OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: LCC88/2012

Before: **The Honourable Justice Meer, Assessors Ms AE Andrews and Mr T Simamane**

Heard on: **6 June 2016 - 15 June 2016; 14 February 2017; 19 – 27 March 2018** and **23 – 26 April 2018**

Delivered on**: 30 May 2018**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED: YES / ~~NO~~
30/05/2018 .....
DATE SIGNATURE

In the matter between:

ELAMBINI COMMUNITY **FIRST PLAINTIFF**

BHEKANI STANLEY MAJOLA **SECOND PLAINTIFF**

MZWAH MLABA (in his capacity as representative of the estate late Mnini Livingstone Mlaba) **THIRD PLAINTIFF**

KHELA VUNDLA (in his capacity as representative of the estate late Cecil Vundla) **FOURTH PLAINTIFF**

EDWARD MNCWENGWA MAJOLA **FIFTH PLAINTIFF**

and

THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**FIRST DEFENDANT**
REGIONAL LAND CLAIMS COMMISSION	**PARTICIPATING PARTY**
CROOKES BROTHERS LTD	**THIRD DEFENDANT**
FINNINGLEY ESTATE (PTY) LTD	**FOURTH DEFENDANT**
FINNINGLEY INVESTMENTS (PTY) LTD	**FIFTH DEFENDANT**
PEGMA 27 INVESTMENTS (PTY) LTD	**SIXTH DEFENDANT**
PEGMA 40 TRADING (PTY) LTD	**SEVENTH DEFENDANT**

JUDGMENT 30 MAY 2018

MEER J.

Introduction

[1] This is a claim for restitution of rights in land by the Elambini Community, the First Plaintiff. Although individual claims were also lodged by the Second to Fifth Plaintiffs, they no longer persist with their individual claims, but claim as members of the community, the First Plaintiff. The claim before us thus stands to be adjudicated as a community claim in terms of Section 2(1)(d) of the Restitution of Land Rights Act No 22 of 1994 ("the Act"), the section which entertains the claim of a community that was dispossessed of rights in land. As there is in effect only one plaintiff, this judgment shall refer to all the Plaintiffs cited above, collectively, as "the Plaintiff".

[2] The land claimed comprises some 30 coastal sugar farms in the Magisterial District of Umzinto, along the KwaZulu-Natal South Coast. It is just to the north of Scottburgh and measures some 1380 hectares in extent. The

farms, most of which are under intensive sugar cultivation, are situated between the Amahlongwa River in the north and the Mpambinyoni River in the south. The description and details of each farm as gazetted by the Participating Party, the KwaZulu-Natal Land Claims Commission ("the Commission") pursuant to the lodging of the claim, appears at Annexure "A" attached hereto. I shall refer to the farms collectively as "the claimed land". The members of the Plaintiff contend that they or their forbears were dispossessed of rights in land in respect of the claimed land after 1913.

[3] The First Defendant, the Minister of Rural Development and Land Reform, does not dispute the validity of the claim and abides the decision of this Court.

[4] The Commission has accepted the claim as valid and recommended in its referral report to this Court that the claimed land should be restored to the members of the claimant community, to be held in title by a legal entity to be formed.

[5] The Third to Seventh Defendants are the land owners of the claimed land and oppose the claim. They deny that the Plaintiff is a community and further deny that any of the members of the Plaintiff occupied the claimed land, or were dispossessed thereof, as alleged by them. Save for the relatively small area owned by the Sixth and Seventh Defendants, most of the claimed land is owned by the Third to Fifth Defendants. They own the land through various entities belonging to the Crookes family. The family has been a major player in the sugar farming industry in the area since the turn of the last century, intensively farming sugar.

5.1 The Third Defendant, Crookes Brothers Limited, is the owner of the following portions of the claimed land:

5.1.1 The farm Crockworld No. 16648;

5.1.2 The Remainder of the farm Clan No. 16649;

5.1.3 Portion 2 of the farm Lot 1 No. 1667;

5.1.4 The Remainder of Portion 22 of the farm Lot 1 No. 1667;

5.1.5 The Remainder of Portion 23 of the farm Lot 1 No. 1667;

5.1.6 A Portion of the consolidated farm Crockworld no. 16648, known before the consolidated as Portion 133 of the farm Lot 1 No. 1667; and

5.1.7 A Portion of the consolidated farm Crockworld No. 16648, known before the consolidated as Portion 148 of the farm Clansthal No. 1202.

5.2 The Fourth Defendant, Finningley Estate (Pty) Ltd, a Crookes family entity, is the registered owner of the following properties that have been claimed:

5.2.1 Portion 138 of the farm Clansthal No. 1202;

5.2.2 The Remainder of Portion 52 of the farm Clansthal No. 1202;

5.2.3 The Remainder of Portion 116 of the farm Clansthal No. 1202;

5.2.4 Portion 117 of the farm Clansthal No. 1202;

5.2.5 Portion 121 of the farm Clansthal No. 1202;

5.2.6 Portion 125 of the farm Clansthal No. 1202; and

5.2.7 Portion 138 of the farm Clansthal No. 1202.

5.3 The Fifth Defendant, Finningley Investments (Pty) Ltd, a subsidiary of the Fourth Defendant, is the registered owner of a portion of the Consolidated Portion 138 of the farm Clansthal No 1202, known

before the consolidation as the Remainder of Portion 47of the farm Clansthal No 1202.

5.4 The Sixth Defendant, Pegma 27 Investments (Pty) Ltd is the registered owner of the Remainder of Portion 3 of the farm Clansthal No 1202.

5.5 The Seventh Defendant, Pegma 40 Trading (Pty) Ltd, a subsidiary of the Sixth Defendant, is the registered owner of Portion 2 of the farm Clansthal No 1202.

[6] Thus with the exception of the Pegma properties, the claimed land held by the landowner Defendants, is owned by the Crookes family. Apart from the Third to Seventh Defendants, none of the owners of the other properties that have been claimed, have participated in these proceedings.

History of the Litigation

[7] This matter has had a long and protracted history. The claims were lodged with the Commission in November and December 1998. For reasons which are not apparent, it took all of 14 years for the Commission to refer the claims for adjudication to this Court, which it did on 12 June 2012. Thereafter it took the parties a further four years to get the matter trial ready, during which period a number of conferences were held by the Court in managing the case. At a pre-trial conference on 22 April 2016, the parties agreed to a separation of the issues. They resolved that the Plaintiffs' entitlement to restitution of a right in land in terms of Section 2(1) of the Act would be determined first. This was recorded at a conference convened by the Court on 13 May 2016. The effect of this is that the issue of just and equitable compensation would be considered at a later stage, if required.

[8] Proceedings in this Court initially commenced on 6 June 2016 and continued until 15 June 2016. The proceedings then abruptly had to be halted, due to various complaints levelled by the Plaintiff against their legal team, against the First Defendant and against the Commission. Correspondence was sent to the Court by the Plaintiff in this regard. As a consequence, the Plaintiff's legal team who appeared to the Court to have ably represented them up until that stage, felt compelled to withdraw, because, as conveyed to the Court, of the attitude of the claimant community towards them.

[9] The matter was thereafter postponed to 14 February 2017, on which date the Plaintiff's current legal team sought a postponement *sine die*. The reason for the postponement was that the new instructing attorney had been instructed only on 15 December 2016, counsel had been briefed on 23 January 2017, and there were difficulties in getting the members of the Plaintiff community to consult with them. The matter was accordingly postponed *sine die,* by agreement, on 14 February 2017. The First Plaintiff itself and not the State, who funds it, was directed to pay the wasted costs occasioned by the postponement. Thereafter the Plaintiff was only ready to continue the trial on 19 March 2018, this time with the landowner Defendants also represented by new senior and junior counsel. The trial recommenced and continued between 19 – 27 March 2018, and thereafter between 23 – 26 April 2018, when it was concluded.

The Legal Framework

[10] As this is a community claim, the threshold requirements for restitution of rights in land to a community, as opposed to an individual claimant have to be satisfied for the claim to succeed. These are set out at Section 2 of the Act, and in particular Section 2(1) (d), which pertains to a community claim.

> "**2. Entitlement to restitution.** - **(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 the direct descendant of a person referred to in paragraph (a) who has died without leaving 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 the 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 or practices; and

(e) the claim for such restitution is lodged not later than 31 December 1998."

Section 2(2) of the Act provides:

"(2) No person shall be entitled to restitution of a right in land if –

(a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or

(b) any other consideration which is just and equitable,

calculated at the time of any dispossession of such right, was received in respect of such dispossession."

[11] "Community" is defined in Section 1 of the Act as:

"... any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group;..."

[12] "Right in land" is defined in Section 1 of the Act as:

"... any right in land whether registered or unregistered, and may include the interests of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question;..."

[13] Thus, in order to obtain the relief it seeks, it is necessary for the Plaintiff to allege and prove the following:

13.1 that it is a community or part of a community as defined in the Act;

13.2 dispossessed of a right in land;

13.3 after 19 June 1913, as a result of past racially discriminatory laws or practices;

13.4 that a claim for such restitution was lodged not later than 31 December 1998; and

13.5 that it did not receive just and equitable compensation as contemplated in section 25(3) of the Constitution, or any other consideration which was just and equitable.

THE PARTIES' PLEADED CASES

The Regional Land Claims Commission KZN ("the Commission")

[14] The Commission referred the matter to this Court on 12 June 2012, by way of a Notice of Referral in terms of Section 14 of the Act. The Referral Report referred to the claim as a community claim and went on to state the following:

14.1 The community resided on the claimed land by virtue of a historical right of occupation, alternatively, on the basis that they had beneficial occupation. They practiced subsistence farming up to 1918, when the process of systematic colonial occupation and dispossession commenced in earnest;

14.2 From 1932, and by the enactment of the Native Services Contract Act, the community's status was reduced to that of labour tenants. The community was moved to unproductive and inhospitable reserve land;

14.3 No compensation was received by the community for the loss of their rights;

14.4 The claim was accepted by the Regional Land Claims Commissioner ("the Commissioner") on the basis that the claimants were dispossessed of their rights as trust beneficiaries which they had held in the land for many years;

14.5 The community derived their rights in land from shared rules determining access to land, held in common by the community;

14.6 The claimed land was, at the time of dispossession, occupied under the enforced land tenure system, incorporating indigenous practices, as imposed by the colonial authority. This provided that traditional leaders would administer and allocate land, as agents of the state, to members of the community;

14.7 The traditional leaders held the land in trust for the community members. As a result of such system, the claimant community enjoyed beneficial occupational rights under an implied trust arrangement; and it acquired its rights to the claimed land by reason of its beneficial use and occupation of the claimed land, bestowed as trust beneficiaries, prior to 1913;

14.8 The rights of owners, alternatively beneficiaries, were dispossessed, and the rights and interests of beneficial occupation and use are rights in land as set out in Section 1 of the Act;

14.9 The dispossession occurred in the furtherance of the objects of a racially discriminatory practice on or about 1927;

14.10 The erosion of the rights in land, as well as the eventual dispossession, constituted discrimination against the claimants and was due to the interest of promoting white controlled sugar cane farming and its demands for labour;

14.11 The restoration of the claimed land is justified and appropriate.

The Plaintiff's Response to the Referral Report

[15] The Plaintiff filed a response to the referral report, the salient features of which are as follows:

15.1 The Plaintiff claimed to be a community of black families and the claim was advanced as a community claim as envisaged in the Act;

15.2 Prior to the arrival of the white people, the forefathers of the community had been in exclusive occupation of the claimed land under the authority of Chief Tshonkweni and his successors, in accordance with customs and traditions;

15.3 The rights held by the community were akin to those held under customary law and/or traditional ownership and/or communal ownership and/or beneficial occupation;

15.4 The white people came later and surveyed, subdivided and registered title to the claimed land. It was then transferred to various

members of the white group who farmed the land by mainly planting sugar cane;

15.5 The community's customary rights were reduced to those of labour tenants and farm labourers over time, and members of the community were forced to work for various white land owners. If they refused they were forced to seek residence in the black townships. They had to sell their livestock if they opted to move to the townships. Those who became labour tenants were forced to work for minimum wages and only for 6 months each year, whereafter they had to seek labour elsewhere;

15.6 The then Government prevented further labour tenancy contracts through the enactment of legislation which further reduced the rights of the members of the community;

15.7 Those members of the community who refused to accept permanent employment, but who remained on the farms, were regarded as unlawful squatters and removed in terms of the Prevention of Illegal Squatting Act No 52 of 1951 and the Native Trust and Land Act No 18 of 1936;

15.8 The dispossession occurred as a result of various acts, most of which were enacted during or after 1936. The dispossessions took place during or about 1914 to 1940 and afterwards;

15.9 It was alleged that restoration was the appropriate remedy.

The Stance of the First Defendant

[16] The stance of the First Defendant, the Minister of Rural Development and Land Reform, was to abide the decision of the court, and as such no plea was filed.

The Plea of the Third to Seventh Defendants

[17] In their plea the Third to Seventh Defendants stated as follows:

17.1 They denied that the claimant community constituted a community as defined in Section 1 of the Act;

17.2 They pleaded that such community could not have had any rights in land as defined in the Act. They were not in exclusive occupation of the claimed land, could not have practiced customary practices or traditions on the land, and could not have lived under the authority of Chief Tshonkweni thereon;

17.3 There was no historical evidence of any community settlements on the claimed land;

17.4 They denied that any rights were reduced to that of labour tenancy;

17.5 They further denied that any dispossessions had occurred as a result of racially discriminatory laws or practices or otherwise;

17.6 They denied that restoration was appropriate and feasible.

Background and Common Cause Facts

[18] The claimed land measures some 1380 hectares. It is depicted on the map, which appeared at Trial bundle "E" on page 62 ("E62"), annexed to this judgment. The map featured prominently during the trial and it is useful at the outset to explain what it depicts.

18.1 The area outlined in yellow depicts the claimed land. The inset on the map displays in shaded colours the ownership of the land. The land owned by the Third Defendant is depicted in yellow. The land owned by the Fourth and Fifth Defendants is in green and that owned by the Sixth and Seventh Defendants is depicted in pink.

18.2 The green numbered markings depict each of the portions of the claimed land as gazetted.

18.3 The blue numbered markings depict the areas pointed out by members of the claimant community, at an Inspection in loco attended by all parties and the Court on 10 June 2016 ("the Inspection in loco"). The areas pointed out were referred to extensively at the trial as is reflected below.

18.4 The pink numbered markings depict areas visited during a 2006 inspection, undertaken by the parties and the Commission. These pink markings are not relevant for the purposes of this judgment.

[19] The Cele people, whose descendants the First Plaintiff community claims to be, were settled and established in the southern coast of what was then Natal by the mid 1800's. They lived between the Amahlongwa and Mpambinyoni

rivers, which is roughly where the claimed land is. Their chiefs were Mtungwana and later his son, Tshonkweni.

[20] After the British Government annexed Natal in 1842 it seized and claimed land as crown land, included in which was the land under claim. A scheme was launched to offer grants of crown land to white immigrants on very favourable terms. The properties under claim are linked to two parent properties that were granted by the British Government.

[21] The first parent property is Clansthal. It was granted in 1852 to Bernhard Schwikkard, a German settler. The current Finningley and Pegma properties owned by the Fourth to Seventh Defendants can be traced back to Clansthal.

[22] The second parent property is Lot 1, which was granted to Henry Milner in 1858. This is the parent property of the farm currently owned by the Third Defendant, Crookes Brothers Limited.

[23] The patriarch of the Crookes family, Samuel Crookes, and his three sons, George, Fred and John, farmed in the area before the turn of the 20th century on the farms Renishaw, Restalrig and Maryland. These farms were acquired from 1876 to 1882 and later consolidated into what is now known as the farm Renishaw. In 1895 Samuel Crookes formed a company which he called Samuel Crookes & Sons (Pty) Ltd, which continued his farming operations. At the same time Samuel's sons acquired farms in their own names in the area. As appears from the history of the ownership of each of the parent properties below, the Crookes family acquired the bulk of the parent properties over time.

[24] The history of ownership of each of the parent properties is as follows:

Clansthal

Clansthal, as aforementioned, was originally granted in 1852 to Bernhard Schwikkard who commenced sugar farming on it. It was transferred to Richard King in 1864, who further developed it as a sugar farm. He sold the farm in 1870 to the Natal Lands and Colonisation Company, who were speculators. This entity had rent paying tenants on the farm for a period, and then created a number of sub-divisions, which were sold off by 1912. The bulk of Clansthal, Sub-division G was sold to John Joshua Crooks, a son of the Crookes patriarch Samuel Crookes, in 1912. He had leased the property for a number of years before the acquisition. John Joshua Crookes purchased the remainder in 1934, which became Finningley Estates, the Fourth Defendant, in 1938. J J Crookes controlled both the Fourth and Fifth Defendants. Crookes Brothers Limited purchased Sub Division 1.

[25] Portions 2 and 3 of Clansthal, currently owned respectively by the Seventh and Sixth Defendants, who are unrelated to the Crookes family, was acquired by Alfred Blamey at the turn of the century. He sold it to an entity called Banana Station, from whom the Sixth and Seventh Defendants acquired these portions. These portions were never owned by any of the Crookes family members.

Lot 1

[26] Lot 1, as aforementioned, was granted to Henry Milner in 1858. He farmed sugar intensively thereon and established his home at Freeland Park. Lot 1 remained in Milner's ownership until 1909, when he sold sub-division A to George Crooks, another son of Samuel Crookes. Thereafter, Milner sold sub-divisions E and F to Crooks Brothers Limited in 1939. The Third Defendant is accordingly the owner of Lot 1.

[27] Thus the bulk of Clansthal was owned by JJ Crookes from 1912, and the bulk of Lot 1 was owned by Crookes Brothers Limited from 1939.

[28] Apart from attracting white settlement, the area also became a centre of missionary activity. The American Mission Board set up a mission station at Amahlongwa in 1848. The Amahlongwa Mission Reserve was granted to the Natal Native Trust in 1862. Many people, including some residents of the claimed land, moved onto the Reserve.

[29] The intensive cultivation of sugar on both parent properties thus began in the 1850's. Labour on the sugar farms in the early period came from three sources: the local African population, Indian indentured labour and migrant labourers from Pondoland. African people who did not want to work on the sugar farms on the claimed land could not live there, but were required to leave. Some moved to the Amahlongwa Mission Reserve. Intensive sugar farming has continued on the claimed land since the 1850's and continues today, under the ownership of the Third to Seventh Defendants.

THE EVIDENCE

The Evidence for the Plaintiff

[30] Fourteen members of the Elambini Community testified on behalf of the Plaintiff. Some of them pointed out during the Inspection in loco to places where they said their forebears had lived. The minutes of the Inspection in loco recorded nine points that were pointed out. These, as aforementioned, are the blue numbered markings on the map, E62, as annexed. Each point is referred to in the body of the evidence for the Plaintiff below as "blue point" followed by a relevant number.

[31] The Plaintiff filed an expert report commissioned from historian Professor Delius; however Professor Delius was not called to testify as an expert witness.

Clement Dube

[32] Clement Dube, aged 68, is the chairperson of the Elambini Community. He lives at Mandawe Mission and sells medical equipment. He testified that the purpose of forming the Elambini Community was to claim back the land. The community is made up of 23 families who originally resided at Elambini, the name by which the land claimed is known. They are currently scattered all over.

[33] Mr Dube did not have personal knowledge about the community when they lived on the claimed land. He heard that around 1913 they were living as a community with livestock and were farming. They intermarried, went hunting and fishing and held traditional ceremonies. The graves of their forefathers, he said, are located on the claimed land. These were hard to find because of the farming that had taken place.

[34] He referred to three zones on the claimed land, the Mtikatika Zone where the Sabela family lived, the Govela Zone where the Mlaba family lived, and the Manto Zone where the Ntaka family lived. He could not say where precisely these zones were. He was told that people were removed, by the Crookes family because sugar was going to be planted there and they were "dirtying the sea." He was very tentative about the dates of the removals.

[35] The Mission Reserve came about as a result of their removal. Some people returned to the farms they were removed from, looking for jobs. The Mthethwa and Khoma families got jobs, and were given land to build houses on. Residents were not allowed to stay on the farms if they did not work.

[36] Mr Dube was somewhat vague about where his forebears had lived. After much prodding he said they had lived around Clansthal Station. However, he also said they had lived at the Elambini lighthouse. During the Inspection in loco, he however pointed out two different areas as being where they had lived.

[37] At blue point 6, which is Crocworld, he pointed to the sugar cane fields across the road and said that his family and various other families had lived there. This area is depicted in photograph 6.1[1]. This, he said, was part of Elambini. The undisputed evidence, as appears below, of the Defendants' aerial photography and map expert, Mr Gerber, was that the lighthouse falls slightly outside the claimed area and is about 1 km from Crockworld. It is 2.3 km from Clansthal Station. Mr Dube's pointing out at blue point 6 is thus not in sync with his testimony in Court.

[38] At blue point 9, located on the Pegma property, Mr Dube pointed to a mountain on the property and said his grandfather had told him he owned the land between this mountain and the Amahlongwana River to the north. This area is depicted on photographs 9.1 and 9.2[2]. The unchallenged evidence of Mr David Crookes was that neither he nor Mrs Blamey, who had lived most of her life on the farm, knew of any Dubes who had lived there. Mr Crookes did not know the zones Mr Dube referred to. The unchallenged evidence of Mr Gerber is that it is a distance of 1,73km from blue point 9 to the edge of the river and the greatest portion indicated by Mr Dube falls outside the claimed land. This, and the discrepancies between the locations in Mr Dube's oral testimony when juxtaposed against his pointings out, and the vagueness as to when the alleged dispossession occurred, renders his evidence unreliable.

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[1] Trial Bundle E page 53
[2] Ibid pages 58 A and 59

Michael Velaphi Msani

[39] Mr Msani said his grandfather had lived on Freeland Park and his father was born there. It is common cause that Freeland Park is outside the claimed land. He too, said they had formed the Elambini community to claim back their land. Elambini, he said, consists of Freeland Park, Ezikaweni, Amahlongwa, and Mahlongwana and includes Crocworld and Clansthal. There are family graves that he last visited in 1968. Their cattle used to roam around, grazing at Crocworld.

[40] He said the family had moved from the farm Mandawe, otherwise known as Mahlongwa, which was owned by the Crookes family. They had left in 1958 because his father did not want to work on the farm. However, contrary to his evidence that the family had lived on "Crookes land", at the Inspection in loco, from blue point 4 Mr Msani pointed to an area down a steep hill as being where his family had lived. The undisputed evidence of David Crookes, as appears below, when shown photographs 4.1 and 4.2 of what was pointed out, is that this area is in the Amahlongwa Reserve, which is outside the claimed land.

[41] This was probably so, according to the unchallenged evidence of aerial photography expert, Mr Gerber, who in addition stated that the area pointed out by Mr Msani at blu point 3, being between the R102 and the sea, was outside the claimed land. Mr Crookes was not aware of the owner of the land, named by Mr Msani as Mashangawe.

[42] The material discrepancies in the evidence of Mr Msani, renders his evidence unreliable. The claim he advances can in any event not be entertained, as his pointing out depicts that his family lived outside the claimed land. The evidence of both Messrs David Crookes and Gerber that this is so, was, as aforementioned, not at all challenged, and therefore stands.

Sandri Zinya

[43] Mr Zinya, born in 1942, said he had lived on a farm called Kwa Njangano. He and his forebears were born on Crookes land. They ploughed the land and his grandfather had about 50 cows. They had to leave in 1953 when a white man called Mabengwana told them the land was going to be used to farm sugar cane, and had been bought by the Crookes. They had to sell their cows very cheaply. They lived and worked close to their neighbours, the Mthethwas and the Khomas. Their chief was Shokweni Cele. They had been to visit graves in the 1950's, but were told never to come back.

Alice Khoma

[44] Alice Khoma was born in 1932 and said she grew up on the farm "KwaJohn" (Mr David Crookes confirmed that this was the colloquial name for Finningley). Both her husband and father had worked on the farm. Their homestead was very big. They had cropping and grazing land. They had lived as one together with other families, with names Mbuthweni, Sabela, Duma, Xaba, Mafolo, Mabodwa. Their place of residence was near where the Zinyas stayed.

[45] Her family was told to leave as they had cattle and the owner wanted to use the land for cultivating sugar cane and did not want livestock on the farm. She was a young woman when the families were chased off the farm. They left as they were told to either sell or eat their cattle. They all left around the same time.

Thandukwazi Robert Dube

[46] Mr Dube was born in 1952. He was told by his grandfather that his forebears farmed many cattle in an area around Clansthal, called Ulwandle, close to the sea. They were forcibly removed by the Crookes. They had lots of cattle and farmed with others as a community. They were told to leave by white

men in camouflage who had guns. The land belonged to the Crookes, who told them to either work for them, in which case they had to significantly decrease their cattle, or get off the land. This happened around 1913.

[47] The undisputed evidence of Mr David Crookes was that Clansthal is outside the claimed land, and that nobody was removed in the manner described by Mr Dube. The term Ulwandle, he said, was a reference to the sea.

Sikhosiphi Kelly Ntaka

[48] Ms Ntaka, aged 61, was born in the Amahlongwana Reserve. She said her forebears had lived on "Crookes farm" at a place called Elambini. Her forebears came there in the 1860's, running away from Shaka. The Majolas, Mkhizes and Dubes had also lived there. Around 1912 they were forced to move off the land where they had cattle, grew crops, and hunted. The witness referred to the Immigration Act, which according to her, stated that black people were not allowed to live near the sea. She said if you refused to leave, the whites would take your livestock as they wanted to cultivate the land. On Ms Ntaka's version the removal occurred in 1912, which is before the threshold date of 1913 required by the Act for a valid restitution claim. Her evidence thus does not advance the Plaintiff's claim.

Sithembize Mkhize

[49] Mr Mkhize, aged 50, was born in Amahlongwana. His grandfather informed him that his family lived on "Crookes farm", farming livestock and crops, and were removed during the period of racial discrimination. When this happened, he could not say. His grandfather told him that the Crookes assaulted his family with guns and told them they had to move or work on the farm. His family refused to work for the Crookes because they could not work for someone else on their own land. They were told if they wanted to remain they

had to work on the farm and reduce their livestock. His forebears were buried there, but it would be difficult to point out graves as there are fields there.

[50] Given the vague nature of Mr Mkhize's hearsay evidence, and the absence of evidence that the alleged dispossession occurred after 1913, his evidence does little to advance the Plaintiff's claim.

Clifford Khehla Vundla

[51] Mr Vundla, a teacher aged 51, was cited as the Fourth Plaintiff as representative of his brother's estate. As aforementioned this is no longer an individual claim but falls under the community claim. The claim lodged by his brother, he said, was in respect of the land forcibly taken from them at Clansthal, Elambini and Crocworld. The Lighthouse referred to on the claim form is right next to Crocworld. Whilst living at Crocworld, they inter-married, shared crops and had cows.

[52] His grandfather told him that white people came on horses, with guns, and told them that black people were not allowed to stay there, because they made the sea dirty. His grandfather told them never to forget 1913 as that was the year that most removals took place. Some returned looking for work as they were destitute.

[53] Whilst Mr Vundla's claim form recorded "Lighthouse" and "Crockworld" as the land he was dispossessed of and this was confirmed during his evidence in chief, at the Inspection in loco, from blue point 2 Mr Vundla pointed to two sites in Freeland Park, which is outside the claimed land, as being where his family had lived. The first of these is where a development Jesslyn Mews now stands (photo 2.1), which he said was where the family kraal had been. The second site was across the P118 road at a sign marked "Coconut Village", where he said his grandfather was buried and where the family cropped. The

unchallenged evidence of both Mr David Crookes and expert Mr Gerber is that these sites fall outside the claimed area. Mr Crookes testified that Freeland Park was started in 1950.

[54] With reference to Mr Vundla's claim form, which indicates that the Government acquired the land in 1952, Mr Crookes suggested this might have been because of the township development of Freeland Park at the time. It is also clear from the map Annexure "E62" that the sites pointed out by Mr Vundla is outside the claimed land. In the circumstances Mr Vundla's evidence does not advance the Plaintiff's claim.

Sibongiseni Julius Shozi

[55] Mr Shozi, aged 51, is a teacher born at Amahlongwa. He testified that the area where his family had lived, was next to the Clansthal Station. His grandfather told him that he was born in 1908 and that in 1920 Samuel Crookes and his sons told them they had to leave because they, (the Crookes family) had bought the land.

[56] It is common cause that Clansthal Station is outside the claimed land. This was confirmed by the unchallenged evidence of the expert, Mr Gerber. Mr Shozi's evidence cannot, in the circumstances, assist the Plaintiff's claim.

Mduduzi Edgar Sibiya

[57] Mr Sibiya, aged 71, lives at Amahlongwa Mission Reserve. He said his forbears had lived at the lighthouse. They were forced to leave at gunpoint. He did not know when this happened, but they left between 1913 and 1914. Mr Sibiya did not participate in the pointing out, and so was unable to give further context to his testimony.

Mzwandile Knowledge Fortune Mlaba

[58] Mr Mhlaba is 36 years old and the grandson of one of the original claimants who lodged a claim form on behalf of the Plaintiff, Minini Livingstone Mlaba, who died in 2010. The witness was born at Amahlongwa Reserve where he still resides. His grandfather, he said, was the person dispossessed and he was born at Elambini in 1929. However, he claimed his grandfather was chased away by white people in 1913 and 1914, an impossibility, on his own version of his grandfather's birth date. During cross examination he could not satisfactorily explain why the year 1909 is reflected as the date of dispossession in paragraph 2.17 of the claim form.

[59] The claim form describes the land dispossessed as "Umkomaas Fenglen Farm –Renishaw John Crookes". When asked to explain this, he stated "all I know is that they used to stay there and then white people came in and chased them away from their place".

[60] The undisputed evidence of Mr David Crookes is that the farms referred to on the claim form, were the Crookes-owned farms Renishaw and Glen Cliff, both of which are outside the claimed area. The description thus accords with other Crookes farms and not the claimed land. This and the unexplained discrepancies in dates does not advance the Plaintiff's claim.

Swenka Norman Myeza

[61] Mr Myeza, aged 67, currently lives in Umlazi. His father and grandfather were born at Ngcongweni, which later became Freeland Park. It is common cause that this is outside the claimed area. A few families stayed with them, working the fields and grazing cows. He said whites came with papers and told them that they must leave, which they did.

[62] During the Inspection in loco, the pointing out by Mr Myeza as to where his family lived, were from blue points 2 and 3. The unchallenged evidence of expert witness Mr Gerber, is that these were two totally different tracts of land in diagonally opposite directions. At blue point 2 Mr Myeza pointed north east from Jesslyn Mews, Freeland Park, to the area depicted in photograph 123. The unchallenged evidence of Mr David Crookes and Mr Gerber was that this area was outside the claimed land. Mr Gerber said no structures could be located at either blue points 2 or 3, where Mr Myeza said his family had resided.

[63] Contrary to this, at blue point 3, from the water tower, Mr Myeza pointed generally to the south west across the road P118 to the area in photograph 124, as where the family had lived. No explanation was provided for these discrepancies, which adversely reflects on the version of Mr Myeza.

Tito Ndlovu

[64] Mr Ndlovu, aged 58 and currently studying for a master's degree, was born at Amahlongwa. His family had resided at KwaJohn, the colloquial name for Finningley Estate. Also living there, he said, were the Ntaka, Majola and Shozi families, who are also claimants. They were told in 1912/ 1913 with the coming of the white farmers, that they would need to leave otherwise their cows would be confiscated. At a later stage those who were left behind were forcibly removed.

[65] He further said that people on horses had expelled them after they were told their cows would be killed. They had lived as a community and intermarried. The Elambini Community, he too said, was formed to ventilate their claims.

[66] They had a lot of cattle and they cultivated crops as a community. The size of their plots was around a square kilometre, like a soccer field or small

rugby field. During cross examination he said that the community could have had exclusive use of the property, meaning it had its own rules and did not live under white rules. If restored, they would like to use the coastal land for business ventures such as fish farming and processing. Some claimants, he said, want between 15 and 20 hectares and some want between 20 and 25 which means an average of 20 hectares per family.

Bekani Stanley Majola

[67] Mr Majola, aged 52, was cited initially as the Fifth Plaintiff. As aforementioned he no longer claims as an individual, but as a member of the community. He testified also on behalf of Edward Mncedgwa Majola, cited initially as the Second Plaintiff, who has had a stroke. The latter's claim form describes the farms they were removed from as Elambini, Mhlongohlongo and Crocworld and the date of removal as in the 1940's. Mr Majola however testified that the removal was in 1920. Mr David Crookes, commenting on this claim form, said he did not know a place called Mhlongohlongo.

[68] Mr Majola was told by his grandmother that his grandfather had lived at Crocworld around the lighthouse, Elambini, with other families. They ploughed and had livestock and did traditional ceremonies and social events. They lived as a community with their neighbours.

[69] They were chased away by white men on horses, because they were going to start planting sugar cane. They had to leave with all their livestock. They were told it was the law that they must move. Their land was between 20 and 25 hectares in extent.

[70] During the Inspection in loco Mr Majola pointed out from blue point 8, the Lighthouse Viewing Point. Mr Majola pointed out towards the Greenpoint lighthouse and said his family had lived right next to the lighthouse and had

their cemetery there. He testified that "Mr David" used to live in one house at the lighthouse. Mr David Crookes testified that he had lived at the lighthouse during 1970 to 1980, but denied that Mr Majola or any other families had lived there. According to Mr Crookes the only other person who lived at the lighthouse was the caretaker.

[71] Contrary to the evidence of Mr Majola, the validation report in respect of the two Majola claims, prepared by the Commission, states at paragraph 6.2 that the Majolas were removed from Freeland Park, which is an area outside the claimed land and not near the Lighthouse. The evidence of Mr David Crookes was that the distance between the Lighthouse and Freeland Park is between 2 to 3 km as the crow flies. The validation report, it would appear, also refers to the Majolas being moved from Crocworld, which Mr Crookes testified was a kilometre away from the lighthouse.

Other Pointings Out during the Inspection in Loco

[72] **Blue Point 1: Southern Lighthouse**

This does not fall within the claimed land and the claimants present said this was not the lighthouse they were referring to.

Blue Point 5: Mbambo Pointing Out

Mr Mbambo pointed in the direction of the sea, and said from the small stream down to the Amahlongwa River is the site of his family lands. He did not testify.

Blue Point 7: West over the highway towards Finningley Estate

The Finningley Estate land was pointed out as where various families had lived.

Evidence for the Third to Seventh Defendants

[73] Seven witnesses testified on behalf of the Third to Seventh Defendants. These were two members of the Crookes family, Messrs David and Douglas Crookes, Mr Philip Barker, the managing director of Renishaw Property

Developments, a subsidiary of Crookes Brothers Limited, Mrs Bridget Delport, a resident on the Pegma property, and three expert witnesses, being Anthropologist and Historian, Dr Whelan, Aerial Photographer, Mr Gerber, and Conveyancer, Mr Harrison.

David Colin John Crookes

[74] Mr David Crookes is the great grandson of Samuel Crookes, the patriarch of the Crookes family and its sugar farming industry. His father was Colin Crookes, and his grandfather was John Joshua Crookes. His grandfather as aforementioned, farmed on Clansthal, the second parent property which became Finningley Estate. Mr Crookes was born in 1945 in Scottburgh and grew up on Finningley Estate. Mr Crookes has lived there for most of his life, except for 5 years when he studied BSc. Agricultural Economy at University in Pietermaritzburg. Mr Crookes testified as follows about the farming operations on Finningley Estates and Lot 1, the Crookes Brothers Limited properties and the general developments thereon.

[75] The labour on both farms comprised of migrant workers recruited from Transkei /Pondoland, Indian indentured labourers and local people. The latter were allowed to live in kraals on a portion of the farms, provided that they worked on the farms. The labourers from Pondoland lived in a hostel and the Indian workers lived in their own houses. Farm workers were paid monthly in cash and given a food ration. The relationship his family had with African labourers on the farm was an employer/employee relationship. There were no rent paying tenants and labour tenancy was not practiced on the Crookes farms. Mr Crookes emphasised that the condition for living on the farm was working on the farm. If workers found employment elsewhere they were obliged to move off the farm. In his time he was not aware of anyone being put off the farm for not wanting to work.

[76] With reference to map "E62" annexed to this judgment, Mr Crookes pointed to areas marked in pink as 11, 12 and 14, outside the claimed land, as the sites of the homesteads where labourers lived. He recalled two families living on the farm to be the Mthethwas and Khomos. In the 1970's families living here were moved to brick houses in the middle of Finningley Estate and provided with electricity. The area where they had formerly lived was planted with sugarcane.

[77] From 1970 to 1980 Mr Crookes had lived in one of three houses at the Green Point Lighthouse, marked as green point 4 on the map "E62". He said no member of the local population occupied any area around the lighthouse. The lighthouse, he said, had been built in 1905.

[78] In 1985 the development Crocworld, marked as green point 1 on the map "E62", was built. Crocworld was developed by Crookes Brothers Limited to rear crocodiles for their skins. Mr Crookes was not aware of any African families who were resident in the vicinity of 100 to 200 metres around Crocworld in 1985. The environmental impact assessment, which preceded the construction of Crocworld, revealed no graves or remnants of kraals on the site. The area where Crocworld was constructed had been half bush and half under cane.

[79] During all the years that he lived on Finningley Estate he was not aware of a community called Elambini Community. He had heard of this community for the first time with the institution of their land claim. He was adamant that

there was no community residing on Finningley, Lot 1 or the Pegma owned land, which had shared rules giving access to land.

[80] Mr Crookes' evidence about the pointings out at the Inspection in loco has already been set out in the section above dealing with the evidence of the Plaintiff. A few of his further observations are recorded below:

80.1 Point 1 of the minutes of the Inspection *in loco* is referred to as the Southern Lighthouse. Mr Crookes explained that in Zulu a lighthouse is known as "elambini". He testified about the various lighthouses in the area and suggested that witnesses, who testified about their forefathers living at the lighthouse that was dismantled, could have been referring to the Scottburgh Lighthouse, which had been dismantled. Subsequently, the Green Point Lighthouse was built. With reference to map "E62", he located the Northern and Southern Lighthouses. The Green Point Lighthouse is marked as green No. 4 on map "E62". He said that the witnesses who testified about living at this lighthouse could have lived at either of the other lighthouses which are not on the claimed land.

80.2 In respect of the pointing out from blue point 7 to an area in the direction of the homestead on Finningley Estate, where it was alleged the Ntaka, Shozi, Gumede, Zinya, Mthethwa, Khomo, Khuzwayo and Ndlovu families lived, Mr Crookes stated that the Ntaka, Mthethwa and Khomo families are still living on the farm. They had lived at pink points 11 and 12 on map "E62", which is outside the claimed land. They had been later relocated to live on the farm in brick houses. It was Mr Crookes' recollection that the family Zinya had lived off the farm.

80.3 Mr Crookes had accompanied some of the claimants and the Commissioner to a 2006 inspection when graves were pointed out. He testified that the graves are outside the claimed land at pink points 11 and

12 on map "E62" and that they were the graves of the Mthethwa and Khomo families who worked on the farm.

[81] The Finningley wage books, said Mr Crookes, have been discovered and they date back to 1922. He observed that the wage books have names of workers similar to some of the claimants who had testified.

[82] Mr Crookes was referred to the report by Professor Delius, commissioned on behalf of the Plaintiff. He agreed with the report. He was referred to the statement in Doctor Whelan's supplementary report, that there is no published or archival evidence of people on the properties in question being evicted as a result of racial based legislation from 1913 onwards. He said the absence of such evictions accorded with his knowledge.

[83] During cross-examination it was put to Mr Crookes that the description "Fenglen", in the claim form of Mr Majola, sounded like Finningley. He said it was a bit of a stretch, but that one could say yes. He however added that everyone knows the farm as Finningley or Kwajona or Kwajoe.

Douglas John Crookes

[84] Mr Douglas John Crookes, aged 77, is another great grandson of the patriarch Samuel Crookes. His father was Duncan Crookes and his grandfather John Joshua Crookes. He was the managing director of Crookes Brothers from 1980 to 2006, during which time Crocworld was developed. He testified that Crocworld was developed without disturbing any of the indigenous bush, on an area immediately adjacent to the coastal bush, on what used to be cane land. Nobody ever lived on what is now Crocworld. He too said that during the

excavation for Crocworld the developers did not come across any remnants of kraals.

[85] He confirmed the evidence of his cousin, David Crookes, pertaining to the labour practices on the farm, namely that only persons working on the farm could live there. He was adamant that no community had lived on the farms, nor at Clansthal Station. He too had never heard of the Elambini Community until the land claim was launched. He knows of no one that his grandfather threw off the Crookes farms.

[86] Finally he said that there were no areas on the farms where indigenous people could share grazing, cropping or could occupy the land without the intervention of either his father or grandfather.

Bridgette Gillian Delport

[87] Mrs Delport is the granddaughter of Alfred Blamey, a former owner of portions 2 and 3 of Clansthal. These portions are currently owned by the Seventh and Sixth Defendants respectively. Mrs Delport, who was born in 1935, has lived on Clansthal all her life and still lives there, close to Clansthal Station. After her grandfather, her father owned the farm. Sugarcane was actively cultivated and apart from African employees who lived in a workers' compound, no other African families lived on the farm. Mrs Delport had never heard of African people ever living near Clansthal Station. Her father's unpublished book, "Blamey Memoirs" makes no mention of African people living at or near the station.

Johannes Adolf Gerber

[88] Mr Gerber is an expert at interpreting aerial photography. He was trained as an aerial photography analyst in the South African National Defence Force in

1990, and subsequently worked at the Joint Air Reconnaissance Intelligence Centre at Airforce Base Waterkloof. He was in charge of handling all aerial photography, satellite imagery and video data for the South African Defence Force, and has international experience. He is trained in cartography.

[89] Mr Gerber testified about the area under claim with reference to aerial photographs, taken in 1937, from the Surveyor-General's office in Cape Town. He comprehensively explained the methodology applied and explained how mosaics of aerial photographs are compiled. The 2 maps he used in his evidence were "D1", being a mosaic of 1937 photos, and the map "E62" annexed, which is a 2013 image.

[90] He explained that as part of the analysis of imagery it is important to examine "scarring" that would be left after human interference in a natural state. Typically the way we identify if humans have been in a certain area is by looking for historical evidence of the movement of people. Humans impact an area by leaving visual scars that can be identified from the photography, for example foot paths, vehicle paths, roads, evidence of farming, and evidence of structures.

[91] He indicated that all the portions of land reflected in the Government Gazette, and which constituted the claimed land, fell within the yellow boundaries on maps "D1" and "E62", excluding Portion 36 of Lot 1, which was not coloured with a yellow boundary around it.

[92] He explained and confirmed that on the map "E62" the numbered points in blue refer to the June 2016 Inspection in loco attended by the court and the parties. The points in pink on "E62", he stated, referred to an earlier inspection in loco conducted in 2006. He confirmed the points in pink and blue as corresponding with the relevant GPS readings taken during the inspections.

[93] He then focused primarily on the blue points depicting the Inspection in loco, and addressed each of those spots marked in blue on the map "E62" as at 1937. His observations on many of the pointings-out by the witnesses during the Inspection in loco have been referred to in the section above, dealing with the claimants' evidence. The following aspects are emphasised:

93.1 At blue point 2, which was pointed out by, *inter alia*, Mr Vundla, he found evidence of structures and farm buildings in the general vicinity. The structures accorded with what Mr Vundla explained and was consistent with his alleged date of dispossession being 1952. There was no evidence of cropping land in the area across the road in a north-easterly direction from point 2, which Mr Vundla had pointed out as being where his family had planted crops. He stated in any event that the area pointed out by Mr Vundla from blue point 2 fell outside the claimed area.

93.2 At blue points 2 and 3, where Mr Myeza pointed out areas where his family allegedly lived, Mr Gerber found no evidence there of any residences or structures. These areas in any event, he stated, fell outside the claimed land and were in diagonally opposite directions.

93.3 At blue point 4, Mr Msani pointed to an area which was probably outside the claimed area. Although Mr Gerber found four structures in the general vicinity on the 1937 aerial photograph, none of these could

have been the Msani structures, as according to the evidence of Mr Msani his family was living in Freeland Park at that time.

93.4 At blue point 6, which is Crocworld, there were no structures visible on the 1937 aerial photograph.

93.5 At blue point 7 Mr Gerber confirmed that the staff accommodation pointed to, in the direction of the Crookes house at Finningley Estate, appeared at pink points 11 and 12 on map "E62". Mr Gerber found evidence of structures at pink points 11 and 12 where Mr Crookes testified the staff had stayed. These points are outside the claimed land.

[94] During cross-examination Mr Gerber conceded that he could only comment on the physical evidence, as of 1937, from his aerial photos. It is possible he said, that at some stage before 1937 there was someone present on the claimed land, but with the cultivation of sugar there was no way to tell.

Duncan Stewart Harrison

[95] Mr Harrison is a duly admitted attorney, conveyancer and notary since March 1995 and a director of Tatham Wilks & Company, Pietermaritzburg since 2000. He confirmed, as per his conveyancing certificate, that Clansthal and Lot 1 were the parent properties of the properties claimed and published in the Government Gazette. He traced the various transactions relating to the claimed properties, as recorded in the land register.

[96] Mr Harrison had perused the title deeds of the parent properties and had found no endorsements reflecting expropriations as a consequence of racially discriminatory laws. The only endorsements of expropriation were for road constructions, the construction of a lighthouse, a railway, a water tank and other

utilities. None of the properties, he testified, were owned by any other entities or persons than those reflected in his certificates.

Phillip John Barker

[97] Mr Phillip John Barker is currently the managing director of Renishaw Property Developments, a subsidiary of Crookes Brothers Limited. He has a long association with the company, having initially worked as an accountant there since 1985. He was a director of the company during 2010 to 2016. Crookes Brothers Limited was incorporated on the stock exchange in 1948. Renishaw (Pty) Limited was incorporated in 2009 and got approval to develop 1434 hectares. The development stretches from Clansthal in the north to Scottburgh in the south. There is community involvement in the project which includes a mall, hospital, school, wharehousing and factories. The property development, except for on the claimed area, had already commenced. The land claim was holding back the development.

[98] Mr Barker also testified that during the construction of Crocworld, no remnants of kraals or graves were found, nor were there any African people living within a kilometre or so around the area where Crocworld was constructed. The site, he said, was under sugar cultivation and bush. Mr Barker, too, said he had never encountered the Elambini community until this case was launched.

[99] Mr Barker explained that Crookes Brothers Limited was involved in various transformation efforts and that one of the values of Crookes Brothers, and its stated vision statement, was to work to support efforts for transformation of the agricultural sector in South Africa. In this regard he referred to various joint ventures with communities.

Doctor Deborah Whelan

[100] Doctor Whelan holds the degrees Bachelor of Architecture, Master of Architecture, Bachelor of Arts (majoring in Anthropology, Archaeology and English) and a PhD in Anthropology. Formerly a Professor at Durban University of Technology, she is currently a senior lecturer at the University of Lincoln in the U.K and goes by the title of Doctor. She is also a consultant at Archaic Consulting, carrying out research work in the land investigation and heritage impact fields. Dr Whelan, as an experienced researcher, has researched about 50 land claims and has previously testified as a land claim expert. Dr Whelan was requested by the Third to Seventh Defendants to prepare a report on the veracity of the Plaintiff's claim. Her report titled, "*Historical and Anthropological Report on the Elambini Claim, Crocworld, Scottburgh Area, KwaZulu- Natal*", was written in February 2016 under the auspices of Archaic Consulting.

[101] In preparing her report, Dr Whelan consulted land registers at the Kwa-Zulu Natal Provincial Deeds Office, archival material, old topocadastral maps and surveyor-general compilations. The Crookes family papers and a seminal book on the Crookes family, "Renishaw", written by Anthony Hocking in 1992, were also consulted

[102] In the executive summary of her report Dr Whelan states[3]:

> "History finds the Cele people settled along the Mpabinyoni River having moved south from the Umvoti River. At the time of Wilhelm Bleek there were some 190 households settled along the banks of the Mpabinyoni between 1849 and 1853. In 1860 a portion of land was granted to the American Zulu Missions and in 1862 lands around it were transferred by the crown into the Natal Native Trust and named the Amahlongwa Mission Reserve, home to Cele and Zembe people which were also

[3] Page 3 main report by Doctor Whelan

> resident in the adjacent location no.1. The Mission Reserve was governed by regulations which included the payment of rents. The boundaries of the Mission Reserve did not change from the outset until 1997 when the adjacent Cele Location was sutured with a substantial portion of the old Mission Reserve
>
> The claimed properties were held in secure tenure by the time of the passing of the Native Land Act in 1913, having been granted in the 1850's. They were intensely farmed under sugar by the turn of the twentieth century and as such would have consolidated labour, normally seasonal into distinct areas of the property which were later turned into compounds. The Crookes family is a significant feature of this settlement and agriculturalisation, rapidly purchasing properties around the Amahlongwa Mission Reserve between the 1880s and 1925."

According to Dr Whelan people were motivated to apply to live in the Reserve because they got access to land through the Reserve.

[103 Under a heading "*Historical Residence in the District*", Dr Whelan[4] records what Bleek, an ethnologist who travelled through Natal in the 1850's, recorded in his book *"The Natal Diaries of Dr. W.H.I. Bleek"*. She states:

> "William Bleek records of the aboriginal groups in the mid-19th century that a section of the AmaCele resided at 'Umpambinyoni, both banks close to the sea'. He notes the chief in 1849 and also in 1853 as being Sicuban who had under him some 190 adherent homesteads."

[104] Some time was spent during Dr Whelan's testimony focusing on the 190 homesteads observed by Bleek, in relation to the claimed land and the forbears of the claimant community.

[105] In contextualising Bleek's recordal, Dr Whelan said his observations have to be seen in the light of what appears in the book "*Valiant Harvest The Founding of The South African Sugar Industry 1848 – 1926*" by Robert S Osborne. There on page 320 it is recorded that by 1861, one John Robertson

[4] At page 8 paragraph 5

had written that at the head of the lagoon at Mpambinyoni there were 50 acres of sugar cane, and by 1870 sugar had been planted near the mouth of the river. Robertson made no reference to persons occupying the banks of the river. In addition she noted that the township development of Scottburgh on the southern bank of the river commenced in 1861.

[106] Dr Whelan referred also to Hocking, the author of "*Renishaw*", the book about the Crookes family. Hocking recorded that in 1857 "the region was empty but for a scattering of kraals,...". Hocking's recordal, she said, tallies with her archival research and the published records.

[107] She concluded from the subsequent recordings of Robertson and Hocking, and the development of Scottburgh in 1861, that the occupiers of the 190 homesteads referred to by Bleek would have left by 1861. She added that the 190 huts referred to by Bleek would not have been on Clansthal, which is quite a distance from the Mpambinyoni River.

[108] During cross examination on this aspect, she clarified that the portion of the claimed land next to the river is too small an area to have accommodated these 190 homesteads. She testified that from the surnames of the 23 families comprising the claimant community, names which are generally found in other parts of the province and are not necessarily Cele associated, she did not suspect they were descendants of the occupants of the 190 homesteads. She had no idea what had happened to the occupants mentioned by Bleek and Hocking, but referred to the documentary evidence that over time people had moved on a piecemeal basis into the Amahlongwa Reserve. This, she noted, was corroborated in the report of Professor Delius.

[109] Dr Whelan testified about a surveyor's document[5],with the title, "*Report on the Land Measured*", which was given to Schwikkard in 1852 when Clansthal was acquired by him. She explained it was the practice at the time to measure land allocated and that she had had sight of several similar documents containing information recorded by the surveyor. She commented in particular about the question posed at paragraph 9 of the document as to "whether any natives reside on the land, and if so how many, for what length of time and under what circumstances". The handwritten response next to that question, she initially suggested, in keeping with stock responses in other similar documents, was "several". On looking at the document again she said, it could very easily be "removed" as was put to her by Mr De Wet.

[110] She added that, whatever the recordal was, if there were African people on his land they were there at the grace of Schwikkard who was the owner. Occasionally, she said, some earlier settlers requested people to remain on the land in order for there to be access to rental tenancies or a pool of labour. From very early on there was the notion of the landowner being in control and those staying on the land being at his mercy.

[111] She quoted Professor John Lambert who she called a specialist in the history of Natal, late 19th century, as stating that in the 1880's the farmers,

"accepted that the land could only be beneficially owned if it was farmed by white men. The only position to which an African was entitled to on the land was that of a servant, certainly not that of an independent tenant."[6]

[112] Dr Whelan further noted[7], citing Lambert, that Ordinance 2 of 1855, commonly known as the Squatter Act, permitted a landowner to have a maximum of 3 families living on the land - more than this would mean that the landowner would have to enter into labour agreements with them, and submit

[5] page 65 Ibid
[6] (Lambert 1986:91)
[7] Page 21 Whelan Main Report

annual tax returns. During cross examination Dr Whelan emphasised that she had found no tax returns in respect of the land under claim.

[113] She noted further that evictions of such occupants would require legal notice periods and recourse through a magistrate. Due process was thus called for and there would be magisterial records of evictions. She said she had found no magisterial records relating to evictions on the claimed land, government sponsored or otherwise. Had there been evictions from the claimed land there would have been records of such evictions, Dr Whelan said, adding that there is reasonable documentation and archival material of government sponsored evictions. She referred to a list of removals in the Umzinto area documented by the Surplus People's Project. She was absolutely certain that in terms of officially sanctioned evictions, she had covered all bases available to her. In another claim in Zululand she was able to find clear references in the archives to magisterial evictions.

[114] In a supplementary report, Dr Whelan notes salient recordings from the 1904 Statistical Yearbook for "Alexandra County", the former name of the area covering most of Southern Kwa-Zulu Natal, including the claimed land. The Year Book records 38 white labourers as overseers, 663 African labourers and 1896 Indians employed in the County. It is also recorded:

> "The Magistrate Blue Book of 1898 refers to Alexandra County having some 7500 natives living on white owned land, paying an annual rent on 1750 huts of between 20s and 50s per dwelling."[8]

About the extent of farming, by 1910, she adds there were about 3300 hectares of Crookes-owned land under cane. She summarises:

> "People living on these properties appear as rent paying tenants, as was the convention in this district. Further, those that were employed were paid wages. This

[8] Page 3 Trial Bundle E

> northern section of Alexandra County was productive from the 1860's onwards, and certainly by the time of the Census in 1904 was relatively intensely farmed."

[115] Doctor Whelan was asked to comment on the report of historian, Professor Delius, commissioned by the Plaintiff. She knew of Prof Delius, who she described as being part of a "cohort of Marxist historians from the 70's and 80's who sought aggressively to address the very conventional histories which had been trundled out about white colonial settlements in Natal colony". Dr Whelan endorsed the Delius report which she said tallied with her findings. During cross examination Mr Chiti for the Plaintiff asked her to comment on Professor Delius' statement that his conclusions were tentative. She understood this to relate to Delius' frustration at not being provided with proper documentation and the salient facts. She added that Professor Delius is a very competent historian at being able to find the right information.

[116] In re-examination she was pointed to the last sentence in the Delius Report:

"Such an exercise might have been possible if individual claims had been lodged and researched immediately after 1998, but whether it is feasible now is doubtful and it is certainly far beyond the scope of this report."

She tended to agree. She agreed also that what he saw on the claim papers and the case report from the Commission, was nowhere near what he got from his own investigators who interviewed the members of the community.

[117] Dr Whelan was cross examined about a reference in her report to a statement[9] by N. J .Van Warmelo, Government Ethnologist, who noted in 1935:

> "The Mission Reserve is densely populated whilst the farmland between the Mission Reserve and the ocean is thinly occupied by African people. (Van Warmelo 1935: map 9). The Cele people under Tshonkweni numbered some 555 on farmland in the area and the same number in location lands."

[9] Page 9 Whelan main report

[118] Dr Whelan contextualised these numbers with reference to an extract from a publication of the Department of Native Affairs, "*A Preliminary Survey of the Bantu Tribes of South Africa*" by N. J .Van Warmelo[10], and a 1935 map by Van Warmelo with boundaries of Clansthal and Lot 1 superimposed[11]. From these documents she explained that the number 555 was in fact a reference to the total number of poll tax paying men in Umzinto in February 1933. From the markings on the 1935 map of Van Warmelo, with boundaries of Clansthal and Lot 1 superimposed thereon, she testified that in 1935 there were 30 tax payers who were reflected as being on Lot1 and Clansthal. These were male persons over the age of 18 who were required to pay poll tax. These taxpayers may well have been employees on the claimed land and could have been forbears of the claimants.

[119] During cross examination, when asked if the persons demarcated by the dots could have been a community, she said they could have formed a social community, but not a community as defined in the Act. Certainly by the time the dots were recorded in 1935 these occupants would have been subjected to the rules of the landowners on the claimed lands.

[120] Commenting on the referral report by the Land Claims Commission, Dr Whelan stated that the archival material relied upon by the referral report was incomplete.

[121] Finally, Dr Whelan noted[12] that from the 1937 and 1959 aerial photographs, which she scrutinised for homestead occupation:

> "Certainly by 1937, the properties in question were largely under sugar-cane, and there is little evidence on the parent farms Lot 1 and Clansthal of individual homesteads."

[10] Trial bundle C page 66A
[11] Trial Bundle F page 49
[12] Ibid page 26

She goes on to state that the 1937 aerial photographs reveal four possible homestead sites, of which, by 1959, one could have been affected by the construction of the R102, in 1952, with expropriation by Government. A possible homestead site is located in the area now known as the Freeland Park, and it is still extant in 1959. This could have been a removal by the Scottburgh Town Council in the 1960s. Possible homesteads, or remains thereof, on Subdivision 138 (Finningley) are unclear on the 1959 maps. A possible homestead on Clansthal 16649 appears extant on the 1959 map. During cross examination she said that if removals had taken place in 1914, it could be "a bit of a stretch" to find relics of settlement.

The report of Professor Delius.

[122] As aforementioned, a report was obtained from Professor Delius, by the Plaintiff, and was only filed after its discovery was repeatedly called for. As Professor Delius was not called as a witness for the Plaintiff, there was some debate as to the evidential weight to be attached to his report. There was, however, consensus that I could accept Doctor Whelan's evidence on the Delius report. Doctor Whelan, as aforementioned, agreed with and endorsed the Delius report and said it accorded with her findings. She thus corroborated his report. Professor Delius' report is clearly one of an objective expert, as is evidenced by his questioning of the claim of the party who commissioned him. His findings are reasoned and fully explained. As pointed out by Mr De Wet, no evidence was presented to unsettle any of the crucial findings made by Professor Delius. In the circumstances I can find no reason why the report of Professor Delius should not be accorded full weight. A curriculum vitae for Professor Delius was not filed. From the evidence of Dr Whelan, it is noted that he is a respected scholar and historian. I consider salient aspects of the Delius report below:

[123] Professor Delius searched for relevant documents in the Kwa-Zulu Natal Archives Repository in Pietermaritzburg, the Killie Campbell Archives in Durban, and the National Archives Repository in Pretoria. Days, his report records, were spent in the respective archives searching for primary material related to the claimant community, the farms under claims as well as general documents concerning the Scottburgh/Amahlongwa area. Apart from primary material, secondary literature concerning the American Mission Board was also located. Finally, after numerous requests, various important documents, such as site visits reports, maps, and family histories, were made available.

[124] The most striking finding emerging out of the exhaustive searches of the written sources, certainly in comparison to research he states he has done in other land claims, was just how limited the available material is. "The Elambini 'community' has left a very limited mark indeed on the written record of the area", he states. This fact, he goes on to say, does not necessarily imply that their claim has no validity, but it does make it very difficult to find corroborating evidence for their accounts of the history of the land.

[125] He goes on to state[13] that one solution to the problem of limited documentary sources is the use of oral material and that much more extensive interviewing than was done for previous reports, was undertaken.

> "But the fact that most of the individuals who were adults when they lived on and left the farms in questions have died, weakens the foundations of this resource. We are primarily left with fragmented recollections of conversations of grandparents and parents which are often vague and contradictory. This set of difficulties with the oral material is compounded by the absence of significant collections of relevant oral evidence which predate the claims. The limited oral material and paucity of documentary material makes it very difficult to triangulate the evidence in ways which might help compensate for many weaknesses and absences in the range of sources we can access."

[13] Delius Report Trial bundle F page 4

[126] This being so, Prof Delius concludes as aforementioned, that given the very limited documentation that exists, almost "all our conclusions are tentative."

[127] Under a heading "*Settlement of the claimed farms prior to 1913*", like Dr Whelan, Professor Delius states[14]:

> "While there is evidence of settlement in the wider area - especially in the interior - there is no documentary evidence of settlement of the farms under claim. Some interviewees claimed that their ancestors had lived in the area prior to 1913 but most informants were vague at best on this issue and there are no independent oral traditions that we have been able to find that suggest there was a community living on these farms at that time. Given the wider historical patterns in the Natal coastal area in the nineteenth century, it is likely that there were some homesteads established on these farms before and after white land purchase and settlement from the 1850s. These homesteads probably had a range of relationships to the new owners of the land ranging from effective independence through rent tenancy and in some instances labour tenancy. But the expansion of sugar plantation in the regions saw an increasing reliance on migrant and indentured labour and by the 1880s and 1890s many earlier forms of settlement and tenancy probably became decreasingly significant and some of the homesteads moved to neighbouring reserves and less intensively cultivated farms."

[128] With regard to the experiences post 1913, Professor Delius states that in this period, as in the earlier period, there is very little documentary evidence of settlement on the farms under claim. There is, however, ample evidence of African settlement on other farms, especially surrounding the Amahlongwa Reserve. It is however possible, he notes, that some homesteads still remained on the farms claimed under forms of rent and labour tenancy.

[129] Furthermore, similar to Dr Whelan, with regards to the existence of the Plaintiff as a community on the claimed land, Professor Delius states[15]:

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[14] Ibid page 57
[15] Ibid page 47

> "Our interviews suggest that settlement on the farms took the form of homesteads consisting of extended families who lived at some distance from one another. There is very little evidence to suggest that these scattered homesteads formed a subsection of a wider community or constituted a community in their own right."

[130] Neither, states Professor Delius, does the evidence suggest that they were a subsection of a wider traditional authority or tribe. Tshonkweni kaMtungwana did exist as a chief with power in the Umzinto area, but archival evidence suggests that his authority extended to the Amahlongwa Mission Reserve, which is on the other side of the Amahlongwa River. The Elambini Community, notes Delius, claims to be the descendants of the Cele people, yet whether or not the authority of a figure such a Tshonkweni or any of his descendants encompassed Elambini is also vague.

[131] There is very little evidence, he says, that land was held or managed in common on the farms under claim, or that there was any wider effective overarching community structure operating on them. A very limited number of claimants suggested that new land was allocated after consultation between heads of homesteads, who would then approach Ndunas, but most informants were very vague on these issues. It would be difficult on the basis of such limited evidence to conclude a community existed in terms set out in the relevant legislation, records Delius.

[132] It may well be, continues the report, that some families lived on these farms since the 19th century. As the sugar industry grew and farmers put more and more land under production, the space available for these families was steadily reduced and many may have been given the option of becoming labour tenants or leaving, especially if they were not prepared to work as wage labours on the plantations. The existing evidence, however, records Professor Delius, makes it very difficult to periodise this process and so to determine whether the families left the land before or after 1913. But, he says, it could also be argued

on the basis of information available that many of the families who left the farms had been employees of some sort and their decision to leave was not the result of any direct compulsion by the land owners.

[133] Like Dr Whelan, he explains that in the late 19th century most African homesteads on white owned farms fell into two categories, squatters and labour tenants. After the enactment in 1913 of the Native Land Act, new rent tenancies were outlawed, and squatters were forced to enter into labour tenancy. In the Scottburgh area, pressures relating to the growth of commercial sugar probably led to people being pushed off land. In many cases these individuals ended up living in native reserves. Some interviewees, the report states, claimed that their parents or grandparents did not want to work for white people and were made to leave for the Reserves.

[134] The report furthermore records[16]:

> "There seems little doubt that a degree of coercion was involved in some instances in the movement of some families off the farms, but it is difficult to assert on the basis of the evidence at hand that this process amounted to the systematic coerced removal of a community. There is stronger evidence to suggest that particular families may have been dispossessed of tenant rights or beneficial occupation. But exactly when this happened or which of the claimant families could credibly make a claim to having lost rights on a homestead rather than a community basis is very hard to determine given the paucity of the evidence. Addressing these issues would involve researching individual claims in much greater depth, a very complex and difficult research process indeed."

Discussion

[135] As this is a community claim, the Plaintiff has to succeed in establishing all the threshold requirements, stipulated at Section 2 of the Act, for a community claim. It must show, firstly, that it is a community as defined in the Act that had a right in land; secondly, that it was dispossessed after 19 June

[16] Ibid page 49

1913, as a result of past racially discriminatory laws or practices; and thirdly, that no just and equitable compensation was received for the dispossession.

Is the Plaintiff a Community as defined in the Act?

[136] The definition of community at Section 1 of the Act is repeated here for convenience

> "**community** means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group. . ."

[137] In *In re Kranspoort Community* 2000 (2) SA 124 (LCC), at paragraph 34, Dodson J gave context to the definition:

> "... it is clear that there must be a community in existence at the time of the claim. Moreover, it must be the same community or part of the same community which was deprived of rights in the relevant land ... This seems to me to require that there must be, at the time of the claim,
>
> (1) a sufficiently cohesive group of persons to show that there is still a community or a part of a community, taking into account the impact which the original removal of the community would have had;
>
> (2) some element of commonality with the community as it was at the time of the dispossession to show that it is the same community or part of the same community that is claiming." (Footnotes omitted.)

[138] The finding in *Kranspoort* supra was endorsed by the Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits* (Pty) Ltd 2007 (10) BCLR 1027 (CC), at paragraph 39, where Moseneke DCJ stated:

> "In the case of *In Re Kranspoort Community*, Dodson J correctly construes s 2(1) (d) of the Restitution Act to require that there must be a community or part of a community that exists at the time the claim is lodged and that the community must

have existed some time after 19 June 1913 and must have been victim to racial dispossession of rights in land."

[139] Also in *Goedgelegen,* Moseneke DCJ at paragraphs 40 to 42 went on to give further context to the definition of community:

"There is no justification in seeking to limit the meaning of the word 'community' in s 2(1) (d) by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy… what must be kept in mind is that 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 …The threshold set by s 2(1) (d) is well met if the right or interest in land of the group is derived from shared rules determining access to land that is held in common." (Footnotes omitted.)

[140] In similar vein, in considering what constituted a community, Cameron J in *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) , at paragraph 112, said:

"The landowners invoked this court's statement in *Goedgelegen* that the 'acid test remains' whether a community 'derived their possession and use of the land from common rules'. That is correct. It is what the statute requires, namely a group of persons whose rights in land are derived from shared rules determining access to land held in common by the group. Whether the 'acid test' is fulfilled is a question of fact." (Footnotes omitted.)

At paragraph 113 Cameron J, still commenting on *Goedgelegen,* continued:

"There, dispossession occurred because common rules determining access to land were supplanted by labour-tenancy rules. These, this court said, did 'not sit well with commonly held occupancy rights'. The court concluded that, when the dispossession in question occurred, 'no rights in land remained vested in the labour-tenants as a community'." (Footnotes omitted.)

[141] Thus it is settled law that for a community litigant to succeed in a restitution claim it must prove that it existed as a community after 19 June 1913,

that it derived its possession and use of the land from common rules, and that it existed as the same community at the time that the claim was lodged. If at the time of dispossession, the possession and use of the land did not derive from common rules, but were supplanted by labour tenancy rules, the rights in land were not held by a community at the time of dispossession.

[142] There are parallels between *Goedgelegen* supra and this case. In *Goedgelegen* indigenous ownership of land in the 1800s was supplanted by white settler ownership of the land and the rights in land held by the indigenous owners in time degenerated to labour tenancy and farm worker rights. These, the court found, were not rights in land derived from shared rules determining access to land held in common by a group, as specified in the definition of community. Or, as was stated in *Salem*, these rights did not sit well with commonly held occupancy rights.

[143] The following extracts from *Goedgelegen* are in my view pertinent to the case before us. I take the liberty therefore of quoting somewhat extensively from the pertinent paragraphs. At paragraphs 35 to 38, Moseneke DCJ stated as follows:

> "[35] At the heart of this enquiry is whether the occupational rights in the land were derived from shared rules determining access to land held in common. At its core, the question is whether the labour tenants, through shared rules, held the land rights jointly. The community and individual applicants contend that they did. They support this contention by pointing to the history of their use and occupation of the land and to the attendant social arrangements. Their forebears lived on the farm since the mid-1800s, before the first registered owner Mr Hattingh in 1889, and the claimants continue to do so despite successive registered ownership of the land...
>
> ...
>
> [37] However, what is clear on all the evidence is that the indigenous ownership of land in the original Boomplaats farm was lost before 1913. Once they had lost ownership, they were compelled to work for the owner. Their relationship with the owner was coercive. The Land Claims Court found, correctly in my view, that "the

white owners took possession of the land, and compelled the inhabitants to become labour tenants.

[38] Although they had lost indigenous ownership, they continued to exercise the right to occupy the land, to raise crops and to graze their livestock. Successive registered owners did not terminate these rights. By 1969, the collective indigenous title to land of the Popela Community had succumbed to settler dispossession and subsequent land laws on ownership and occupation of land by black people. Members of the community had been successfully coerced into being farm labourers whose occupational interest in the land had become subject to the overriding sway of the registered owner. They had to work the lands of the owner without wages in order to live there." (Footnotes omitted.)

[144] In finding that the claimants in *Goedgelegen* were not a community as defined in the Act, Moseneke DCJ at paragraphs 45 to47, went on to state as follows:

"[45] ... The acid test remains whether the members of the Popela Community derived their possession and use of the land from common rules in 1969. The answer must be in the negative. By then, each of the families within the community had been compelled to have its own separate relationship with the Altenroxels. They pointed out the land for use by each family. They ordered them to dispense with their livestock. They required them singularly and often also their children as young as ten years, to toil on the farm if they were to live there. The registered owner made it clear that he did not heed any rules of the community on land occupation. They made the rules and the labour tenant had to obey...

[46] In any event, at its very core, labour tenancy under the common law arises from a so-called innominate contract between the landowner and the labour tenant, requiring the tenant to render services to the owner in return for the right to occupy a piece of land, graze cattle and raise crops. In name, it is an individualised transaction that requires specific performance from the contracting parties. This means that labour tenancy does not sit well with commonly held occupancy rights. It is a transaction between two individuals rather than one between the landlord and a community of labour tenants. It must however be recognised that despite the fiction of the common law in regard to the consensual nature of labour tenancy, on all accounts, the labour

> tenancy relationships in apartheid South Africa were coercive and amounted to a thinly veiled artifice to garner free labour.
>
> [47] I conclude that by 1969, no rights in land remained vested in the labour tenants as a community. It has not been shown that, at the point of dispossession in 1969, the community of tenants on Boomplaats held the land in common under shared rules that they could enforce effectively in the face of an individualised system of labour tenancy..." (Footnotes omitted.)

[145] Similarly, as in *Goedegelegen,* whatever indigenous ownership of land rights might have been held in common by the forbearers of the Plaintiff as a community, had with the acquisition of the claimed land in the mid 1850's, degenerated into the rights of labour tenancy and farm workers. This much is clear from the expert evidence of Dr Whelan and the report of Professor Delius, endorsed by her, evidence which I have accepted above that of the Plaintiff. These rights derived from white registered ownership and control of the land, and not from shared rules determining access to land held in common as a group. As in *Goedgelegen*, the evidence before me indicates that each of the occupant labourers had their own separate relationship with the land owners and the use of the land was dictated by the labour needs of the landowners. A precondition for remaining on the land was their willingness to work as farm labourers. The transaction in this case too, was between farm owner and farm labourer, rather than between the farm owner and a community of occupiers on the farm.

[146] The Plaintiff bore the onus of proving that they constituted a community with shared rules determining access to land held in common by them. They failed to fulfil this onus. What little evidence was adduced about their constituting a community focused on their farming, social, cultural and religious interactions, as opposed to shared rules regulating access to land. A constant refrain was that they lived as a community, inter-married, performed rituals and

visited family graves. The high water mark of any evidence approximating the onus they bore, is perhaps Mr Ndlovu's vague evidence during cross examination that "the community could have had exclusive use of the property, meaning it had its own rules and did not live under white rules". This, however, is a far cry from establishing on a balance of probabilities that they had shared rules determining access to land held in common by them.

[147] In the recent unreported decision of *Mazizini Community and Others v Minister for Rural Development and Land Reform and Others* (LCC 23/2007) [2018] ZALCC, delivered on 10 April 2018, the Prudhoe community were able to establish that they had shared rules determining access to land held in common by them, and passed the acid test as it were, when they proved that their headmen had the responsibility for accepting new members into the community and for the allocation of land. They were also able to show that the community that was moved continues to be a community today. (See *Mazizini* paragraphs 268 to 271.) There is no such evidence before us.

[148] The Plaintiff's evidence simply does not pass muster in proving the existence of a community as defined. This is especially so when juxtaposed against the corroboratory expert evidence of Dr Whelan and Professor Delius, to the effect that settlement on the farms took the form of homesteads consisting of extended families who lived at some distance from one another. By 1913 these families would have been farm labourers on the claimed land which was intensely farmed under sugarcane. The probabilities, as stated by Mr De Wet, simply would not have entertained a system of shared rules determining access to land held in common by a community, coexisting with intensive sugar farming on privately owned land. Nor has the Plaintiff proved this on a balance of probabilities.

[149] It is disquieting that the Plaintiff, who was legally represented and, significantly, at the state's expense, throughout these proceedings, could have pursued and persisted with a community claim without adducing a shred of evidence to prove the legally established acid test post *Goedgelegen,* that they derived their possession and use of the land from common rules. Nor does the evidence point to a community existing at the time of the claim. In this regard the evidence of several of the witnesses for the Plaintiff, to the effect that the Elambini Community was formed to launch this land claim, is instructive.

[150] I am accordingly unable to find that the Plaintiff or its forebears constitutes a community as defined in the Act. Nor am I able to find that there was a community that existed at the time of the claim and that such community must have existed at the time of the alleged dispossession.

[151] I note also that the evidence does not support a finding of dispossessions of anyone as a result of racial laws or practices after 1913. In this Court the community witnesses also gave "fragmented recollections of conversations of grandparents and parents which were often vague and contradictory" (Delius' description of their interviews, above), as to where their families had lived, when they moved and why. Some of their versions were dispelled by the unrefuted evidence adduced by the Defendants. Several went so far as to disqualify themselves by pointing to places from which they were dispossessed that were located outside the claimed land. Some, who referred to living on Crookes' farm, did not establish on a balance of probabilities that they had lived on the claimed land, as opposed to other Crookes farms in the area.

[152] Their evidence suggests a range of different dates when they moved. Most witnesses recorded the dates of removals as 1913, and opportunistically so, contends Mr De Wet. The dates in the claim forms differed. The Second Plaintiff's claim form alleged the dispossession took place in about 1927, the

Third Plaintiff's claim form recorded this date as 1909 and the forms of the Fourth and Fifth Plaintiffs alleged dispossessions in 1952 and the 1940's respectively. The unreliability of such evidence speaks for itself. The reasons for moving ranged from unsubstantiated accounts of being chased away by white men with guns, to being given ultimatums to work on farms or leave, or to simply choosing to leave. Such references as there were to legislation, were vague. Certainly there was no account of a mass removal of a community as defined in the Act. The undisputed evidence of Dr Whelan, also recorded by Professor Delius, was the absence of historical evidence of persons who were evicted, moved or dispossessed from the claimed land.

[153] After all is said and considered, what remains is a narrative of individuals moving off the properties in question, as a consequence of landowners acquiring the claimed land for sugar cultivation in the 1850s, the sugar industry developing and more and more land being put under production. With this came labour tenancy, wage labour and indentured labour. Families left the properties in question for a variety of reasons on a piecemeal basis. Paramount amongst the reasons for leaving was that occupants did not want to work for the land owners.

[154] In view of all of the above I am unable to find that the Plaintiff has satisfied the requirements as specified at Section 2 of the Act, in particular section 2(1)(d), which applies to a community claim, and that they were dispossessed of a right in land.

Costs

[155] Mr De Wet submitted that in the event of the claim not succeeding, the First Defendant and the Participating Party, who he referred to as the Second Defendant, as the State Defendants, were liable to pay the Third to Seventh Defendants' costs jointly and severally. These landowner Defendants, he

pointed out, had challenged the State's referral of the Plaintiff's claim against their land, and the lis in this matter, as was found by this court in *In Re Kusile Land Claims Committee: Land Restitution Claim, Midlands North Research Group and Others* 2010 (5) SA 57 (LCC) at paragraph 23, lay between the State and the landowners. In keeping with the Constitutional Court's judgment in *Biowatch Trust v Registrar, Genetics Resources, and Others* 2009 (6) SA 232 (CC), that in constitutional litigation, if the landowner's defence against the State is good, the State should bear the costs, unless there were particularly powerful reasons for a court not to award costs against the State, he submitted that the landowner defendants were entitled to their costs.

[156] In *Biowatch* supra, at paragraph 24, Sachs J stated:

> "[24] At the same time, however, the general approach of this court to costs in litigation between private parties and the State, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it." (Footnotes omitted.)

[157] This Court has, in a number of cases, granted costs against the State and in favour of private litigants who have achieved substantial success in proceedings against the State. It has done so on the basis that land claims litigation, deriving as it does from Section 25 (3) of the Constitution, is in the genre of constitutional litigation. See *Makhukhuza Community Claimants* (LCC 04/2009) [2010] ZALCC 26 (18 November 2010) at paragraph 30; *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others* 2010 (4) SA 308 (LCC) at paragraph 35 and 36; *Greater Tenbosch Land Claims Committee and Others v Regional Land Claims Commissioner and Others*

(74/06) [2010] ZALCC 25 (15 September 2010). Ms Naidoo, for the First Defendant, in opposing the costs order sought, argued that the present matter is distinguishable from that in *inter alia* Quinella supra, in that in those judgments the Commission's conduct was subject to justifiable criticism. The First Defendant, she submitted, had not conducted herself in any manner warranting an order of costs against her. In support of her argument she referred me to the judgment in *Competition Commission of South Africa v Pioneer Hi–Bred International Inc and Others* 2014 (2) SA 480 (CC). In that case the Court set aside a costs order against the Competition Commission and in so doing emphasised that the Competition Commission was not acting as a mere opposing party in civil litigation.

[158] This argument, with which Mr Sibisi on behalf of the Commission aligned himself, loses sight of the fact that in *Biowatch* the requirement for a cost order against the State was not some untoward conduct on the part of the State, but substantial success against it. This having been said, I note that the conduct of the Fist Defendant, in continuing to abide, after the report of Professor Delius was filed by the First Plaintiff, albeit only in March 2018, is not beyond reproach. Neither Mr Sibisi nor Ms Naidoo were able to point me to any particularly powerful reasons which existed for costs not to be awarded against the State. In the circumstances I am of the view that the landowner Defendants are entitled to their costs against the State Defendants.

[159] I now turn to the scale and nature of the costs that are to be awarded. I consider firstly, whether these costs should be on a punitive scale as between attorney and client, as also sought by the Third to Seventh Defendants. Mr De Wet submitted that when the State became aware of the report of Professor Delius, it should have reported to this Court, in terms of section 6(1)(A) of the Act that the claims were no longer considered valid or good, or with prospects

of success, in order to expedite the finalisation of the matter. The State's attitude to simply abide was untenable.

[161] The emergence of the Delius report has a somewhat chequered history in this case. It was commissioned by the Plaintiff and it would appear to have been completed in 2015. The Plaintiff had received the report by April 2016 if not earlier. In a letter to the Plaintiff's erstwhile attorney, dated April 2016, Mr Clement Dube complained about the report which very clearly did not support the Plaintiff's claim. The letter refers to the Elambini Community's decision to reject the report of Professor Delius and to obtain another expert.

[162] On 2 June 2016 the landowners issued a notice to inspect, seeking a copy of the Delius report. The notice to inspect was followed-up with an application on 15 August 2016 to discover the report. The Plaintiff undertook to produce the report by the end of August 2016. The report was again requested at the pre-trial conference of 19 February 2018, and finally produced on 1 March 2018, shortly before the resumed hearing.

[163] From the chronology it is not at all clear that the First and Second Defendants, whilst being aware of the existence of the report, had knowledge of its contents, and notwithstanding such knowledge, failed to put it before the Court. I am accordingly not persuaded that the State Defendants should be mulcted with a punitive cost order. Nor, in my view, does the First Defendant's conduct per se, in continuing to abide for the remaining month or so of the trial after the Delius report was produced, warrant such an order.

[164] If any party was remiss it was the Plaintiff, who was obliged to discover the report, but blatantly prevented it from surfacing for some two years. The Plaintiff was further remiss in relentlessly pursuing the claim in the manner they did, at considerable cost to the taxpayer, given that their own expert could not

support their claim. The community members rejected settlement offer after settlement offer, despite the best efforts of the landowners and the State Defendants to broker a settlement. They rejected the last offer of 100 hectares which the parties made known to the Court, despite the Court repeatedly warning them of the risk of going away empty handed if they did not prove their case. No costs were sought against the Plaintiff.

[165] The Third to Seventh Defendants furnished me with a draft cost order in which they seek, *inter alia,* the fees and expenses of a number of experts. I am disinclined to grant the costs of those experts whose reports and testimony did not feature in the trial before me. These experts are Brian Land, cartographer; Clive Henderson, valuer; and Mr Hudson, a historical researcher. The latter, as I was given to understand, featured in a review application which was not before me. With regard to the valuer, as the issues were separated, and the hearing before me concerned Section 2(1) of the Act, a valuer was not necessary for this leg of the enquiry.

[166] An order in the following terms is granted:

1. The Plaintiff's claim is dismissed.

2. The First and Second Defendants shall bear the costs of the Third to Seventh Defendants, on the scale as between party and party, such costs to include the following:

    2.1 The employment of 2 (two) counsel and an attorney in respect of all trial dates to 26 April 2018, which is to operate jointly and severally with any previous cost orders secured against the Plaintiff, the quantum of which is to be determined by the taxing master;

2.2 The costs of 2 (two) counsel and an attorney for attending all pre-trial conferences, the costs incurred in respect of consultations with representatives of the Defendants, and the costs in respect of consultations with the experts listed below and the witnesses who testified, including all travelling expenses and costs in respect of travelling time, the quantum of which is to be determined by the taxing master;

2.3 The costs of attending to inspections in loco by 2 (two) counsel and an attorney, the quantum of which is to be determined by the taxing master, including costs in respect of travelling time and travelling expenses;

2.4 The travelling and reasonable and necessary accommodation expenses of the witnesses of the Defendants and expert witnesses to attend the trial of the matter;

2.5 The qualifying fees and expenses of the expert witnesses set out below, such to include the costs of the inspections in loco conducted by them, the consultations by them with the Defendants to obtain relevant information to compile their reports, the drafting of the reports and the consultation time with Defendants' two counsel and attorney, and the attendance fees for the trial;

2.6 All costs of drafting maps and the obtaining of all aerial photographs and the making of copies thereof for the trial;

2.7 All costs incurred by the Defendants' attorney in preparation, indexing and pagination of all bundles of documents, maps and photographs, transcripts of court proceedings and making copies

thereof as well as indexing and pagination of the Court bundles and files (inclusive of lever arch files), the latter costs and expenses of which were the responsibility of Plaintiff's attorneys.

3. The experts referred to above in paragraph 2.5 are as follows:

3.1 Dr D Whelan;

3.2 Mr A Gerber; and

3.3 Mr D Harrison.

4. The First Plaintiff shall pay the wasted costs occasioned by the postponement on 14 February 2017[17]. Such costs shall not be recovered from the State.

Y S MEER
Acting Judge President
Land Claims Court

I agree.

Ms AE Andrews
Assessor

[17] As per order granted on 14 February 2017. See paragraph 9 above.

I agree.

Mr Simamane

Assessor

Appearances

For the Claimants:	Adv. T Madonsela SC and Adv. M. Chithi
Instructed by:	Blose Phindela Attorneys
For the 1st Defendant:	Ms. P Naidoo
Instructed by:	State Attorney, KZN
For the 3rd to 7th Defendants:	Adv. De Wet SC and Adv. G Van Der Walt
Instructed by:	Livingston Leandy Incorporated
For the Participating Party:	Adv M Sibisi
Instructed by:	The State Attorney, KZN

NO.	PROPERTY DESCRIPTION	EXTENT	CURRENT TITLE DEED NO.	CURRENT OWNER	BONDS & RESTRICTIVE CONDITIONS (INTERDICTS)
1	The farm Crocworld No. 16648	24, 3390 ha	T29064/1995	Crookes Brothers Ltd	K847/1995s VA1174/2002
2	Remainder of the farm Clan No. 16649	211, 7732 ha	T29055/1995	Crookes Brothers Ltd	I-2878/2004I K838/1995s K863/1995s
3	A portion of Erf 1424 Scottburgh Township, previously known as the farm Freeland Park Extension No. 17709	16, 1139 ha	Not Registered		
4	Portion 1 of the farm Lot 1 No. 1667	20, 1300 ha	T1037/1936	Republic of South Africa	I-1002/1981LG
5	Portion 2 of the farm Lot 1 No. 1667	800 dum	T74/1942	Crookes Brothers Ltd	I1002/1981LG
6	Remainder of Portion 22 of the farm Lot 1 No. 1667	191, 7322 ha	T3668/1939	Crookes Brothers Ltd	I-2878/2004I K578/1995s K837/1995s K863/1995s
7	Remainder of Portion 23 of the farm Lot 1 No. 1667	800 dum	T3668/1939	Crookes Brothers Ltd	I-2878/2004I
8	Portion 36 of the farm Lot 1 No. 1667	1, 3892 ha	T5608/1962	South African Rail Commuter Corp Ltd	I-1002/1981LG
9	Remainder of Portion 37 of the farm Lot 1 No. 1667	6, 4588 ha	T5608/1962	South African Rail Commuter Corp Ltd	None
10	Portion 126 of the farm Lot 1 No. 1667	800 dum	T26837/1982	Republic of South Africa	None
11	Portion 127 of the farm Lot 1 No. 1667	233, 3152 ha	T26837/1982	Republic of South Africa	None
12	Portion 129 of the farm Lot 1 No. 1667	26, 1063 ha	T33896/1998	South African Roads Board	None
13	A portion of the consolidated farm Crocworld No. 16648, known before consolidation as Portion 133 of the farm Lot 1 No. 1667	16, 8622 ha	T29064/1995	Crookes Brothers Ltd	None
14	Portion 2 of the farm Clansthal No. 1202	55, 8037 ha	T13667/1971	Banana Station (Pty) Ltd	None
15	Remainder of Portion 3 of the farm Clansthal No. 1202	17, 8189 ha	T13667/1971	Banana Station (Pty) Ltd	I-4972/1976LG
16	A portion of the consolidated Portion 138 of the farm Clansthal No. 1202, known before consolidation as the Remainder of Portion 47 of the farm Clansthal No. 1202	88, 0486 ha	T6240/1982	Finningley Inv (Pty) Ltd	I-4972/1976LG
17	Remainder of Portion 52 of the farm Clansthal No. 1202	695, 9097 ha	T1266/1978	Finningley Estates (Pty) Ltd	B14373/1997 K220/1997s VA289/1997

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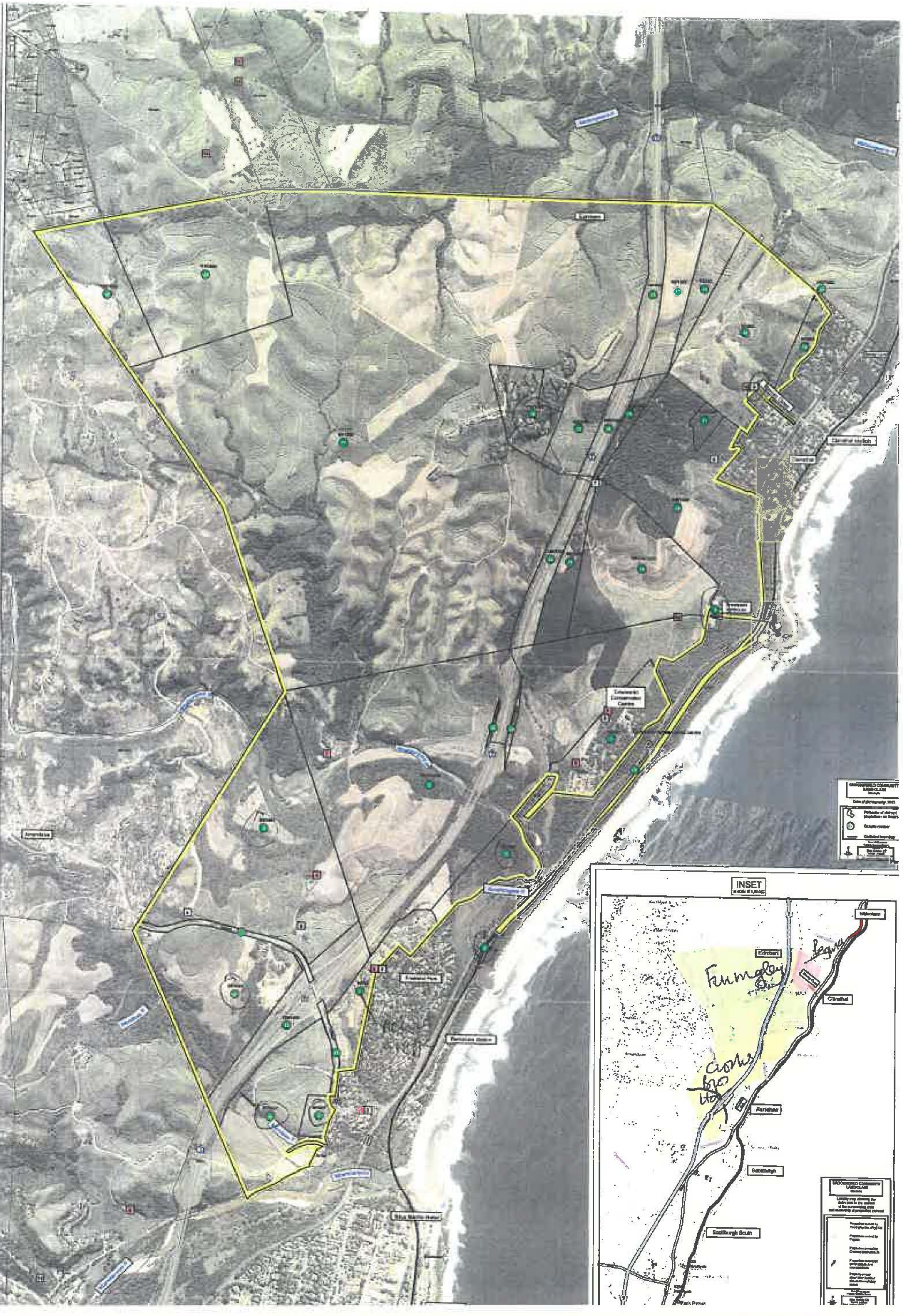
NO.	PROPERTY DESCRIPTION	EXTENT	CURRENT TITLE DEED NO.	CURRENT OWNER	BONDS & RESTRICTIVE CONDITIONS (INTERDICTS)
18	Portion 115 of the farm Clansthal No. 1202	14, 6468 ha	Not Registered		I-4972/1976LG
19	Remainder of Portion 116 of the farm Clansthal No. 1202	65, 3854 ha	T1268/1978	Finningley Estates (Pty) Ltd	B14373/1997 K220/1997s VA269/1997
20	Portion 117 of the farm Clansthal No. 1202	71, 8035 ha	T1518/1999	Finningley Estates (Pty) Ltd	None
21	Portion 121 of the farm Clansthal No. 1202	2, 9074 ha	T5978/1971	Finningley Estates (Pty) Ltd	I-4972/1976LG
22	Portion 125 of the farm Clansthal No. 1202	29, 1428 ha	T1518/1999	Finningley Estates (Pty) Ltd	None
23	Portion 138 of the farm Clansthal No. 1202	68, 5700 ha	T6240/1992	Finningley Inv (Pty) Ltd	None
24	Portion 140 of the farm Clansthal No. 1202	11, 8065 ha	T11993/1988	South African Roads Board	None
25	Portion 141 of the farm Clansthal No. 1202	11, 7145 ha	T11993/1988	South African Roads Board	None
26	Portion 142 of the farm Clansthal No. 1202	6, 4174 ha	T11993/1988	South African Roads Board	None
27	Portion 144 of Portion 3 of the farm Clansthal No. 1202	0, 1211 ha	T41867/1999	Ugu Regional Council	None
28	Portion 146 of the farm Clansthal No. 1202	0, 4047 ha	T33899/1988	South African Roads Board	None
29	Portion 147 of the farm Clansthal No. 1202	1, 1067 ha	T33899/1988	South African Roads Board	None
30	A portion of the consolidated farm Cropworld No. 16648, known before consolidation as Portion 148 of the farm Clansthal No. 1202	0, 2727 ha	T29054/1995	Crookes Brothers Ltd	None


INSET
Widenham
Ezimbeni
Clansthal
Renishaw
Scottburgh
Scottburgh South
Park Rynie