

SOUTH AFRICA / JUDGMENT

Chithi and Others v The Minister of Agriculture, Rural Development & Land Reform and Others (LCC125/2008) [2021] ZALCC 20 (16 August 2021) [2021] ZALCC 20

COURT
Land Claims Court

BEFORE
MP Canca

CASE / FILE NUMBER
LCC125/2008

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IN THE LAND CLAIMS COURT OF SOUTH
AFRICA

HELD

AT RANDBURG

CASE NO: LCC 125/2008

(1)

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

REVISED: YES/NO.
In the matter

between:

MLULEKI
MARTIN
CHITHI FIRST
APPLICANT
DLUDLU
ATTORNEYS SECOND
APPLICANT
M C
NTSHALINTSHALI
ATTORNEYS THIRD
APPLICANT
and
THE
MINISTER OF AGRICULTURE, RURAL
DEVELOPMENT
AND LAND REFORM FIRST
RESPONDENT
REGIONAL
LAND CLAIMS COMMISSIONER SECOND
RESPONDENT
DJ SCHEUER
FARMING
CC THIRD
RESPONDENT
MANFRED
MARTIN
HILLERMAN FIFTH
RESPONDENT
HERMAN
THEODOR
HEYER SIXTH
RESPONDENT
EVANGELICAL
LUTHERAN CHURCH NEW HANOVER SEVENTH
RESPONDENT
HOPEWELL
TRUST EIGHTH
RESPONDENT
ROLF
MATTHEW
SCHRODER NINTH
RESPONDENT
UHLMANN
FAMILY
TRUST TENTH
RESPONDENT
MANFRED
VICTOR
SCHRODER TWELFTH
RESPONDENT
WOERNER

TRUST THIRTEENTH
RESPONDENT
WHITE THORN
TRUST FOURTEENTH
RESPONDENT
RM MARK
FAMILY FIFTEENTH
RESPONDENT
WITTEMOUNTAIN
TRUST SIXTEENTH
RESPONDENT
MANFRED
MEYER FAMILY TRUST SEVENTEENTH
RESPONDENT
WERNER
MEYER FAMILY TRUST EIGHTEENXTH
RESPONDENT
WERNER MARK
REDINGER NINETEENTH
RESPONDENT
AMBLESIDE
MEATS
CC TWENTIETH
RESPONDENT
BRIAN BASIL
MITROPOULUS TWENTY
FIRST RESPONDENT
TMJ
INVESTMENT 15
CC TWENTY
SECOND RESPONDENT
DROGEMOLLER
LIF & SHORT-TERM
BROKERS
CC TWENTY
THIRD RESPONDENT
ROLAND
GERHARD FRENZEL TWENTY
FOURTH RESPONDENT
COCOHAVEN
1057
CC TWENTY
FIFTH RESPONDENT
ROYHEATH
RAMDEWU AND REETHA
RAMDEWU TWENTY
SIXTH RESPONDENT
UCL
CO-OPERATIVE LTD TWENTY
SEVENTH RESPONDENT
MOOIZICHT

IN RE:

TRUST TWENTY
EIGHTH RESPONDENT

MAVUNDULU
COMMUNITY CLAIMANTS
And
DEVELOPMENT
AND LAND
REFORM FIRST
DEFENDANT
REGIONAL
LAND CLAIMS COMMISSIONER SECOND
DEFENDANT
DJ SCHEUER
FARMING
CC THIRD
DEFENDANT
MANFRED
MARTIN
HILLERMAN FIFTH
DEFENDANT
HERMAN
THEODOR
HEYER SIXTH
DEFENDANT
EVANGELICAL
LUTHERAN CHURCH NEW HANOVER SEVENTH
DEFENDANT
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RM MARK
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FIFTH DEFENDANT
RAMDEWU TWENTY
SIXTH DEFENDANT
UCL
CO-OPERATIVE
LTD TWENTY
SEVENTH DEFENDANT
MOOIZICHT
TRUST TWENTY
EIGHTH DEFENDANT

JUDGMENT

DELIVERED ON: 16 AUGUST 2021

JUDGMENT

CANCA, AJ

INTRODUCTION

- [1] This is an application for my recusal brought by Mluleki Martin Chithi, Dlodlu Attorneys and MC Ntshalintshali Attorneys (collectively, hereinafter referred to as “the affected parties”).
- [2] The application sprouts from the costs order depriving the affected parties of their fees (both already earned and those still to be paid) in my judgment handed down on 25 May 2020 in the matter of Mavundulu Community v The Minister of Agriculture, Rural Development and Land Reform and 27 Others (“the Mavundulu judgment”).
- [3] The affected parties contend that they fear, for the reasons which follow, that I will not bring an impartial mind to bear when

considering their application for leave to appeal that costs order. In essence, they contend that I am either biased or that they,

reasonably, apprehend bias on my part in the light of certain statements and/or assumptions contained in my judgment and elsewhere.

- [4] The offending order is set out in the following terms:

“[4] The fees of Plaintiff’s legal representatives, Mr.Chithi, Dlodlu Attorneys and MC Ntshalintshali Attorneys, are disallowed in full for the entire matter. They are ordered to repay to the relevant entity that funded them on behalf of the State, whatever fees that may already have been paid to them.”

- [5] The first and second respondents, The Minister of Agriculture, Rural Development and Land Reform (“the Minister”) and the Regional Land Claims Commissioner (“the RLCC”), together, hereinafter referred to as “the State respondents”, do not oppose the application and have elected to abide the Court’s decision. The landowner respondents, however, do oppose the application.
- [6] The Court must, at the outset, express its sincere apologies to the parties for the delay in finalizing this matter.
- [7] Apart from the inconveniences caused by the Government imposed Covid restrictions to contain the spread of the virus, I was indisposed for a while.

THE MERITS

- [8] The affected parties have listed a number of grounds, set out below, which they contend disqualifies me from hearing their leave to appeal application.
- [9] However, before dealing with the merits of the recusal application, it is convenient to first address an issue raised by the affected parties in their heads of argument, namely that the landowner respondents:

“... do not have a direct and substantial legal interest in the subject matter of these proceedings which may be prejudicially affected by the judgment of this Court, either in relation to this application or the application for leave to appeal.”

- [10] I find that counsel and the attorney for the landowner respondents, as senior officers of the Court, were ethically bound, having been part of the hearing, to advise the landowner respondents to bring to the Court’s attention facts and legal authority to assist it in arriving at a considered decision with regards to the recusal application. The affidavits of both Mr. Uhlmann and Mr. Van der Merwe, were particularly helpful in that they set out some of the evidence which shows how the appointment of the third affected party came about as one of the claimant community’s legal representatives. More on this below.
- [11] In the light of the above, it is my view that the affected parties’ objection to the participation of the landowner respondents in the recusal application has no merit and stands to be dismissed.

THE TEST FOR RECUSAL

- [12] The test for the recusal of a judicial officer is objective and the onus of satisfying the requirements for a successful recusal falls upon the applicant. This is trite. The Constitutional Court, in setting out the requirements to be satisfied in matters of this nature, held, unanimously, in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC) at 48, that:

“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

[13] The requirements to be met for a successful recusal application, as distilled from the case law, including South African Rugby Football Union (“SARFU”) supra, Mulaudzi v Old Mutual Life Assurance Company (South Africa) Ltd and Others; National Director of Public Prosecutions and Another v Mulaudzi 2017

(6) SA 90 (SCA); S v Serame [2019] 4 All SA 529 (GJ) and SACCAWU and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) [2000] ZACC 10; 2000 (3) SA 705 (CC) at [14] are the following:

13.1 Proof that the judicial officer is actually biased, or

13.2 Apprehension of bias on the part of the judicial officer and whether such apprehension is that of a reasonable, objective and informed person based on the correct facts.

[14] Also see the dictum of Cameron J, in Irvin & Johnson Ltd (Seafood Division Fish Processing) supra, where the learned Judge, explained the double reasonable test, alluded to in paragraph 13.2 above as follows:

“Not only must the person apprehending bias be a reasonable person, but “ the apprehension itself must in the circumstances be reasonable. This two-... finds reflection also in S v Roberts, decided shortly after SARFU, where the Supreme Court of Appeal required both that the apprehension must be that of a reasonable person in the position of the litigant and that it be based on reasonable grounds.”

GROUND S RELIED ON FOR THE RECUSAL

[15] The grounds for my recusal cover the following topics:

15.1 apprehension of bias;

15.2 judgment against the third affected party;

15.3 the Court’s main judgment vis-à-vis Luhlwini judgment;[1]

15.4 the amendment application;

15.5 the telephonic conference on 17 July 2020.

[16] The three applicants, Mr. Chithi, Dlodlu Attorneys and MC Ntshalintshali, were counsel and the attorneys, respectively, for the claimant community during the hearing. Mr. Ntshalintshali, the senior partner of MC Ntshalintshali, and the deponent to the founding affidavit in this application, however, denies that his firm was part of the legal team for the claimant community.

[17] Although the affected parties are at one on the need for my recusal on the grounds of (1) bias and/or the apprehension thereof;(2) my reliance on the Luhlwini judgment and the telephonic conference referred to in paragraph 15.5 above, Mr. Chithi and Mr. Ntshalintshali also raised grounds specific to them.

- [18] Mr. Chithi's main complaint, if I understand his contentions correctly, is that, in accusing him of having breached the Code of Conduct promulgated in terms of the Legal Practice Act 28 of 2014, I expressed "subjective views and personal observations" about him, thereby giving him cause to fear that "the chances of [me] changing that view when dealing with the application for leave to appeal are slim or non-existent."
- [18] The offending "subjective views and personal observations" appear in paragraph [59] of the judgment, which I quote below. It was contended on behalf of Mr. Chithi that "Where a Presiding Judge made personal observations, that has been said to be sufficient to create a perception of bias."
- [19] To put the contentions made on behalf of Mr. Chithi in proper perspective, I consider it appropriate to quote paragraphs [58],
- [59], [60] and [61] of the judgment in full.
- [20] The paragraphs of the impugned judgment alluded to above, read as follows:
- "[58] A legal representative cannot accept instructions and argue cases that are patently unsustainable in law. For example, if the legal representative has to represent a client facing a damage's [sic] claim based on fraudulent conduct, he cannot argue that fraud is not delict in South African law. That would be patently incorrect. That legal representative may, however, argue that his or her client's conduct was not fraudulent, even if in his own opinion it was fraudulent.*
- [59] Mr. Chithi is very experienced in matters involving this Court and appears often in the Land Claims Court, particularly in cases emanating from KwaZulu-Natal, where he is based. That province, on the whole, has the most cases on this Court's Roll. Mr. Chithi must (or should), therefore, have been well aware of the fact that a group of persons cannot claim restitution of rights in land in terms of the Restitution Act if their rights in the land were not derived from shared rules determining access to land held in common by that group. It is, moreover, worth noting that Mr. Chithi was counsel in both Elambini [2] and Luhlwini cases in which the definition of "community" contained in the Restitution Act was at issue.
- [60] In the present matter, Mr. Chithi knew (or should have known) from the outset that the Plaintiff could not submit any evidence which might satisfy the legal requirements that their rights in land must be derived from shared rules determining access to land held in common by the group and/or community. He should have advised the group that their community claim cannot possibly succeed, and offered to surrender his brief. As can be gleaned from the evidence tendered by the Plaintiff, there is no evidence which shows that the rights of which the Plaintiff was dispossessed, were derived from shared rules within the group and not from the land owners.

- [61] Even if Mr. Chithi had not realized the dismal prospects of success of the Plaintiff's claim, it should, given his long experience as a practitioner in the Land Claims Court matters, have dawned on him, after sight of the landowner defendants' experts' reports ... claimants' persistence with the claim was akin to a voyage on the Titanic doomed to end in failure, as was the case for the majority of its passengers and crew. This was another opportunity for him to surrender his brief on the basis suggested in paragraph
- [60] above and the one below. An order precluding legal representatives from recovering fees is not novel. See *Minister of Rural Development and Land Reform v Normandiem Farms (Pty) Ltd and Others, Mathibane and Others v Normadien Farms (Pty) Ltd and Others*
- [2017] ZASCA 168 [2016] 1All SA 390 (SCA), 2019 (1) SA 154 (SCA) par [83]."
- [21] On reading the contents of the paragraph [20] above objectively, one cannot but come to the conclusion that Mr. Chithi's contention, that I am (or was) biased against him, is not tethered to reality and is, therefore, in my view, unreasonable.
- [22] Pointing out the misinterpretation of a particular aspect of the law or the non-compliance by a legal practitioner of a rule or rules governing his or her profession in a specific matter, does not, per se, point to bias on the part of a Presiding Judge (nor can it, reasonably, be said that that creates an apprehension of bias by a
- reasonable legal practitioner). I find no merit in the contention that I am (or was) biased against Mr. Chithi, and, as a result
- thereof, will not bring an independent mind to bear when adjudicating the merits of the affected parties' leave to appeal
- application. This contention stands to be rejected.
- [23] Mr. Ntshalintshali followed a different tack. The gravamen of his attack is that the costs order against his firm was granted without any evidence that it was appointed as a legal representative for the claimant community. The costs order, so it was contented, was based solely on his presence in Court.
- [24] Mr. Ntshalintshali, omits to refer to the evidence given by Mr. Nkosi, a senior partner of Nkosi Sabelo Incorporated ("Nkosi Sabelo"), in particular, that, as appears below, an attorney in the employ of his law firm, Ms. Phakamile Nyamo ("Ms. Nyawo"), was engaged by Nkosi Sabelo to assist Mr. Chithi during the trial. And, he is also silent as to whether that assistance was not remunerated.

- [25] Nkosi Sabelo was the firm appointed by the Minister via the Department of Agriculture, Rural Development and Land Reform, to attend to the selection and appointment of legal representatives, including the payment of their fees and disbursements incurred in the prosecution of claims and/or initiation or defense of those cases falling under the Restitution Act of Land Rights Act, No. 22 of 1994, (“the Restitution Act”) through its Land Reform Management Facility.
- [26] Moreover, it was not denied by neither the second nor third affected parties that they share offices and that the second affected party’s letterhead reflects that it practices “In Association with Ntshalinshali Attorneys”. In addition to the above, an email from a Mr. Walter Mashapa from Maenetla Attorneys, the predecessor to Nkosi Sabelo, to Mr. S. Ndlovu, an official based at the office of the RLCC, attached to the replying affidavit of Mr. Uhlmann (one of the landowner respondents) dated 6 September 2017, in relevant part, state the following:
- “I refer to the above-named matter and noted your confirmation that Messrs Dlodlu were allowed to employed [sic] the services of*
- Ntshalinshli to assist them to a certain extend [sic] in light of the complexity of the matter.”
- [27] Consequently, I also find no merit in the aforementioned ground advanced by the third affected party for my recusal.
- [28] A further submission is also advanced on behalf of Mr. Dlodlu and Mr. Ntshalintshli, namely that judgment was passed against them without a hearing. Again, this submission is not borne out by the facts.
- [29] On 12 March 2020, I directed Mr. Chithi to address me on the issue of whether the costs of the legal representatives, including his, should not be disallowed. Both Mr Dlodlu and Ms. Nyamo were in Court. Whilst Mr. Chithi put forth submissions as to why an adverse costs order would not be appropriate, Mr. Dlodlu (and Mr. Ntshalintshali or Ms. Nyamo) did not depose to an affidavit or sought to address the Court as to why he was entitled to costs. As stated in the previous paragraph, the submission that the second and third affected parties were not afforded an opportunity to make representations regarding costs is not borne out by the facts and, therefore, it too, stands to be rejected.
- [30] Another objection to my continued involvement in this matter is my alleged extensive reliance on the Luhlwini judgment, handed down shortly before the conclusion of the trial, by Meer AJP. In support of this objection, attention is drawn to the similarity in terms and language of the costs order and the amendment judgment. The manner in which the amendment judgment and the main judgment was written, it is contended, would leave any reasonable person in the position of the affected parties with a reasonable perception of bias and a reasonable apprehension that I “did not have a mind open to persuasion in particular the pertinent and germane arguments which were raised by the first applicant.” My alleged failure to follow MEC for Health v Lushaba 2017 (1) SA 106 (CC) at [18] – [21] and

Black Sash Trust & Others v Minister of Social Development 2017 (3) (CC) at [76] on the issue of the disallowance of legal fees and the procedure to be employed in doing so but rather my following the Luhlwini judgment was a further evidence of my alleged bias, so the contention continued.

- [31] Quoting with approval certain passages of Luhlwini or using similar wording, rather than being indicative of “an inference of untoward conduct or bias”, is, in fact, evidence that I concurred with the ratio of the judgment. Judgments containing references to other decided cases or portions thereof verbatim, is not a novel concept in our law. The aforementioned objection holds no merit and is similarly rejected.
- [32] The complaint or ground regarding what the affected parties refer to as “The Amendment Application”, is, in essence, a repeat of the ground considered in the paragraphs [30] to [31] above, in that the accusation is that I relied exclusively on the Luhlwini judgment. I do not intend repeating my reasons for rejecting that ground, save to state that I also find no merit in this contention for the same reasons set out above.
- [33] A further allegation levelled at me is the averment that I was a participant in a virtual meeting and/or tele-conference held with certain officials of the Department during which Acting Judge President Meer allegedly, “complained about the incompetence of the First Applicant [Mr. Chithi] herein.”
- [34] The allegation alluded to above is persisted with by the affected parties, despite the fact that I, on more than one occasion, denied having been a participant in that meeting. In fact, Mr. Ntshalintshali, the deponent to the founding affidavit in this application, has annexed, as annexure “NA 3”, email correspondence I addressed to my then Registrar, Ms. Nosipho Makasi

and copied to their then attorney of record. In that mail, I chastise her for not having brought to my attention that attorney’s

mail, requesting me to, inter alia, confirm my attendance at that meeting. I then state in the third paragraph of the mail that:

“I’m not sure who arranged the virtual meeting but can confirm that I was not part of it.”

The next paragraph is framed as follows:

“So, with regard to the Mavundulu Appeal, given that I only now see that mail was directed to me in respect of, clearly, in my view, incorrect information, the Hintsa Attorneys, may want to re-frame certain portions of their Notice of Appeal. If not, which is their prerogative, I’ll simply deal with it in the judgment.”

- [35] It is evident from the email trail contained in annexure “NA 3” that my email was copied by the affected parties’ said attorneys to Mr. Chithi, their counsel, Ms. Norman, as well as, among others, Mr. Ntshalintshali and Mr. Dlodlu on the same day that I sent it to Ms. Makasi, namely, on 19 June 2020. It is clear, therefore, that the affected parties and their counsel must have known as far back as 19 June 2020, or soon thereafter, that I was not part of the impugned meeting with the officials of the Department.
- [36] Mr. Ntshalintshali also avers that “it was concerning to us that he would suggest how we should frame the issues in our Notice of Appeal. Of further concern is the statement that should we choose not to reframe the Notice of Appeal then he would simply “deal with it in my judgment”.
- [37] A reasonable interpretation of the contents of my mail to Ms. Makasi, in my view, is that it contains a denial of my presence at the impugned meeting and a suggestion that, given that part of the grounds for the appeal was based on incorrect information, the drafters of the Notice of Appeal, now that they were in possession of the true facts, might wish to amend same. Any suggestion that my aforementioned comment was anything other than an innocent one, giving cause for concern, is nothing but an illusion on the part of the affected parties.
- [38] The last ground advanced for my recusal centers around, inter alia, certain utterances and lack of empathy by me during a pre-trial tele-conference held on 17 July 2020. These actions and/or inactions,

it is averred, also contributed to the affected parties’ apprehension that I would not bring an impartial mind to bear in

adjudicating their leave to appeal.

- [39] Offence is taken that, when informed by Ms. Norman, during the aforementioned conference, which was convened for the purposes of discussing possible dates for the hearing of the various applications for appeal, I

“...furiously retorted and asked our counsel when did {sic} she receive those instructions and why he never received a courtesy letter from our instructing attorney.”

- [40] I fail to see how the aforesaid can be said to be sufficient cause for a Presiding Judge to recuse him or herself. It is common practice that counsel or an attorney, who intends to move an application for the recusal of a judicial officer, to inform that officer in advance. I would have expected senior practitioners such as the affected parties and their legal representatives to have known this. [41]

[41] In my view, I was justified in being taken aback at being ambushed with a notice that an application for my recusal was in the making during a pre-trial teleconference convened to discuss dates for the hearing. At the very least, given that the date for that pre-trial conference was known in advance by all the parties, the issue of my recusal should have been put down as an item for discussion or noting during the conference.

[42] Finally, it is averred that:

42.1 “However, when the presiding judge was informed by our Counsel that we wish to bring an application for his recusal, he delved into the merits of the matter and stated that if the recusal application revolved around his alleged attendance of the virtual meeting, he was not in attendance of [sic] such meeting.” and

42.2 “This alleged virtual meeting has a bearing on the merits of the application for leave to appeal which is pending before the Court. For this reason it is desirable that the presiding judge should recuse himself from hearing the application for leave to appeal.”

[43] As already stated elsewhere in this judgment, the affected parties have persisted with the unsubstantiated allegation that I was party to the impugned virtual meeting despite my recordals denying my presence there, both in writing and verbally. And, although the affected parties had ample opportunity to support their allegations with affidavits from any of the participants at that meeting, in view of the gravity of the allegation, they failed to do so.

[44] For all of the reasons set out above, this application stands to be dismissed.

Costs

[45] It is trite that the Court is, as a general rule, loath to award costs against the losing party in matters heard in this Court. The exception is where there are special circumstances. Mr. Roberts sought a punitive costs order based on the fact that the affected

parties, not only made unwarranted and unsubstantiated allegations against me but persisted with them despite categoric denials of the veracity thereof.

[46] It is a matter of grave concern that the words of a Presiding Judge no longer carry weight, during the conduct of a matter, with senior members of the Bar and Side-Bar. The unfortunate phenomenon of the ever- diminishing view of the judiciary, by some practitioners and members of the public, is aptly dealt with by Khampepe J, in *Mkhatshwa and Others v Mkhatshwa and Others* [2021] ZACC 15 at [25], where the learned Judge states that “Of course, courts and their members are by no means immune from public criticism and accountability to those they serve.” However, such criticism must be measured and justified. Lack of restraint in the criticism of the judiciary, will, as stated by the learned Judge Khampepe, in *Mkhatshwa supra*, at para [26], “...undermine and erode the authority and integrity of the Judiciary ...”

[47] Although tempted to concur with Mr. Roberts that this is a case where a punitive costs order is appropriate, for the reasons advanced by him, I am mindful of the fact that a punitive costs order has already been awarded against the affected parties. A punitive costs order would only compound their woes. Therefore, in my view, an appropriate order, in these circumstances, would be costs awarded against the affected parties on a party and party scale, with such costs to include the costs of two counsel.

[48] In the result, I order as follows:

1. The application by the first, second and third applicants for my recusal is dismissed.
2. The first, second and third applicants are to pay the landowner respondents' costs, (namely, those respondents represented by Cox & Partners) such costs to include the costs of two counsel.

MP Canca

Acting Judge, Land Claim Court

Appearances

For the Affected Parties: Adv. Norman SC with Adv. Nqala

Instructed by: Hintsa Attorneys, Durban.

For the Landowner Respondents: Adv. Roberts SC with Adv. Roberts

Instructed by: Cox & Partners, Vryheid.

[1] See *Luhlwini Mchunu Community v Hancock and Others* [2020] ZALCC 2 (16 March 2020).

[2] See *Elambini Community v Minister of Rural Development and Land Reform and Others* [2018] ZALCC 11.

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