IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA 3/03/2017

CASE NO: 2013/73273

(1) REPORTABLE: **YES**/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

03/03/2017 .....

DATE SIGNATURE

In the matter between:

THE CHAIRMAN OF HLANEKI TRIBAL AUTHORITY	Applicant
and	
MAKHONYA RONALD JUL SHIMANGE	First Respondent
PERSONS UNLAWFUL ERECTING BUILDING(S) AT SHILAWA HLANEKI BLOCK B	Second Respondent
THE REGIONAL LAND CLAIMS COMMISSIONER, LIMPOPO	Third Respondent

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JUDGMENT

MLAMBO JP

[1] The applicant is the Hosi (Chief) of the Hlaneki traditional community and he launched this application in his capacity as the Chairperson of the Hlaneki Traditional Authority. The term 'Hosi' is titular and is used with reference to a Chief in the Tsonga Community. It is appropriate that I use the term Hosi in this Judgment as an institution that has a place in our Constitutional framework. The application was commenced by Hosi Chabane Jackson Hlaneki, who passed away on 20 November 2015. He was succeeded by Hosi Mkhacani Adeyemi Maluleke Hlaneki as Hosi and Chairperson of the Hlaneki Tribal Authority with effect from 13 April 2016. The late Hosi was properly substituted in these proceedings in terms of Rule 15(2) and (3) by notice.

[2] The first respondent (Shimange) is an individual resident in Shilawa Village,[1] the area where the construction works that gave rise to this application took place. He was identified by the applicant's Indunas (Headmen) as primarily behind the said construction works. Shimange opposes the application and aligns himself totally with the merits of the defences and arguments advanced by the third respondent who applied and was granted leave to join the proceedings as a respondent. The second respondent as cited refers to the construction workers observed on site but they have never been positively identified in the papers and hence no opposing papers have been filed by them or on their behalf.

[3] The third respondent is Mr Lebjane Harry Maphuta and is the Regional Land Claims Commissioner, Limpopo (the Regional Commissioner), who joined this litigation on 28 November 2013 when this Court granted him leave to intervene as the third respondent. The Regional Commissioner is a creature of statute in that he was appointed in terms of section 4(3)[2] of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). His predecessor, who launched the intervention application, was the Acting Regional Land Claims

[1] This village is also referred to as Shimange by the first respondent.
[2] Section 4(3) provides: 'The Commission shall consist of a Chief Land Claims Commissioner appointed by the Minister, after inviting nominations from the general public, a Deputy Land Claims Commissioner similarly appointed and as many regional land claims commissioners as may be appointed by the Minister.'

Commissioner, Limpopo, Mr Sanjay Singh (Singh). The Acting Regional Commissioner is similarly a creature of statute having been appointed in terms of section 7(3A)[3] of the Restitution Act. Singh stated in his affidavit that it was the office of the Regional Commissioner that was primarily responsible for the construction works, stating that a clinic and community centre were the objective of the construction being the implementation of a land claim settlement on behalf of Shimange and the Shimange tribal community.

[4] As I mentioned earlier these construction works were the source of this litigation and were commenced in Shilawa Village on 23 December 2010. This village is situated in an area properly described as Hlaneki Block B in Giyani, Limpopo. The village is within the area of jurisdiction and under the control of the Hlaneki Traditional authority ie the Tribal Authority chaired by the applicant. Within days of the commencement of the construction works the applicant launched an application on 29 December 2010, on an urgent basis with the objective of securing an order declaring those construction works to be unlawful and interdicting the then respondents from continuing with the said construction works as well as an order that the respondents be ordered to demolish any structures already erected.

[6] The matter was heard by this Court on 4 January 2011 and an interim interdict was granted, inter alia, prohibiting the named respondents from continuing with the erection of structures and/or buildings at Shilawa Village. The respondents were also ordered to follow the customary law system asserted by the applicant and to obtain approval in terms thereof to build in the area. The Court ordered that the interim interdict operate as a *rule nisi* returnable on 8 February 2011 and was thereafter extended several times.[4] On 28 November 2013 when the *rule nisi* was further extended, the Court granted the Regional Commissioner leave to intervene as a respondent. On 11

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[3] Section 7(3A) provides: 'If the office of a regional land claims commissioner is vacant or if a regional land claims commissioner is absent or unable to perform any or all of his or her functions, an acting regional land claims commissioner appointed by the Minister shall act in his or her stead and whilst the acting regional land claims commissioner so acts, he or she shall perform all the functions of the regional land claims commissioner.'

[4] 21 April 2011, 23 November 2011, 27 April 2012, 3 May 2012, 24 October 2012, 28 May 2013, 28 November 2013, 3 March 2014, 23/28 June 2014, 7 October 2014, 9 February 2015 and finally on 11 February 2015.

February 2015 the Court extended the *rule nisi* until the matter was heard in this Court's opposed motion roll. It was eventually heard by this Court on 7 September 2016 when this Judgment was reserved.

[7] Subsequent to the Regional Commissioner being granted leave to join the litigation as third respondent, the applicant was also granted leave to file an amended notice of motion and supplementary affidavit. It did so and whilst persisting with the initial relief he sought, he further sought alternative relief to the effect that in the event that the Regional Commissioner produced documentary evidence that the clinic and community centre development is *prima facie* lawful, this Court should extend the *rule nisi* granted on 4 January 2011, pending the outcome of a review application to be launched by him in the Land Claims Court, within one month after the date of this order, failing which the interim order would lapse. The applicant also, in the supplementary founding and replying affidavits, responded extensively to the case made out by the Regional Commissioner, more particularly to the Regional Commissioner's assertions that the clinic and community centre development was valid and was properly sanctioned through the relevant provisions of the Restitution Act.

[8] The primary basis advanced by the applicant when launching the application is that the construction works were taking place in an area within his area of jurisdiction and control and was undertaken without notice or consultation with him and without his permission. The applicant asserts that all developments such as the one at issue in this matter have to be initiated in line with the customary law of his traditional community and initiated through his office and be properly approved.

[9] His case is that for a very long time dating back to the 19th century, the Hlaneki traditional community has resided in that area and applied customary law and procedures regarding the administration and allocation of land under its control. In brief these customary law rules entail that anyone seeking land for residential or business purposes must apply to the Induna (Headman of the area) who then recommends the application to the Hosi. The Hosi, should he approve the application, then submits the application to the local authority

who must submit the application to the Provincial government who can either approve or decline the application. There is a fee of R120 for residential land applications and R1000 for business land applications which are payable to the Tribal Authority. There are instances where the fee is reduced where the applicant is poor. In short in terms of this customary law anyone requiring land for any purpose must apply to the Hosi, via their Induna, for the grant of the required piece of land. This land allocation and administration customary law has been in place since the 19th century and, according to the applicant is practiced by most if not all the tribal communities in Limpopo.

[10] The right asserted by the applicant is to protect the land under his jurisdiction and control from illegal appropriation but more importantly to safeguard the right to administer such land in accordance with his Tribal community's customary law rules. It is on this basis that he argues that the development of the clinic and community centre allegedly sanctioned by the Regional Commissioner is unlawful as this was done without consultation with him and without compliance with the customary law rules and procedures applicable. The applicant further argues that he has a clear right to the relief it seeks based on his role as the Hosi and therefore representative of the Hlaneki traditional community. He makes the point that as a traditional leader he enjoys Constitutional authority in that capacity to assert the customary law rights of his community.

[11] The applicant buttresses his argument by referring to the history of the Hlaneki traditional community, its recognition as such and its leadership institutions in several pieces of legislation from apartheid times until the promulgation of The Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act). The Framework Act indeed recognises the institutions of traditional communities in section 3 and traditional leadership in section 19. The applicant further makes reference to the Limpopo Traditional Leadership and Institutions Act 6 of 2005 (the Limpopo Traditional Leadership Act). The applicant asserts that this further piece of legislation recognises traditional communities but more importantly, the role of traditional leaders in Limpopo. The applicant argues that he and the Hlaneki traditional community have enjoyed statutory recognition since the days of the Black Authorities Act 68 of

1951 culminating in the Framework Act and the Limpopo Houses of Traditional Leaders Act 5 of 2005.

[12] Shimange denies any involvement in the construction works and bases his opposition on this. He however also aligns himself in all respects with the case made out by the Regional Commissioner who states that his actions arise from a land claim lodged by Shimange on behalf of the Shimange traditional community. The Regional Commissioner opposes the application on the primary basis that this Court lacks jurisdiction to determine the issues in this matter, it being a matter requiring resolution of Restitution Act matters and therefore falling within the jurisdiction of the Land Claims Court.

[13] In view of the decision I have come to and to the extent necessary, I set out the necessary factual background provided by the Regional Commissioner to spearhead the clinic and community centre development at Shilawa Village. His case is that the decision to build the clinic and community centre was pursuant to the settlement of a land claim lodged by Shimange on behalf of the Shimange community in terms of section 10 of the Restitution Act to the Commission on Restitution of Land Rights (the Commission). That claim was investigated and found to be genuine and compliant with the dictates of the Restitution Act. This in short entailed that the Shimange community had been dispossessed of its rights to their land in the farm Northampton which they had occupied since the 19th century until the community had been forcibly removed from that land in 1968 and relocated to Shilawa Village, which fell within the area of jurisdiction of the Hlaneki Tribal authority

[14] Furthermore the investigation revealed that restoring the Shimange community's land rights to Northampton posed insurmountable difficulties as there was already a community settled there and as a result there was no alternative state owned land available for award. In view of this and in terms of what he refers to as delegated powers in terms of section 42D of the Restitution Act, the Commission then negotiated a settlement between the Shimange community and the State. The negotiations culminated in a settlement of the claim in terms of which the community elected that a clinic

and community centre, valued at R10 148 308 be built at Shilawa Village which would benefit the wider community.

[15] The further terms of the settlement were that the building project would be 'primarily driven' by the Regional Commissioner in his official capacity, the project would be supported by a number of Government departments. Final approval of the settlement was granted by the Acting Land Claims Commissioner in January 2008 but implementation commenced in 2010. Implementation took the form initially of meetings with different sectors of society which included representatives of different Government departments as well as representatives from the Shimange community. The applicant and Hlaneki tribal authority were not involved in these meetings.

[16] This is the factual matrix on which the Regional Commissioner argues that the settlement of the Shimange land claim as well as the decision to build the clinic and community centre in Shilawa Village are lawful. Based on these facts the Regional Commissioner opposes the grant of final relief on the primary basis that this court lacks jurisdiction to determine this matter as the rights asserted by the applicant and the relief he seeks as well as the role and actions of the Regional Commissioner, are all rooted in the Restitution Act. For this reason, so the argument goes, it is only the Land Claims Court that has exclusive jurisdiction in terms of section 22 of the Restitution Act to determine the issues raised in the matter.

[17] The Regional Commissioner further argues that the decision to settle the Shimange land claim and the decision to locate the development of the clinic and community centre in Shilawa village are valid and lawful. His case is that should the applicant be unhappy about his conduct and decisions he has a number of alternative remedies which are all contained in the Restitution Act. On this basis he contends that the application stands to be struck off the roll with costs.

[18] This being an application for interdictory relief in the main, the test is whether the applicant has established the existence of a clear right which is being infringed or is under threat of infringement and that he lacks alternative redress. The requisites for the right to claim for a final interdict were

expressed in *Setlogelo v Setlogelo*[5] and are to the effect that an applicant desirous of approaching a court for a final interdict must demonstrate: (i) a clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of an alternative remedy. A clear right must be established on a balance of probabilities.[6] The clear right required to be shown in interdict proceedings has been varyingly described. Van der Linden refers to it as '*een liquide recht*'.[7] Modern authorities refer to it as a definite right, that is a right clearly established.[8] The word 'clear' relates to the degree of proof required to establish the right.[9]

[19] The predominant issue requiring resolution is whether the applicant has succeeded in establishing a clear right, to practice and apply customary law in land allocation and administration and to prevent developments he and his tribal authority have not authorised on land under his authority. In my view the right asserted by the applicant is rooted in the Constitution, i.e. the right to practice customary law. He argues that it is this right that was infringed by the Regional Commissioner in simply commissioning the development of the clinic and community centre in that land without complying with the customary law procedure to source the land.

[20] The Regional Commissioner argues that the right asserted by the applicant if it exists is capable of protection under the Restitution Act but that in any event any role or authority he may have had in administering land has been legislated away by successive pieces of legislation. In this regard the argument advanced in the heads of argument is that the Black Authorities Act on which the applicant has placed some reliance for its contentions, did not expressly confer powers in relation to land allocation. The argument goes on to suggest that the powers under that act were not customary law but other laws and that that act did not expressly recognise '*black laws or customs for*

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[5] 1914 AD 221 at 227.
[6] *Nienaber v Stuckey* 1946 AD 1049 at 1054; *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd* 1961 (2) SA 505 (W) at 524C-D; *Welkom Bottling Co (Pty) Ltd v Belfast Mineral Waters (OFS) (Pty) Ltd* 1967 (3) SA 45 (O) at 56D-E; *De Villiers v Soetsane* 1975 (1) SA 360 (E) at 362B; *Beukes v Crous* 1975 (4) SA 215 (NC) at 219F.
[7] 'Judicieele Pracktijck' 2.19.1.
[8] *Erasmus v Afrikander Proprietary Mines Limited* 1976 (1) SA (W) 950 at 956 and cases there cited.
[9] The word 'clear' relates to the degree of proof required to establish the right.

either tribal authorities or chiefs or headmen'. The argument was further that that Act was in any event repealed on 31 December 2010 through the Black Authorities Repeal Act 13 of 2010.

[21] The argument then refers to the Black Administration Act 38 of 1927 especially section 47(3) which purportedly vested land administration powers not in tribal authorities but in the Bantu Administration Commissioner. This argument further suggests that whatever powers may have been enjoyed by traditional leaders and traditional authorities were finally taken away through the repeal of the Black Administration Act by the Repeal of the Black Administration Act and amendment of Certain Laws Act 28 of 2005. The argument further refers to the Government Immovable Asset Management Act 19 of 2007 which it was argued, vested custodianship of land situated in the former homelands on the Minister of Rural Development and Land Reform. This Act came into force in April 2009 and it was argued, finally wiped whatever powers or role traditional leaders and authorities may have had in land allocation.

[22] It is not correct as argued by the Regional Commissioner that the right asserted by the applicant is within the contemplation of the Restitution Act. The right asserted is a constitutional right to practice customary law. This is a matter where the Courts are enjoined by the Constitution to recognise, protect and apply customary law. In *Nwamitwa v Phillia*[10] the High Court and the SCA in *Shilubana v Nwamitwa (Commission for Gender Equality as Amicus Curiae)*[11] had dealt with and determined an issue dealing with customary law and so did the Constitutional Court when it eventually heard the matter. See also the cases of *Bhe v Magistrate Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole, South African Human Rights Commission v President of the Republic of South Africa.*[12]

[23] In *Shilubana v Nwamitwa*,[13] the Constitutional Court, referring to section 211 stated that 'customary law is protected by and subject to the Constitution in its

[10] 2005 (3) SA 536 (T).
[11] 2007 (2) SA 432 (SCA).
[12] 2005 (1) SA 580 (CC).
[13] 2009 (2) SA 66 (CC).

own right'.[14] And further that 'the status of customary law in South Africa is constitutionally entrenched'[15]. The Court went on to state that as this Court held in *Alexkor v Richtersveld Community*, customary law must be recognised as "an integral part of our law" and "an independent source of norms within the legal system."[16] It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly ...

As a result, the process of determining the content of a particular customary law norm must be one informed by several factors. First, it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules and norms that has developed over the centuries.[17] An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, in line with the approach set out in *Bhe*.[18] Equally, as this Court noted in *Richtersveld*, courts embarking on this leg of the enquiry must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it ...

It follows that the practice of a particular community is relevant when determining the content of a customary law norm. As this court held in *Richtersveld*, the content of customary law must be determined with reference to both the history and the usage of the community concerned. "Living" customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.'[19]

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[14] Para 43, quoting *Bhe*.
[15] Para 42.
[16] *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) para 51.
[17] *Alexkor* para 53.
[18] *Bhe v* para 43.
[19] Paras 43-44 and 46.

[24] Clearly this Court has jurisdiction to determine this aspect as it impacts a Constitutional issue i.e. the protection and development of customary law under the Constitution. Furthermore the jurisdiction to grant procedural relief by way of interdicts remains within the purview of this Court unless the issue at stake is decreed by legislation to fall under the jurisdiction of another Court of equal status such as the Land Claims Court. There is a dearth of authority confirming this and especially where Constitutional rights are impacted.

[25] The next enquiry must now focus on whether the customary law right asserted by the applicant exists and further whether it has been legislated away by successive pieces of legislation as argued on behalf of the Regional Commissioner. I have given sufficient detail of the version and evidence advanced by the applicant in earlier paragraphs on this aspect. The Regional Commissioner has tendered no evidence to contradict the applicant's version. All the Regional Commissioner has done is offer arguments suggesting that the applicant has made this up. Singh actually went further to suggest that the applicant was asserting this right for ulterior purposes, i.e. if the applicant was able to, he would have used this process to make money for himself. Whilst being downright disrespectful this offers no contradictory evidence that such a customary law system does not exist. This argument is also supported by an assertion that Hosi Chabane and by implication the current Hosi have no standing to bring this application as their chieftainship is suspect. This submission is also premised on lack of legislative foundation. This argument is built around an interpretation of the different pieces of legislation dating from the Black Authorities Act to current legislation such as the Framework Act.

[26] The evidence provided by the applicant effectively nullifies this whole argument. That evidence is to the effect that through the ages especially through the period of the legislation mentioned by the Regional Commissioner, the applicant's community has observed and applied their customary law land allocation system. This is a solid basis depicting the lived reality of that community in observing and applying their customary law. That customary law system has without a doubt survived all the successive pieces of legislation referred to on behalf of the Regional Commissioner. The further

submission that the applicant's standing as traditional leader is also suspect, was not based on any evidence. Clearly it is misplaced and all I need say is that this traditional leadership institution is the same institution that was upheld by the Constitutional Court when it approved Hosi Shilubane's right to assume her rightful place as Hosi in the chieftainship institution of the Nwamitwa Tribal community. That the applicant is Hosi is beyond question and evinced by his certificate of appointment in apartheid years and which has continued to be recognised under the Framework Act. A further illustration of the fallacy of the Regional Commissioner's argument is shown by the letter of appointment of Hosi Mkhacane, the current Hosi of the Hlaneki Tribal Authority, which was issued by the Limpopo Department of Co-Operative Governance, Human Settlements and Traditional Affairs, issued in terms of section 12(1)(*c*) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005.

[27] My conclusion is that the argument advanced on behalf of the Regional Commissioner which is solely reliant on legislative interpretation, cannot displace the applicant's evidentiary material tracing the history of the Hlaneki tribal community and its observance and application of a customary law land allocation and administration system from the previous century. I must also say that the stance of the Regional Commissioner on this point is surprising to say the least. That is a state functionary charged with executing an important constitutional responsibility regarding land restitution. It is an indisputable fact that black tribal communities bore the brunt of the apartheid regime's forced land removals which the Regional Commissioner is meant to remediate. Reality is that Tribal Authorities and communities applied nothing but customary law in administering their land. This is what the applicant is saying.

[28] I am also acutely alive to the reminder echoed by Chief Justice Mogoeng Mogoeng in *Pilane v Pilane*[20] that:

'Traditional leadership is a unique and fragile institution. If it is to be preserved, it should be approached with the necessary understanding and sensitivity. Courts, Parliament and the executive would do well to treat African customary law, traditions

[20] 2013 (4) BCLR 431 (CC) paras 78-79.

and institutions not as an inconvenience to be tolerated but as a heritage to be nurtured and preserved for posterity, particularly in view of the many years of distortion and abuse under the Apartheid regime ... Bearing in mind the need to help these fledgling institutions to rebuild and sustain themselves, threats to traditional leadership and related institutions should not be taken lightly.'

See also *Shilubana v Nwamitwa*:

'It is important to respect of communities that observe systems of customary law to develop their law ...The right of communities under 211(2) includes the right of tribal authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the rapidly changing society must be respected and facilitated.'[21]

[29] Clearly the historical context of a traditional community was recognised as playing an important part in how that community's customary legal system was applied. That historical context is integral as seen in the Constitutional Court's statement that indigenous law

'[i] s a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. It will continue to evolve within the context of its values and norms consistently with the Constitution.'[22]

See also *Tongoane v Minister of Agriculture and Land Affairs*[23] where the Constitutional Court again emphasised that land usage, occupation and administration of communal land is regulated by indigenous law.[24]

[30] The next enquiry is whether the applicant is entitled to the relief he seeks in the light of the Regional Commissioner's argument that the section 42D settlement and the clinic and community centre development amount to proper exercise of public power by a state functionary and that until they are set aside they remain valid. The authority for this proposition is located in the

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[21] Para 45.
[22] *Alexkor* para 53.
[23] 2010 (6) SA 214 (CC).
[24] Para 65.

decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[25] where the SCA stated that administrative action must be regarded as valid and binding until set aside by a court. It was also stated that whether or not the particular decision was truly valid is immaterial; until challenged and set aside, its validity is accepted as fact. However in *City of Cape Town v Helderberg Park Development (Pty) Ltd*[26] the SCA said that the *Oudekraal* principle is not absolute; instead the 'settled law', as set out in *Oudekraal*, was that 'the target of such compulsion is entitled to await events and resist only when the unlawful condition is invoked to coerce it into compliance'.[27]

[31] Most significantly, the SCA in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*,[28] referring to *Oudekraal* stated:

> 'The validity of an administrative act is generally challenged by way of judicial review. It is, however, not uncommon for a challenge to arise, not by the initiation of such proceedings but by way of defence, as a collateral issue in a claim for the enforcement or infringement of a private law right, as the case may be. A citizen is not required to comply with an administrative act which is bad on its face as it is unlawful and of no effect. He or she is entitled to ignore it if so satisfied and justify that conduct by raising a "defensive" or "collateral" challenge to its validity.'[29]

[32] Based on this authority the applicant's challenge to the Regional Commissioner's decisions based on legality clearly trumps the Regional Commissioner's submissions. The Applicant questioned the Regional Commissioner's authority and competence to settle the land claim. The applicant further squarely challenged the Regional Commissioner to disclose the settlement agreement as well as any documentary evidence on which he relied for his actions and decisions. The thrust of the applicant's argument is that in the absence of evidence of the delegation relied on by the Regional Commissioner, and especially having been specifically challenged to produce this and failing to do so, the conclusion is ineluctable that the Minister did not sanction the land claim settlement relied on by the Regional Commissioner. The applicant contended correctly that only the Minister of Rural Development

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[25] 2004 (6) SA 222 (SCA).
[26] 2008 (6) SA 12 (SCA) paras 49-50.
[27] Para 50.
[28] 2010 (3) SA 589 (SCA).
[29] Para 13.

and Land Affairs has the authority to settle a land claim in terms of section 42D of the Restitution Act or to delegate the power to do so. Relying on the decision in *Manok Family Trust v Blue Horison Investment 10 (Pty) Limited*,[30] the applicant makes the point that should he be correct that the Regional Commissioner acted outside his powers in terms of the Restitution Act then clearly that exercise of public power violated the principle of legality and was clearly invalid.

[33] Section 42D provides:

> "42D. Powers of Minister in case of certain agreements
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> (1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodges not later 30 June 2019, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:..
>
> (2) ...
>
> (3) The Minister may delegate any power conferred upon him or her by subsection (1) or sections 42C and 42E to the Director-General of Rural Development and land Reform, or to the Chief Land Claims Commissioner or a regional land claims commissioner."

[34] The Regional Commissioner, whilst disclosing other documents relating to the Shimange land claim, has refused to disclose the settlement agreement. He has also failed to disclose any document evidencing the delegated authority he allegedly relies on for his conduct. The Regional Commissioner's stance is that he is not obliged to make discovery in motion proceedings. This in my view is fatal to his case. Litigation is not a game where litigants simply adopt tactical positions aimed at frustrating legitimate causes. It is unhelpful for that office to simply refuse to provide this evidence upon a *bona fide* and direct challenge to do so. This matter deals with important constitutional rights and to adopt such tactics in litigation deserves the strongest censure. I would be remiss if I permitted the Regional Commissioner to deny the applicant the protection he seeks of his and his Tribal community's right to practice their

[30] 2014 (5) SA 503 (SCA).

land allocation customary law system based on flimsy allegations of exercise of public power.

[35] My conclusion is that the respondents have failed to raise any basis to offset the applicant's case. This is a matter where the applicant's version about the existence of a clear right must be accepted. In *Fakie NO v CCII Systems (Pty) Ltd*[31] the SCA stated:

> 'In the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than sixty years ago, this court determined that a judge should not allow a respondent to raise "fictitious" disputes of fact to delay the hearing of the matter or to deny the applicant its order.'[32]

And further

> 'In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[33] this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.'[34]

See also *Webster v Mitchell*.[35]

[36] In the circumstances I am of the view that the applicant has established the existence of a clear right regarding his and his Tribal community's entitlement to practice and apply customary law in administering the land under his control. I'm further of the view that the brazen conduct complained of by the applicant, especially the failure to consult him and his Tribal Authority regarding the implementation of the Shimange land claim calls for a punitive order of costs. The applicant is a traditional leader, with scarce financial means, who has been impelled to approach this court to protect a constitutionally entrenched right at great cost to the Tribal Authority.

[37] I must deal with two further issues that have concerned me in this matter. It is for this reason that I have ordered that this judgement must be brought to the

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[31] 2006 (4) SCA 326 (SCA).
[32] Para 55, citing *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428, per Watermeyer CJ.
[33] 1984 (3) SA 623 (A) at 634-635, per Corbett JA.
[34] Para 55.
[35] 1948 (1) SA 1186 (W).

attention of the Commission. The first issue relates to the statement by Singh insinuating that Hosi Chabane Hlaneki may have been motivated by personal corrupt tendencies to advance the Hlaneki customary law land allocation right. Hosi Chabane Hlaneki was a respected traditional leader especially by his tribal community and a state functionary cannot be allowed to make such an unfounded derogatory remark about a traditional leader. This is the type of conduct that calls for a personal apology to the Hosi. The second issue is that the Commission must have a serious consideration of how the Regional Commissioner has behaved in this matter taking account of the previous litigation history of that office and the Hlaneki Tribal Authority. The applicant has referred this Court to a Judgement of the Land Claims Court[36] where that Court found, in respect of the Regional Commissioner at that time (2005) that:

'The conduct of the second respondent in handling the applicants' claim and conducting these proceedings was reprehensible, calling for costs on a punitive scale, if requested.'

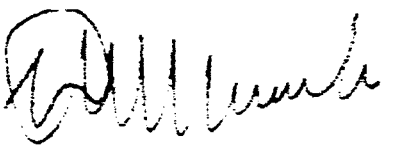
That Court also ordered the Regional Commissioner to take all steps to investigate and finalise the Hlaneki land claim that featured in that matter. It is unclear to this Court if the Regional Commissioner has done so and the Commission must have an interest that Court orders are complied with. It must also be of interest to the Commission that Regional land Claims Commissioners treat all it deals with whether claimants or otherwise, especially traditional leaders in a fair manner.

[38] My order that this judgement be brought to the attention of the Commission is to ensure that appropriate action, where warranted is adopted to ensure that the land restitution programme of that office remains is not mired in controversy and that it retains the confidence of society in its work.

[39] In the circumstances I grant the following order:

[36] Hlaneki and Others v Commission on Land Restitution of Land Rights [2006] 1 All SA 633 (LCC)

1. The building works commenced on 23 December 2010 at Shilawa Village, Hlaneki Block B, Giyani, Limpopo, are declared to be unlawful.
2. The First and Third Respondents are prohibited from continuing in any manner whatsoever with the building works mentioned in 1, without the express consent of the applicant and without complying with the customary law procedure set out in the applicant's founding affidavit and without complying with section 2 of the Interim Protection of Informal Land Rights Act 31 of 1996.
3. The First and Third Respondents are ordered to take the necessary steps to demolish all structures already erected and to remove all building rubble from the building site, within one month from the date of this order.
4. This Judgement must brought to the attention of the Commission on Restitution of Land Rights
5. The First and Third Respondents are jointly and severally ordered to pay the costs of this application on the scale as between attorney and client, including the costs of all the extensions of the *rule nisi* granted by this Court from 4 January 2011.



D MLAMBO

JUDGE PRESIDENT
GAUTENG DIVISION OF THE HIGH
COURT OF SOUTH AFRICA

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Instructed by:	MP Koekemoer Attorneys
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Instructed by:	Mohlaba and Moshoana Inc
Counsel for the third respondent:	ADV A Dodson SC
Instructed by:	The State Attorney, Pretoria
Date of application:	07 September 2016
Date of judgment	03 March 2017