traditional leadership structures, traditional rules in relation to the allocation of land, and traditional structures and customs that were completely independent from AmaZizi. As already shown above, neither Mr Tuswa nor Mr Matiwane disputed this evidence.

[50] The admission by Mr Matiwane that the Prudhoe people were essentially AmaGqunukhwebe detracted from the argument by AmaZizi that the Prudhoe people were not a community. In any event AmaZizi provided no alternative historical background for the Prudhoe Community. The contention, in their pleadings, that the Prudhoe Community was part of AmaZizi Community was not proved by any credible evidence.²⁰ As shown above, Mr Matiwane's evidence on this aspect whittled away any basis for that contention.

²⁰ In the response to the Additional Notice of referral and the Prudhoe Statement of Claim AmaZizi pleaded that 'Whilst the first plaintiff (AmaZizi) admits that they were dispossessed of rights in land, insofar as they were dispossessed of rights in land as a community, first plaintiff avers that they were part of the plaintiff'.

[51] There can be no doubt therefore that Prudhoe established satisfactorily that it was a community as envisaged in the Restitution Act. As was submitted on their behalf, the archival records and Prof Peires' evidence showed a distinct orderly settlement pattern, common traditional practices, pooling of resources for farming, organised economic activity, and firm indigenous leadership structures constituting a hybrid regulatory system for community members. There is no basis for this court to depart from the findings of the LCC on this issue.

Which community proved entitlement to restitution?

[52] The precursor to restitution of land under the Act is previous enjoyment of rights in the land sought to be reclaimed. The claimant community must show that after 13 June 1913 it enjoyed those rights continuously until it was dispossessed thereof as a result racially discriminatory laws or practices. The high watermark of the case for AmaZizi was that, having been granted the lands by virtue of the Maitland Treaty in 1845, they lived on that land until the establishment of the Ciskei Homeland in the 1970's. They pleaded that the 1847 Proclamation by Sir Harry Smith, which annulled the land grants that were in place at the time did not affect AmaZizi, for they had not breached any term of the Maitland Treaty. It will be recalled that a condition of the Maitland treaty was that land granted thereby would be held by the respective chiefs and tribes, and their successors in perpetuity, never to be reclaimed by the British 'except in the case of hostilities committed, or a war provoked by the said chiefs or tribe...'. The argument by AmaZizi was that, unlike AmaGqunukhwebe, who breached the terms of the treaty by fighting on the side of other AmaXhosa tribes against the British, AmaZizi remained loyal to and fought on the side of the British. There would have been no reason therefore for the British to annul the granting of the land to AmaZizi. In fact,

the language used in the 1847 Proclamation clearly excluded AmaZizi from the operation of Proclamation, so it was contended.

[53] However, even if the AmaZizi interpretation of the 1847 Proclamation was correct it would not assist them in their claim to the subject land. The 1845 Treaty clearly granted to the respective chiefs and tribes the lands on which each of them had settled. If the 1847 Proclamation was not applicable to AmaZizi, this only meant that AmaZizi would retain the land that had been granted to them in 1845. It would not entitle them to the land possessed and occupied by the AmaGqunukhwebe, or any other land that had been granted to other African chiefs or tribes.

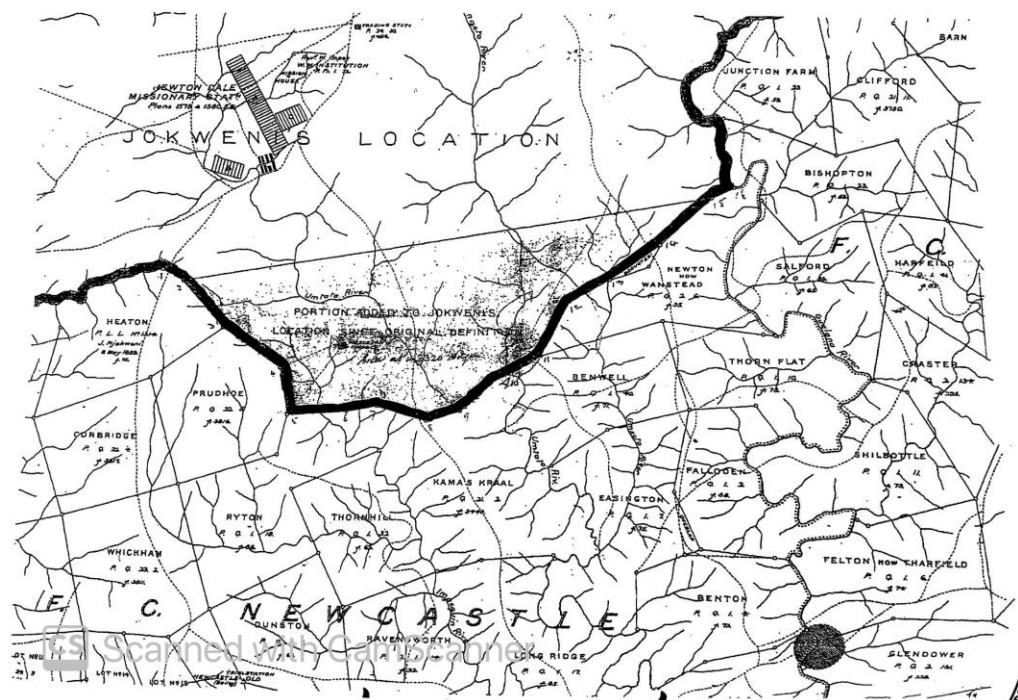
[54] When AmaZizi arrived in Peddie, AmaGqunukhwebe had long settled in the area along the east coast. The acceptance by the LCC of Prof Peires' opinion that AmaZizi could not have been granted the land already occupied by AmaGqunukhwebe in terms of the concessions obtained for them by the Wesleyan Reverend Shaw, must be correct. As Prof Peires illustrated in evidence, the Stockenström²¹ map depicts the land occupied by AmaGqunukhwebe during the period 1836 to 1844 as being along the coast – from the Great Fish River to the Keiskama River and beyond Keiskama to the east.

[55] The later map depicting the community settlements during the period between 1847 and 1850²² clearly shows the AmaZizi original settlement as 'Mfengu Settlement', and the portion of Chief Kama's land that was given to them was depicted as the 'territory more recently inhabited by Mfengu'. That

²¹ The map titled 'Stockenström Treaty System 1836-1844'. See para 6 above.

²² See para 7 above

whole area lies outside the subject land. An even later map depicting the settlements during the period 1853 to 1857 shows AmaMfengu still occupying the same area. Furthermore, as Prof Peires highlighted, and as agreed in point 7 of the Experts' Joint Minute, the boundary line demarcated in 1853 by the Edye and Espinasse Commission between AmaZizi (or AmaMfengu) and the white farmers did not place AmaZizi anywhere near the disputed land.²³ A brief background to this Commission is that after Governor Sir Harry Smith had brought the War of the Axe to an end he sold off the Xhosa lands by public auction to speculators and some white farmers. It became clear to the colonial government that his land allocations were afflicted by corruption. A commission constituted by W Edye, a Magistrate in Peddie and Captain Espinasse, a military officer, was appointed to adjudicate on the disputed boundary between the disgruntled AmaZizi and the white landowners. The adjudication became the basis of the boundary between AmaZizi and the white landowners. The portion of Chief Kama's land that was allocated to



²³ Extracted from Bergh J S and Visagie J C; *The Eastern Cape Frontier Zone, 1660 – 1980*; Map entitled 'The Eastern Cape Frontier Area 1847 – 1850'.

AmaZizi appears inland on the map set out below, within the portion marked 'Jokweni's location' and is depicted as 'portion added to Jokweni's location'. It was common cause that Chief Njokweni was the leader of AmaMfengu.

[56] According to Prof Peires, AmaZizi were never satisfied and always agitated for the land they had been promised by Governor Maitland. In 1911 they organised an 'interview' with the Surveyor General to establish the 'true boundary' between themselves and the farmers. The Surveyor General, referring them to the boundary marked in the map above, insisted that the boundaries 'were laid down by survey in 1854 and these cannot be disputed'. These boundaries placed the tribal authorities inland outside the contested area, the only extension of the land ever granted to AmaZizi being the portion of Chief Kama's land around Newtondale Mission. This land forms part of the area under the jurisdiction of the tribal authorities and was awarded to AmaZizi by the LCC. Even if the Smith Proclamation was not applicable to AmaZizi that would not have the effect of extending their territory beyond what was granted to them under the 1845 Treaty.

[57] Regarding actual occupation of the subject land by Amazizi a closer consideration of parts of Mr Tuswa's last two reports on AmaZizi and Prudhoe reveals interesting evidence. Under the heading 'history of acquisition of claimed land' the report sets out a detailed analysis, on a farm by farm basis, of each of the Prudhoe Community households that he identified as having exercised rights in relation to each farm on the subject land. In the report he recorded that such rights were held in the land after 1913 up to the time of forced removals. Not a single reference to an identifiable AmaZizi community member is specified as having exercised rights on the subject land. On the 'nature of rights in land the claimants were dispossessed of', the report sets

out a detailed list of land rights that were held by the Prudhoe community members and lost as a result of the removals. This is backed up by a detailed analysis on a spreadsheet attached to the report. No such analysis appears on the AmaZizi report.

[58] Under ‘date and circumstances of dispossession of rights in land’, a detailed description of the planning and execution of the removal of the Prudhoe Community is given. No such description is given in relation to AmaZizi. On compensation received, the only analysis in respect of AmaZizi is in relation to the Tribal Authority areas. The Prudhoe report confirms that no compensation was received by the majority of the Prudhoe members and that which was received was meagre. On ‘hardships suffered by the claimant’ as a result of forced removal the report records the severe harm done to the Prudhoe people as a result of the forced removal and their dumping on the Prudhoe farm with no land for cultivation and grazing, no livestock, and being forced to build new homes with their own funds. No such suffering is expressed about AmaZizi.

[59] Lastly, Mr Tuswa’s conclusion and recommendations were that the Prudhoe claim was a valid community claim in terms of s 2(1)(d) of the Restitution Act. With regard to AmaZizi he concluded that no archival documents could be located to support dispossession on the part of AmaZizi Community. The report then ended with the following rather perplexing paragraph:

‘The past racist policies have created a regime of conflictual overlapping land rights viz treaty rights, private locations, labour tenancy, squatters and beneficial occupation occurring over the same piece of land.’

If anything, the contents of Mr Tuswa's report discussed above support the Prudhoe claim. They show evidence of actual settlement by the Prudhoe Community on the contested land. They lend no substance to the claim of AmaZizi.

[60] Even though it is not necessary to consider AmaZizi's interpretation of the 1847 Proclamation given the conclusions drawn from the evidence above, we briefly consider the submission made in this regard. The relevant parts of the Proclamation reads:

'WHEREAS by reason as well of the causes as the result of the present hostilities, carried on in certain territories to the Eastward of this Colony, all treaties and conventions formerly subsisting between Her Majesty the Queen and the Chiefs of the Gaika, Congo, T'slambie and Tambookie Tribes of Kaffirs, and all others, have become and now are wholly abrogated and annulled...

And I do further PROCLAIM, DECLARE and MAKE KNOWN, that all Territory to the South and West of any portion of the line aforesaid, shall be and same is hereby, annexed to and incorporated with the Colony of the Cape of Good Hope as part and parcel thereof, and that any right or title to the exclusive occupation of any part of the said Territory by a Native chief or People, granted or conceded by any such Treaties or Conventions as aforesaid, has wholly ceased and determined and shall not be revived'.

[61] As adverted to above, the submission on behalf of AmaZizi was that the Proclamation was not directed at AmaMfengu (AmaZizi) and their lands because of the reference in the opening passage to the 'Kaffir tribes'. This term, as well as the term 'Native', were generally not used by the British with reference to AmaMfengu, it was submitted.²⁴ Furthermore, unlike AmaXhosa, AmaMfengu had not turned against the British. There was no reason for the British to reclaim the land granted to AmaZizi. This was Mr Tuswa's evidence

²⁴ This was not a general rule. The Stockenstrom map referred to earlier clearly included AmaMfengu among the Xhosa and their area as an area of Xhosa occupation.

as well. However, the language of the Proclamation was clear. And the Amazizi interpretation of the proclamation is not consistent with the plain language used in the Proclamation. Neither is it consistent with the context in which the Proclamation was issued.²⁵ The Proclamation was directed at the chiefs of the identified tribes ‘and all others’, including AmaMfengu. In addition, the evidence shows that Sir Harry Smith did not spare any of the African tribes from the restoration of the lands to British political governance. The proclamation went on to say that ‘any right or title to the exclusive occupation of any part of the said Territory’ had ‘wholly ceased and determined’.

[62] A further contention by AmaZizi was that there was evidence on record that showed settlement by them on the subject land way beyond the 1840’s and 1850’s. Reliance was placed on the returns completed by inspectors of natives locations during the British colonial rule. The first of these returns was for the period ending on 31 December 1881 in relation to a place called Mlenze (Newcastle Commonage). AmaZizi contended that a return, which, on the face of it, related to Lot 6, was in respect of Farm 242, which is located ‘near the Fish River Mouth’ (where the Fish River Sun Hotel is situated). The return recorded that 221 people lived in 38 huts there, under Headman Siwani and had 274 cattle. However, as Prof Peires pointed out in his evidence, there was no evidence that Lot 6 was Farm 242. Instead the archival evidence showed that Lot 6 was under the control of the Whitfield family from 1850 until the 1920’s. Mr Tuswa later conceded that there was no evidence that AmaZizi occupied Farm 242 during the period 1883 to 1929, when the farm was allocated to the white farmer. And, that the people who had moved into

²⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

Mlenze as a result of subdivision of land in the vicinity for white farmers were quickly evicted from there.

[63] A further return relied on was prepared by an inspector of locations, W J Dell, for the Civil Commissioner of Peddie on 5 January 1884. The return related to the quarter ending on 31 December 1883. In the relevant part the following was recorded:

8 'With reference to Newcastle Commonage, the cutting up of that locality into small farms has not to any great extent disturbed the natives who were previously living there as most of them have arranged with holders of allotments to still reside as heretofore, while the few ... have secured themselves places among the farmers in the immediate neighbourhood.'

[64] The submission was that, contrary to Prof Peires' evidence that the AmaZizi had settled for a short period at Mlenze and were expelled from there in 1854, the reference, in this passage, to 'the natives who previously lived in Newcastle' was evidence of AmaZizi having lived at Newcastle under Chiefs Siwani, Msuthu and Njokweni during 1883 to 1884 (the period covered by the return). However, no amount of scouring of the return reveals a reference to Newcastle or Mlenze therein. As Prof Peires opined, the document could just as well refer to Africans other than AmaZizi. It does not support the AmaZizi contention that they had settled at the Newcastle Commonage. Further, when Chief Njokweni gave evidence before the Native Laws and Customs Commission in September 1881, he said that the few AmaZizi who had occupied Mlenze were removed from there whilst they were still building their kraals.

[65] The evidence on records shows that the Prudhoe Community members had the full run of the entire farms during the period between the departure of

the white farmers in the 1970's and their forced removal of Prudhoe's members in 1986/1987. With the exception of Farm 242, all grants to white settlers in respect of the 26 farms took place in the 1800's. The only person who occupied Farm 242 (where the greater part of the Fish River Sun is now situated) between 1883 and 1929 was the white occupant, Mr Whitfield and his successors. There was no evidence of either 'Fingo' or AmaZizi occupation of that farm during this period. In 1929 it was the subject of a deed of grant in favour of a white owner, a member of the Whitfield family.

[66] AmaZizi also relied on the fact that there was reference only to 'Fingoes' in the schedule to the 1913 Native Land Act in support of their contention that they lived on the land when that Act came into effect. However, again, none of the schedules to the 1913 Act pertain to the subject land. Phato's Kop Location, which was the only AmaMfengu location located within Peddie that was included in the schedules was 50km away from the subject land. In any event the areas listed in the schedules were recognised black areas from which there could be no dispossession under the 1913 Native Land Act. For example, '[N]Jokweni location' which appeared in the schedule was one of the tribal authority lands which is located outside the subject land.

Conclusion

[67] The powers of this court to interfere with findings of fact, the inferences to be drawn from those findings, and the remedy granted on the basis of those findings by the LCC are circumscribed. An appellate court is, as a matter of principle, reluctant to upset the factual findings of the trial court because that court heard and observed the witnesses. (*Fourie v First Rand Bank Ltd and Another* [2012] ZASCA 119; 2013 (1) SA 204 (SCA) para 14; *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 – 706 especially para 8).

We are satisfied that the findings by the LCC that the Prudhoe Community was a community as envisaged in s 2 of the Restitution Act and was dispossessed of rights in the disputed land as a result of discriminatory laws after 1 June 1913 was correct.

[68] The AmaZizi Community claim that it had rights to the land claimed by the Prudhoe community under the 1836 and 1845 treaties was unfounded. The AmaMfengu territory never extended to the subject land. Furthermore although the rights enjoyed by the indigenous communities under those treaties were terminated by the 1847 proclamation, both AmaZizi and Prudhoe remained in occupation of the territories previously granted to them. The AmaZizi endeavours to establish occupation of, or the exercise of rights in the subject land failed. That meant that they, in fact, had no cognisable interest in that land and no grounds to challenge the decision by the LCC.

[69] In relation to the subject land the order of the LCC read as follows:

‘5. It is declared that the second plaintiff is a community dispossessed of rights in the land described in Annexure ‘F’ to this Order after 19 June 1913 as a result of past racially discriminatory laws and practices as contemplated in section 2(1)(d) of the Act.

6 The first defendant shall restore the land described in Annexure ‘G’ to this Order to the second plaintiff within 6 months of the grant of this Order.

7 The second plaintiff’s rights in the land described in Annexure ‘G’ are adjusted to full ownership in terms of section 35(4) of the Act.

8. The land described in Annexure ‘G’ may, at the election of the second plaintiff be restored to a communal property association, a trust or another appropriate entity nominated by it.’

[70] At the hearing of the appeal, Counsel for the Prudhoe Community brought to our attention certain errors in Annexures F and G to the judgment

of the LCC and sought to have the order of the LCC corrected accordingly. There was no opposition to this request.

[71] Consequently the following order is granted:

1 The appeal is dismissed.

2 Annexure 'G' to the order of the Land Claims Court is altered to read as follows:

'1 The land falling within the full Prudhoe claimed area as identified in Annexure "B" to the Judgment and handed in at the trial as Exhibit 3;

2 including, the Fish River Sun Farms, namely:

- 2.1 Remainder Farm 242, in extent 147 6693 hectares;
- 2.2 Portion 2 of Farm 235, in extent 10 5700 hectares;
- 2.3 Portion 23 of Farm 235, in extent 11 6870 hectares;
- 2.4 Portion 24 of Farm 235, in extent 12 4881 hectares;
- 2.5 Portion 25 of Farm 235, in extent 1 6033 hectares;
- 2.6 Portion 26 of Farm 235, in extent 6047 hectares;
- 2.7 Farm 243, in extent 41 0035 hectares;

3 but excluding:

- 3.1 Portion 2 of Farm 241, in extent 4 2203 hectares.
- 3.2 Portions 20 and 21 of Farm 261; and
- 3.3 the land in respect of which the second plaintiff has relinquished its claims for restoration, namely:
 - 3.3.1 Portion 13 of Farm 227;
 - 3.3.2 Portion 14 of Farm 227;
 - 3.3.3 Portion 15 of Farm 227;
 - 3.3.4 Portion 16 of Farm 227;
 - 3.3.5 Portion 17 of the Farm 227;
 - 3.3.6 Portion 18 of the Farm 227;

3.3.7 Portion 19 of Farm 227;

3.3.8 Portion 33 of Farm 227; and

3.3.9 Remainder of Portion 1 of farm 227, in extent 11 2824 hectares (excluding Portions of farm 227)'

4 Annexure 'F' to the order of the Land Claims Court is altered to read as follows:

'The land falling in the full Prudhoe claimed area as identified on Annexure "B" to the Judgement and handed in at the trial as Exhibit 4, including, the Fish River Sun Farms, namely:

4.1 Remainder Farm 242, in extent 141 6693 hectares;

4.2 Portion 2 of Farm 235, in extent 10 5700 hectares;

4.3 Portion 23 of Farm 235, in extent 11 6870 hectares;

4.4 Portion 24 of Farm 235, in extent 12 4881 hectares;

4.5 Portion 25 of Farm 235, in extent 1 6033 hectares;

4.6 Portion 26 of Farm 235, in extent 6047 hectares; and

4.7 Farm 243 in extent 41 0035 hectares



N DAMBUZA

JUDGE OF APPEAL

pp



P M MOJAPELO

ACTING JUDGE OF APPEAL

Appearances

For appellants: V Notshe SC (with him S G Poswa)

Instructed by: Makhanya Attorneys, East London
Bezuidenhouts Inc., Bloemfontein

For respondents: A Dodson SC (with him L Siyo)

Instructed by: Legal Resource Centre, Grahamstown
Honey Attorneys, Bloemfontein.