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Eroding the Past:
A Study of the Approaches of Courts towards Oral and Expert Testimony in the Salem Commonage Land Claim

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Abstract

Since the Restitution of Land Rights Act 22 of 1994 came into operation, courts have come to attach considerable significance to historian expert testimony when ruling on land claims that made it to court. Therefore, a universal approach had to be adopted. Over the years the Supreme Court of Appeal and Constitutional Court have developed tried and tested methodologies to aid the courts in determining the weight and admissibility of a witness' testimony. In the Salem Commonage case, both the Land Claims Court and the majority of the Supreme Court of Appeal deviated from these precedents by adopting arguably a broader interpretation of the Act than intended. The case is unique in the sense that the dispute involves a commonage that was subdivided *via* a court order in 1940, resulting in the removal of the remaining black African population from that land. The question therefore was whether or not this group of people fulfilled the requirements for a valid claim as set out in the Act. The Land Claims Court and Supreme Court of Appeal felt that it had. The landowners applied for leave to appeal to the Constitutional Court. The application was granted, but in his judgment, Edwin Cameron agreed with the rationale of both courts, and held that there was a valid claim. This was despite the fact that the testimony of the claimants' 'star witness', Msile Nondzube, was heavily criticised by the landowners as well as a Supreme Court of Appeal judge. The Constitutional Court emphasised that the Act was an extraordinary piece of legislation and had to be interpreted in such a way so as to address the injustices of the past. This included provisions of the Act which dealt with how oral and expert evidence would be dealt with.

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Introduction

Twenty-seven years after the advent of democracy, South Africa is still emerging from 350 years of discriminatory policy and practice, systematically designed to advantage white people over the rest of the populace. This formed the fundamental basis for colonial rule and, later, apartheid.

With the adoption of the interim Constitution in 1994 (and the final one in 1996), provision was made for steps to be taken by government to restore the rights to land to those so dispossessed, or to their descendants. The Restitution of Land Rights Act[2] (the Act) is intended to be read with section 25(7) of the Constitution which provides that a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

The Act forms part of the constitutional framework for land reform aimed at redressing the past injustices of dispossession in this country. It is embedded in a challenging constitutional context in which the public interest imperative of land reform is pitted against constitutional protection of private property rights. Against this background the Legislature has used specific language in the Act as a tool to achieve land reform and to remedy the injustices which flow from dispossession. The Act requires historically determined justice and the application of the principles of 'equity and fairness'. So, it clearly implores the courts to lean towards granting rights to land where it would be 'just' and 'equitable' to do so within the context of the provisions of the Act.

On 13 December 2016, the Supreme Court of Appeal (SCA) of South Africa delivered judgment on an appeal from the Land Claims Court (LCC). The appeal was lodged by a group of landowners from the Salem area in the Eastern Cape whose portions of land were successfully claimed by 152 members of a 'community'[3] who alleged they had been forcefully dispossessed during the 1940s by racially discriminatory legislation. An interesting feature of this case was the heavy reliance by all parties on expert witnesses in the persons of eminent historians, Professors Herman Giliomee and Martin Legassick.[4] The SCA dismissed the appeal in a majority decision of four to one. However, in the minority judgement the dissenting judge, Azhar Cachalia, delivered a scathing report criticising the willing acceptance by the courts of so-called 'unreliable' oral testimonies of the claimants' witnesses, particularly the testimony of their leading witness, Mr Msile Nondzube.[5] The landowners, seemingly inspired by this minority judgement, applied for leave to appeal in the highest court of South Africa, the Constitutional Court (CC).

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2 Act 22 of 1994.

3 The term 'community' with reference to the claimants is intentionally placed under quotation marks. The reason for this is that, although they embrace the term, it would be quite inaccurate and problematic to identify them as a community when thy have very little in common other than the claim.

4 Sadly, Professor Martin Legassick died in March 2016.

5 The claimants called two witnesses to testify: Nondzube and Ndoyisile Ngqiyaza. At one point in his judgement, Cachalia described Nondzube's evidence as 'fanciful and demonstrably false'.

On 11 December 2017, the CC delivered judgement. In an interesting turn of events, the CC held that there was a valid claim to the land by the claimant community, but their rights to the land did not exceed those of the landowners. Thus, the court confirmed the LCC's findings that there was a discriminatory practice that led to the dispossession of the black Africans living on the commonage.

However, the purpose of this paper is not to analyse the rationale of the CC in arriving at its decision. Rather, its purpose is to critique the tendency of all three courts' approach to the historical record and evidence of historians to determine whether a land claim should succeed or not, focussing on the testimonies of Nondzube, Legassick and Giliomee.

In 2019, an article by Professor Robert Ross attempted to analyse the role played by the two historians only.[6] Ross' work did well to highlight the possible reasons why their testimonies could be so 'diametrically opposed' and distinguished between 'truth' and historical justice and that sometimes the need for the latter is far greater. While well researched and articulated, Ross' work does not adequately discuss the claimant 'community' and the greater intricacies regarding the definition of a 'community' in light of land claims in South Africa. Additionally, Ross fails to include the significance of Nondzube's testimony and the acceptance of such evidence in a court of law. It also falls short of satisfactorily explaining the roles which courts expect the historian witnesses to take in such claims. Ross focuses on the individual roles of Giliomee and Legassick specifically in relation to Salem. However, by analysing the general approach(es) of the courts, we can try to better understand its procedures. But more than this, we can identify how courts engage with historical texts and the kind of historiographical approach they are obliged to take in accordance with the Act.

Also, in 2019 I was fortunate enough to be invited to the inaugural '*iMpuma-Koloni* Bearings: An Other Cape?' workshop that sought to critically explore what a vantage point from the Eastern Cape might offer us now in this space and time. The workshop positioned itself around the term 'Eastern Cape' – what it refers to and what it enables. In addition, the workshop encouraged participants to explore historical and conceptual spaces of the Eastern Cape, itself 'a remarkable physical, material, geographical, ecological space … that can also be considered a conceptual space, a political space, a space that looms large in the historical imagination'.[7] At the time, I was well into writing my PhD on the Salem Commonage land claim and so this workshop offered me the opportunity to not only present some of my research, but also gifted me the chance to explore alternative perspectives for application in my own work.

One of the workshop's themes was 'erosion', defined as 'a gnawing away', a noun of action from the past participle stem of *erodere*, 'to gnaw away, consume'. This theme

6 R. Ross, 'The Wizards of Salem: South African historians, truth-telling and historical justice', *South African Historical Journal*, 2019, 633-653.

7 H. Pöhlandt-McCormick and G. Minkley, 'Proposal for a Workshop: *iMpuma-Koloni* Bearings: An Other Cape', 20-21 June 2019.

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resonated with me, especially in the context of my research which essentially deals with dispossession and the restitution of land. In that context I weighed the definition of erosion up between two possible meanings. On the one hand, the process of erosion can bear a cynical connotation in relation to the land claims process as a gradual destruction or diminution of history in favour of social justice and/or political grandstanding. On the other hand, the land restitution process has the effect of eroding injustices of the past and enabling new landscapes to develop and flourish. In terms of my research, these landscapes are both physical and historical. The question however is, to what extent does the legislature and judiciary allow these landscapes to develop. This article seeks to answer that question within the context of the Salem Commonage.

The Salem[8] land claim

The hamlet of Salem lies in the very heart of the Albany District (within the Makana municipal boundaries). It is situated about 20 kilometres southwest of Makhanda / Grahamstown, where the claim was originally heard by the Land Claims Court (LCC). The white residents of Salem are mostly commercial farmers, whereas the black African people are generally employed by these farmers. Salem itself consists of a few permanent buildings, including a historical church opened in 1832, as well as the local cricket pitch, considered to be the oldest in the Eastern Cape. These properties are situated at the centre of, but not included in, a portion of land known as the Salem Commonage (the commonage)[9] measuring a staggering 7,698 morgen.
It is this portion of land that is being disputed between affected farmers and the claimant 'community', who claim, as per the provisions of the Act[10], that they were forcefully removed some seventy years ago. The synopsis of their argument is as follows:

i.) The claimants are a 'community' of black African families whose forebears traditionally occupied the entire commonage from the 1800s.
ii.) They acquired owner, residential and grazing rights, as well as the right to use the land for agricultural purposes, access to firewood, burial sites and the 'use of land as commonage' for the whole community.

8 Ironically, Salem means 'peace' in Hebrew.
9 The word 'commonage' comes from England and describes the 'condition of land held in common, or subject to rights of common'. The 'right of common' usually refers to 'the right of pasturing animals on common land', but is not restricted to this purpose. More specifically it denotes an 'estate or property held in common'.
10 Section 2(1) states that '[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 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 discriminatory laws or practices; or
(c) he or she is a direct descendant of a person referred in paragraph (a) who has died without lodging a claim and has no ascendant who-
(i) is a direct descendant of a person referred to in paragraph (a); and
(ii) has lodged a claim for 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.'

iii.) All these rights were acquired from the last known chief of the 'community', Chief Dayile,[11] and were exercised in accordance with shared rules of usage under traditional law and so-called 'location rules'.

iv.) The Natives Land Act 27 of 1913 was passed to prohibit black Africans from owning land outside of scheduled areas, and the commonage was not a scheduled area.

v.) In 1926 they were 'herded' into a location on the commonage and placed under the control of a 'native superintendent'.

vi.) The subdivision of the commonage was facilitated through the implementation of section 49 of Ordinance 10 of 1921 and the Natives (Urban Areas) Act 21 of 1923, which entitled the Native Commissioner to restrict and control the rights of the black 'community'.

vii.) In 1940 the Salem Village Management Board (SVB), which represented the landowners who owned the adjoining farms in the village of Salem, applied to the Supreme Court in Grahamstown to subdivide the commonage and have it transferred into the names of the individual landowners.

viii.) The court granted the application against the background of the racially discriminatory legislation then in existence, which formed the basis of the dispossession of the community's rights over the commonage.

ix.) As a result of the court granting the application, the location, which housed 500 residents, was disestablished in 1941.

x.) The dispossession of the community's rights began in 1947 and continued until the 1980s.

The landowners responded to these claims with the following defence (summarised briefly):

i.) The commonage was part of a bigger area known as the Zuurveld, where large pieces of land were allotted to several groups, which in total consisted of between 4,000 and 5,000 British settlers.[12]

ii.) One of these groups was led by Mr Hezekiah Sephton. They settled in what would become Salem and established farms in and around the area, using the commonage for common benefit.[13] In 1848 they were granted freehold title over the commonage by the British Colonial Government. Their descendants and successors in title retained this right and held the land collectively until it was subdivided between them in 1941.

11 The spelling of the name varies throughout both the LCC's and SCA's judgements. For the sake of consistency, I will use the spelling of the LCC, as it was the court of first instance.

12 They settled in different locations in the Zuurveld, between the Bushmans and lower Fish Rivers, to the west and east respectively, and became known as the '1820 settlers'.

13 Some of the present landowners descend from these original settlers while others bought their farms from the original settlers or their descendants.

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iii.) When they arrived, there were no other people occupying the land.
iv.) The commonage was strictly limited to the grazing of their livestock. No cultivation of crops or residential accommodation was allowed.
v.) The landowners protected their collective interest in the commonage, which in effect meant that each settler owned his allotted erven as well as an undivided share in the commonage.
vi.) In time the landowners began employing labourers. Later, some of these labourers and their families were permitted to occupy a small portion of the commonage during the time they were employed by the landowners. In return, the labourers had to pay a rental to the SVB. Landowners occasionally permitted their employees to graze their own cattle as part of the owner's quota of grazing cattle.
vii.) Therefore, the employees never acquired any right in land over the commonage, whether traditional or otherwise. Nor did they constitute a 'community' that had any right to the land.
viii.) In 1940 the landowners sought a court order to subdivide the commonage because of disputes between themselves over its usage. Its effect was to end the joint ownership of the commonage and to vest individual ownership of the commonage in each landowner.
ix.) Thus, the order was not sought or granted as a result of any racial discriminatory law or practice.

The claimant 'community'[14]

In the Ross article, quite a lot of attention was given to the merits of an 'isiXhosa-speaking community' living on Salem before, during and after dispossession. He appreciated that the case hinged on whether or not a black African 'community' had formed before privatisation of the commonage.[15] However, he focused primarily on Legassick's and Giliomee's contestations surrounding the existence of a 'community' as defined by the Act. While this is important in navigating the historiographical battleground of the court, which will also be discussed in this article, no attempt was made to describe the ground-level dynamics of the claimants themselves. It is one thing to explain the historical merits of a black African community at Salem, but it is quite another to understand the term 'community' in relation to the Salem claim as well as land claims in general.

Most of the 152 claimants in the Salem case are men and some had been farmworkers on the farms that fall under the claim.[16] They maintain that their forebears were dispossessed of the land when it was subdivided and sold to individual white farmers. The land claim caused a number of divisions not only between the black African residents of Salem but also between them and the neighbouring black African

14 A community is defined in Section 1 of the Act and as a 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 such group.
15 Ross, 'Wizards of Salem', 644-645.
16 Court transcript of testimony of Msile Nondzube (25 January 2013), 230-231.

community of Hope Fountain.[17] Families are divided, disagreeing as to the validity of the claim. People who have been neighbours for years have levelled accusations at one another surrounding a lack of support for the claim.[18] The committee acting on behalf of the claimants, the Salem Community Property Association (SCPA), canvassed large sections of Salem and the surrounding areas of Farmerfield and Hope Fountain to try to encourage resident farmworkers to join the claim. The donation of land to farmworkers by a nearby game farm in the Hope Fountain area only caused further conflict due to the belief that any other development would jeopardise the validity of the claim.[19]

The SCPA was formed by the claimants shortly after they had lodged their claim to the Regional Land Claims Commission (the Commission) in 1998.[20] Its function is currently to coordinate the land claim of the Salem commonage and to inform the rest of the claimants of their rights to the land. Nondzube testified that he is the chairperson of the SCPA,[21] though other members such as Mr Douglas Wilfred Mlungisi Rwentla have been prominent in informing claimants of the case's progress.[22]

The claimants call themselves and their dependants a 'community', though they have very little in common except for this claim and tenuous family connections. Thembela Kepe argues that the use of the term 'community' in South Africa's land reform programme has both positive and negative effects on the beneficiaries.[23] The effects are positive when they help focus policy on the needs of poor people, but negative when they force conflicting groups together in a manner that results in the rights of a weaker group being trampled on by the actions of a more powerful group, such as traditional leadership or the state.[24]

The definition of 'community' remains 'highly elusive', with various competing interpretations, yet it is one of the most commonly used terms in developmental circles.[25] Probably the most common characteristic of 'community' is a group of people who share a common geographical location.[26] However, there is a view that distinguishes between the phrase 'the community' and 'community.[27] It argues that 'the community' is more appropriately linked to people in a particular geographical location than the term 'community'. According to this view, the phrase 'community' places more emphasis on ancestral ties and social interaction components, than the term 'the community'.[28]

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17 K. Luck, Contested Rights: The Impact of Game Farming on Farm Workers in the Bushman's River Area (MA thesis, Rhodes University, 2003), 63.
18 Luck, Contested Rights, 63-64.
19 Ibid., 64.
20 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 394. The Salem 'community' comprises of families represented by Mzukisi Madlavu, Lingani William Nondzube, Mtututozeli Gladman Madinda, Douglas Wilfred Mlungisi Rwentela, Msile De Villers Nondzube and Ndoyise Ngqiyaza.
21 Court transcript of testimony of Msile Nondzube (25 January 2013), 231.
22 *Working the Land*, Dir. Simon Gush (Film, News From Home, 2019). Rwentela did not testify during the court proceedings.
23 T. Kepe, 'The problem of defining "community": Challenges for the land reform programme in rural South Africa', *Development Southern Africa*, 16, 3, 1999, 415-433.
24 Kepe, 'The problem of defining "community"', 428-430.
25 *Ibid*., 418.
26 See P. Selznick, 'In search of community' in W. Vitek and W. Jackson (eds.), *Rooted in the land: essays on community and place* (New Haven: Yale University Press, 1996).
27 See J. Bernard, *The sociology of community* (Glenview, Illinois: Scott, Foresman Publishers, 1973).
28 Kepe, 'The problem of defining "community"' 419.

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A second way of defining a 'community' is as an economic unit. Economic relationships where different social actors share common interests, control particular resources or practise similar economic activities to make their livelihoods, can result in these people being seen as a 'community'. They do not necessarily have to reside in one locality or have any other social ties. In the former homelands of South Africa, for example, people who come from different villages or localities frequently shared resources such as rivers, large dams, forests, the coast and grazing land. This sharing of resources may be characterised by conflict over access and control, but in the eyes of outsiders and, to a lesser extent, some locals, common economic goals may be important enough for these people to be regarded as a 'community'.

Thirdly, people who share a history, knowledge, beliefs, morals and customs, and who have ties of kinship and marriage are also often viewed as a 'community'. These people may or may not occupy the same locality or belong to the same economic interest group. The strength of this community identity depends on how strong the social relationships are.[29] If this third characteristic of 'community' happens to identify individuals or groups who fall outside the locality or the common economic grouping, then there are potential complications for land reform. In land restitution cases, individuals can claim rights to any compensation that may be received by a particular 'community', basing their claim to 'community membership' on these social ties. In land reform as a whole, labour migrants who remain in touch with their rural roots also raise potential problems. In such cases, consensus of other members of the beneficiary group is important in deciding whether or not these migrants should be included.[30]

In all three characteristics of 'community', what is of particular relevance to the land reform programme is an understanding of who is acknowledged as belonging to the 'community'.[31] There are often conflicting notions of who belongs to which group, with disagreements arising both among local social actors, as well as between them and outsiders who act as agents of change, usually Department of Rural Development and Land Reform (DRDLR) officials.

An aspect of membership of a 'community', which is more relevant to the Salem claim, is where a relatively small spatial community, which has occupied the land for many decades, has been invaded by other groups as a consequence of colonial- or apartheid-era forced removals and evictions from white-owned farms. This results in a classic situation of overlapping rights to land. For example, before 1913 there was a community of amaXhosa who lived in the Salem area prior to the arrival of the settlers in 1820. When these people were expelled, the first fragmentation of a community took place. Then, gradually other groups entered the territory and settled there. By 1940, a black African 'community' as per the definition of the Act had formed there. They were not necessarily descendants of the people who had lived there in 1812, or even necessarily amaXhosa. But since the late 1870s this group existed as

29 Ibid., 421.
30 Ibid., 421. See also B. Cousins and D. Cousins, 'Lessons from Riemvasmaak for land reform policies and programmes in South Africa. Vol 1', *PLAAS and Farm Africa Workshop proceedings. Research Report No 2.* (Cape Town, 1998).
31 Ibid., 421.

a spatial and economic unit that developed social and cultural kinship. When that community's rights were dispossessed in the 1940s, another fragmentation of community took place.

The question here then is whether the *descendants* of these people can be called a 'community'. They have no spatial connection as most of the claimants were scattered all over the district since dispossession. As a result, their economic, social and cultural relationships eroded away to a point where these ceased to exist, and over time, new community relationships were established elsewhere with other groups. Ross remarks that '[t]here is, in legal terms, not a lot of evidence for the existence of a community, and certainly no clear demonstration, neither in written documents nor in oral testimony, for such claims to be made'.[32]

This erosion of community identity has led to a reimagination of cultural practices of the original Salem black African community through oral tradition. Indeed, some of the older claimants regale their families with stories of customs that were performed on the Salem Commonage.[33] The physical connection with the land may have been eroded through dispossession, but through the descendants of the community that had lived there prior to 1940, life in Salem before dispossession has been remembered. In the absence of any sort of archival evidence of their rights to the land, the oral tradition is utilised as a tool to substantiate those claims.

Of course, it can and also has been used to establish a hierarchy of claims to the land. Some members of the 'community' feel that they have privileged rights to the land more than anyone else, due to the position of their forebears in the community.[34] Without the existence of any other evidence to support those claims, whether through the archive or corroborative oral evidence, the credibility of such claims to superior rights are questioned not only by other claimants, but also by those who reside in Salem but who are not part of the claimant party.

In addition, the hierarchy of claims was also used to include a finite group, excluding others who had worked the land for decades. For example, when one of the landowners, Arthur David Mullins agreed to sell his farm to the DRDLR, he was surprised to learn that his employees were not part of the claimant party: 'Most of my … old staff are still in their homes and they only are there because we caught wind of the fact that the claimants were going to kick them off…'[35] He recounts that he only agreed on the final sale of the farm once his staff's names were added to the list of claimants.

Many studies have shown that conflict characterises life in rural areas, ranging from that relating to 'natural resource use' to conflict that is institutional by nature.[36] Thus this local internal conflict could easily distort perceptions of who belongs to their community. It is much harder, however, to untangle imposed external notions

32 Ross, 'Wizards of Salem', *South African Historical Journal* 653.
33 Court transcript of testimony of Msile Nondzube (25 January 2013), 232-239.
34 Luck, Contested Rights, 64.
35 Interview: Jako Bezuidenhout with Arthur David Mullins (Kenton-on-Sea, 2 February 2019).
36 See B. Cousins, 'Conflict management for multiple resource users in pastoralist and agro-pastoralist contexts', *IDS Bulletin*, 27, 3, 1996, 41-54 and K. Crehan, *The fractured community: landscapes of power and gender in rural Zambia* (Berkeley: University of California Press, 1997).

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of 'community' if they are found to be problematic, than to get locals to be a part of resolving the problem. Besides, perceptions of 'community' that are exclusively external and are immediately followed by implementation of government-led projects can fuel internal conflicts rather than help resolve them.[37] Thus, it was more than likely that such a conflict would erupt among the Salem claimants, as well as between the claimants and neighbouring residents.

I Oral testimony

i. Mr Msile Nondzube's testimony

Erosion strips away surface layers, revealing layers of rock that have not seen the light of day for millennia. Thus, it is not only a process of destruction, but also one of revelation. Similarly, oral histories reveal a hidden past often snuffed out by the written historical record. Legislators sought to address the imbalances of placing more credibility on the written record than on oral evidence by introducing section 30 of the Act. The provision allows oral evidence to be admitted subject to conditions that will be discussed later. The effect of section 30 is that claimants have the opportunity to reveal their past and place it in the public record. These revelations are sometimes cathartic in nature. However, once a new surface is revealed by erosion, it too is subjected to weathering. Oral evidence is immediately scrutinised by opposing counsel and often by the courts as well.

On 28 January 2013 Advocate Viwe Notshe (SC), representing the claimants, called in his 'star witness' Mr Msile Nondzube.[38] Nondzube gave evidence pertaining to the history of the land on which he was born. He testified how his grandfather, Landonda, had arrived at 'this place he called Tyelera' (currently known as Salem), long before the arrival of the white settlers.[39] They were eventually driven out of the Zuurveld by colonial forces, but returned some years later and re-established themselves as a 'community'.

Nondzube's family were originally from the area known as the Transkei and they were moving around to seek new grazing for their cows.[40] They settled in Dikeni (present day Alice) before moving again, passing by the alleged spot where Grahamstown would be established a few years later, eventually settling in Tyelera.

He went on to recite the clan names of his grandfather's people for the court: 'Nondzube, Mtika, Mazaneni, Tiyo, Jotela, Soga'. 'Collectively', he claimed, 'they were called the Jwara'.[41] Nondzube described the leadership structures of the Tyelera settlement, stating that a chief of non-royal blood administered the area as a proxy for the 'Chief' of his people. Though he did not recall the name of this 'Chief', he claimed that such a person was situated in the Transkei, and 'sent smaller chiefs to oversee

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37 Kepe, 'The problem of defining "community"' 422.

38 Interview: Jako Bezuidenhout with Advocate Viwe Notshe (SC), (Makhanda / Grahamstown, 16 October 2018).

39 Court transcript of testimony of Msile Nondzube (25 January 2013), 226.

40 Court transcript of testimony of Msile Nondzube (25 January 2013), 232.

41 Testimony of Msile Nondzube (28 January 2013), 232. While there is also a Jwara clan within the Mfengu people, it is more probable that this Jwara clan belonged under the banner of the amaXhosa, see J. B. Peires, *The House of Phalo: A History of the Xhosa People in the Days of their Independence* (Johannesburg: University of California Press, 1981), 189 and 74.

this place…'[42] The 'smaller chief' of Tyelera was Dayile, grandfather of Landonda and Nonzube's great-grandfather. Dayile was not of royal blood but was 'appointed' by the 'Chief from the Transkei' as a community leader.[43] He was from the Mantakwenda clan according to Nondzube. Dayile's role was to guard over the people's allotted areas, making sure that grazing and cultivation was done according to the rules of the community. He was also invested with powers to allot land to community members as he saw fit. Lastly, if there was trouble or misunderstandings between community members, this would be resolved at the 'great place' – where Dayile and his successors stayed. Nondzube was adamant that these men were 'elected' as leaders of the community living in the claimed area. When asked by his counsel whether each community member had their own allotted piece of land for grazing and cultivation, Nondzube responded that all the animals were 'grazing in one place and the boys [herders] would look after them in one common place'.

Nondzube's evidence was startling. If true, it would mean that not only were there black Africans living on the commonage long before the arrival of the settlers to the area; it would also mean that these people were part of an established political entity controlled by the Jwara clan whose traditional territory was almost five hundred kilometres to the east. Furthermore, it would create a legal quagmire for the landowners claiming they had sole legitimate rights to the commonage after the grants awarded to the settlers by British Colonial governors.[44] According to Nondzube, it was never the governors' land to give if a black African community was already living on that land.

Naturally, the landowners were sceptical of Mr Nondzube's version. Professor Giliomee was brought in as expert witness to help construct a counter-narrative which made exclusive use of the historical record. This narrative punctured the oral testimony full of holes, challenging Nondzube's credibility as a witness. Added to this, residents of Salem and some of the landowners themselves were also called in to testify that no black African community could have lived on the commonage and, if they did, it was purely at the behest of the white landowners. It soon became apparent that Mr Nondzube's evidence was fraught with contradictions and inconsistencies.

For example, Nondzube was unable to point out the location of Dayile's homestead during the LCC's on-site inspection of the Salem Commonage. He attributed this to the fact that the people who were attending the inspection were 'tired and we did not go there'.[45] He was then asked by opposing counsel why this had not been recorded in the minutes of the inspection. In fact, it was recorded that 'the exact area of his homestead is unknown'. Nondzube responded by saying that he told the inspectors

42 Ibid., 234.

43 There seems to be no other record proving the existence of such a 'chief', except for Nondzube's oral testimony.

44 On 15 December 1836, governor of the Cape Colony, Benjamin D'Urban authorised the granting of a portion of 2,333 morgen to the Salem settlers as commonage. In 1847 one of D'Urban's successors, Henry Pottinger, made an even larger grant of an additional 5,365 morgen also as commonage. However, it was found by the CC that both governors had acted outside of their powers in authorising these grants in terms of Ordinance 15 of 1844 that regulated the registration of subdivided land allotted to the settlers. But it did not authorise the granting of bulk land for the use of commonage. As the Ordinance worked retrospectively, it applied to the 1836 grant as well.

45 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 196.

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that he could point out the area where Dayile's homestead was but not the exact place. However, this was also not recorded in the minutes of the inspection. When it was put to him that what he was saying now in court was also not recorded in the minutes he replied: 'I am not going to dispute that but what I am telling you, it is as it is….'[46]

In addition, Nondzube was also asked during cross-examination if he ever told Mr. Paul Quba, the Commission's chief investigator in this case, about Dayile's existence. Given that Dayile was fundamental to the establishment of a black African 'community' at Salem, such information would be helpful for the investigator of the case in ascertaining whether or not a valid claim exists. However, Nondzube was vague in his answer, saying that he and Quba had discussed 'many things'. When he was pressed, he replied: '[I]t is a story related to us by our forefathers, I do not [know] maybe I told him, or I did not tell him, because all of us know that story because that is how our history was relayed'.[47] When it was put to him that Quba did not know the name of Dayile when he was questioned, Nondzube was 'surprised'.

Cachalia was generally not convinced of Nondzube's testimony. He described it as 'totally unreliable' and 'demonstrably false'.[48] With regards to Nondzube's claims that a black African community was there before and after the expulsion of the amaXhosa from the Zuurveld, Cachalia found it hard to believe as it was 'inconsistent with the contemporary written records'.[49] The SCA judge was puzzled as to why the claimants only relied on two witnesses to support their claim. In his mind, the oral evidence presented to the court 'lacked any credibility'.

Similarly, to Premesh Lalu's protagonist, Nicholas Gcaleka,[50] Nondzube found himself being ridiculed by legal counsel and senior judges alike, and even laughed at by the audience in the court gallery.[51]

With the erosion of the importance given to the written record, came the revelation of a hidden bedrock of historical knowledge. However, this only spawned outrage and scorn. It seemed that the written historical record would triumph over the oral interpretations of a community leader who wished historical justice for himself and his people.

ii. The courts' approaches to oral evidence

In his article, Ross notes that the oral evidence presented by the claimants was 'frankly disappointing' and it is presumably for this reason that he hardly discusses

46 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 196.
47 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 197.
48 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), paras. 307 and 339.
49 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 306.
50 P. Lalu, *The Deaths of Hintsa: Postapartheid South Africa and the shape of recurring pasts* (Cape Town: HSRC Press, 2009). In 1996 Gcalecka, an amaXhosa healer-diviner from Butterworth, claimed that he had found the skull of King Hintsa, the slain amaXhosa king at the hands of British forces in 1835 on the banks of the Nqabarha River during the Sixth War of Dispossession. Gcalecka, guided by a dream in which his ancestors supposedly appeared, travelled to Scotland to recover the skull of the murdered king with the hope that the return of the skull would bring an era of peace in the newly democratic South Africa. He was convinced that the widespread violence and large-scale corruption taking place in the new dispensation was as a result of Hintsa's soul 'blowing all over the world with no place to settle'. Gcalecka's mission was widely mocked and derided from a variety of quarters, including the media, academia and amaXhosa traditional leadership. Like Nondzube, he was accused of fabricating history.
51 Court transcript of testimony of Msile Nondzube (28 January 2013), 226 and Interview: Jako Bezuidenhout with Arthur David Mullins (Kenton-on-Sea, 2 February 2019).

Nondzube's evidence. In fact, in the two sentences he spent discussing the oral evidence, he lamented the ambiguous nature of the evidence, before concluding that 'the most tangible, and most useful evidence had to come from the written archive'.[52] However, contrary to Ross, the courts assigned to adjudicate land claims are obligated not to be as quick to dismiss such testimony. This is because of the nature of the relevant provisions of the Act that will be discussed below. This is important because the benchmark of checking the credibility of claims made by factual witnesses in land claims differs quite substantially from other civil suits.

Usually in civil matters, the courts will follow a procedure formulated in *Stellenbosch Farmers' Winery Group & another v Martell et Cie*.[53] The procedure is, briefly, as follows:

> To come to a conclusion on the disputed issues a court must make findings on:
> a.) the credibility of the various factual witnesses;
> b.) their reliability;
> c.) the probabilities that their versions are factually accurate.

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as the witness's candour and demeanour in the witness box, their latent or blatant bias, the internal and external contradictions in their evidence, the probability or improbability of particular aspects of their version and the calibre and cogency of their performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness's reliability will, for the most part, depend on: the opportunities they had to experience or observe the event in question, and the quality, integrity and independence of their recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.

But in terms of the Act, the level of admissibility is far lower, although it is not stated to what extent. According to sections 30(1)-(2) of the Act, parties are entitled to present both hearsay and expert evidence that may be 'relevant and cogent', even if it would not ordinarily be admissible. However, the court has the discretion as to whether to admit such evidence.

In the Salem case, Cachalia warned that a court must be aware of the 'dangers' posed by the admission of hearsay evidence.[54] He insisted that all evidence must be sifted, weighed and evaluated in light of other evidence in order to give each piece of evidence the weight to which it is entitled. The process of fact-finding in this way

52 Ross, 'Wizards of Salem', 648.
53 [2002] ZASCA 98; 2003 (1) SA 11 (SCA) para. 5.
54 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 296.

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must be underpinned by clear legal reasoning. It must be understood that Cachalia's rationale was dictated by well-established principles and precedent based on Western legal concepts regarding evidence. These principles are still in force in South African law today but the Salem case highlights how these precedents can come into conflict with modern South African jurisprudence.

Justice Edwin Cameron of the CC was cognisant of Cachalia's warning. He also expressed his concerns about the quality of evidence if the courts expected and accepted accounts that did not quite add up. By the same token, Cameron contemplated the fairness aspect: Would it be fair in terms of the Constitution and the Act to dismiss those accounts out of hand? The CC held that oral history is not only concerned with historical facts, but also the values and convictions of the community it recollects.[55] Cameron agreed with the notion that the laws of evidence must be adapted so that this type of evidence can be accommodated and placed on an 'equal footing' with historical documents. He therefore held that while it is still the discretion of the court to admit or dismiss this type of evidence, it must be guided by the Constitution and the Act. In this instance, the CC held that such oral testimony should be admitted as evidence.

II. Expert testimonies: Legassick v Giliomee

i. Legassick's testimony

Martin Legassick was called as the Commission's key expert historian witness.[56] He described the Zuurveld as part of a 'frontier zone' where the amaXhosa and white Dutch and English settlers were occupants.[57] He contended that the amaXhosa were, at the time, a cultural and linguistic entity and therefore had rights of occupation to the entire area. The amaXhosa preceded the white settlers in the Zuurveld, but for decades there was conflict between them with no clear authority dictating the law of the land. The claim of the landowners that the land was vacant when the British settlers arrived was only possible due to the brutal expulsion of the amaXhosa by British military authorities in 1812 during the Fourth War of Dispossession.[58]

Between 1878 and 1884, the amaXhosa people returned to the area.[59] This, he argued, indicated that the habitation of the commonage by the 'natives' was 'officially recognised'. Therefore, they had 'rights to occupy the land', and 'rights to graze cattle on it'.[60] Because they had occupied the land for a long time before the dispossession, they would have established explicit or implicit rules of behaviour, including those determining access to land such as grazing livestock, where to plough, collect wood and bury their dead. They thus constituted a 'partly self-sufficient community'. He also found that the population figures from June 1884 to July 1941 showed that

55 *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 65.
56 Ibid., para. 15. Legassick obtained his PhD from the University of Los Angeles. His doctoral thesis focussed on the Griquas in the Northern Cape.
57 *Salem Party Club v Salem Community* CCT 26-17 (11 December 2017), para. 39.
58 This was carried out under the leadership of Colonel John Graham, after whom Grahamstown was named.
59 Ross, 'Wizards of Salem', 643-644.
60 *Salem Party Club v Salem Community* CCT 26-17 (11 December 2017), para. 131.

a substantial black African population had lived outside of the location and these 'could not all have been servants'.[61] So he concluded that they probably lived on the commonage. And finally, because they had not been consulted by state officials concerning the subdivision of the commonage, or of the disestablishment of the location, this constituted a racially discriminatory practice, which 'violated their right of occupation and dispossessed them'.[62]

Legassick testified that the amaXhosa never accepted their expulsion, because they attacked Grahamstown (unsuccessfully) in 1819 to 'remove this alien town from the Zuurveld and recover their land'.[63] After the settlers arrived in 1820, he maintained that there was no reason to suppose that the amaXhosa would not have returned to their land between 1820 and 1870.

Regarding the period after 1878 he was of the view that because black Africans living on the commonage and elsewhere were required to pay a 'hut tax', this necessarily implied that they had a right to occupy this land.[64] The reports of the Native Commissioner in 1883 to the effect that black Africans living in those huts appeared to be 'of a better class', and whose huts 'are larger and cleaner', were indicative of people 'subsisting for themselves', and not having resided there as farm labourers.[65] He testified that the establishment of the SVB under Act 29 of 1881, and the promulgation of regulations in 1906 to manage communal areas on behalf of the landowners, 'ignored and infringed' on the existing rights of black Africans residing on the commonage.[66] Legassick added that the reference in the SVB records to 'squatters' on the commonage was probably a reference to 'people who were living on the commonage, ploughing the land and grazing cattle, but also possibly to supplement their subsistence by working for the farmers'.[67]

With regards to the claimants' assertion that the SVB's location regulations recognised the amaXhosa as inhabitants, and implied that all the inhabitants had lived in the location, Legassick conceded that he had inadvertently misrepresented this because of the pressure of time when he was compiling his report. He testified that the true position was that there was a small population inside the location and there was a larger population outside. Those outside the location were referred to as 'squatters' because they were not recognised by the SVB, and those inside the location had rights under the regulations. But the regulations were never put into operation because the SVB was never properly in control of the location or the commonage. The 'community' conducted their affairs on the basis of unwritten rules.

With reference to a report by the Grahamstown magistrate in July 1941, estimating that there had been 500 black Africans of whom fifty were servants living with the farmers, Legassick testified that the remaining 450 were therefore not employees and

61 Ibid., para. 131.
62 Ibid., para. 131.
63 *Salem Community v Government of the Republic of South Africa* (217/2009) LCC (Unreported), para. 25.
64 Ross, 'Wizards of Salem', 644.
65 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 133.
66 Ibid., para. 134.
67 Ibid., para. 135.

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had lived on the commonage.[68] A correspondence on cattle branding also indicated that the provincial authorities were aware of the existence of black Africans on the commonage. He insisted that the 'community' had combined their oxen for ploughing purposes and that they had cattle that grazed on the commonage.

He concluded, in his evidence in chief, that those amaXhosa who lived on the commonage 'may well have been connected to amaXhosa people who lived there in the eighteenth century, in one way or another who had established rights through the Cape Colony and their registration as hut tax payers in the 1870s and 1880s'.[69] They lived there until the 1940s and were dispossessed by the judgement of the court and subsequent actions of the authorities. Because the court failed to consult with the amaXhosa residents, those actions, in Legassick's opinion, were discriminatory.

ii. Giliomee's testimony

In response to Legassick, the landowners relied on the testimony of Professor Herman Giliomee.[70] His mandate was to give an opinion on Legassick's views regarding the land rights of the claimants, its factual basis, conduct his own research on the issue as well as supply a report on his findings.

In summary, his opinion was that the amaXhosa existed as a political entity in the eighteenth century – not a cultural or linguistic entity as Legassick suggests. Its borders were defined by the extent of the land occupied by chieftains subject to the ruling Tshawe clan. Land occupied by a chief would have been claimed as amaXhosa territory, unless the king denied any such claim as Ngqika did in respect of the Zuurveld.[71] Any claims to land made by the amaXhosa as a cultural and linguistic entity as it is considered today would be inconsistent with the political claims that were then made by amaXhosa groups on the grounds of prior occupation.[72]

The Gqunukhwebe group[73] did claim the right to live in the Zuurveld on the basis of prior occupation, but were expelled in 1811-1812 during the Fourth War of Dispossession and never returned as a collective entity.[74] According to Giliomee there were three waves of new immigrants to the area after the settlers arrived. The first were Tswana-speaking, the second the Mfengu and the third were amaXhosa – but not the Gqunukhwebe. Giliomee therefore concluded that it is 'highly unlikely' that anyone claiming to be a descendant of the Gqunukhwebe, living in the Zuurveld during that period, would have lived in Salem 100 years later.[75] Any other

68 Ross, 'Wizards of Salem', 644.
69 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 138.
70 His MA thesis was 'Die administrasie tydperk van Lord Caledon 1807-1811'. Therein he dealt with the history of the amaXhosa.
71 In 1797, Ngqika became Paramount Chief of the Xhosa. Both Ngqika and Ndlambe, the Regent for the amaXhosa, were aware that the Cape Colony considered the Fish River to be the boundary dividing it from Xhosa territory further to the east. Ngqika respected that boundary and undertook to prevent his followers from crossing it. There is also evidence of Ndlambe having urged minor chiefs to withdraw across the Fish River to maintain peace with the Colony. Ndlambe would later rebel against Ngqika, who had moved west of the Fish River, and claim part of the Zuurveld.
72 By 1808, Ndlambe, who was no longer a Regent, claimed the Zuurveld on two grounds: he bought it from the Boers and he won it in war – not on the basis of prior occupation.
73 The Gqunukhwebe was a Xhosa group that was firmly established in the Zuurveld area from about 1760, first under Tshaka, then under his son, Chungwa.
74 H. Giliomee, 'Notes on Court Proceedings 21-22 January, 2013', cited with permission from Professor Hermann Giliomee, 27 February 2017.
75 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 156.

amaXhosa group claiming indigenous rights on the basis of the Gqunukhwebe occupation would have been in an even weaker position to assert any right to the commonage based on indigenous title.

Once white dominance had been established over the Zuurveld, Giliomee reckoned that the relationship between masters and servants would have evolved towards an unequal and exploitative one.[76] This would have made it unlikely that the British settlers and their descendants would have allowed labourers or other Africans living on the commonage to establish rights.

Legislation passed by the Cape Parliament shows that black Africans could not have maintained sufficient autonomy to 'build up' rights as a 'community', as Legassick suggested they did. With reference to Legassick's contention that the acquisition of rights to the commonage was 'the reciprocal side of paying taxes', Giliomee pointed out that the purpose of the Native Location Act 6 of 1876 was the opposite.[77] In other words, the purpose of those rights was 'to reduce the number of idle squatters' (namely, tenants economically acting on their own behalf).

In Giliomee's opinion, Legassick's formulation of the claim is one which is made by a 'community' or people as descendants of the amaXhosa without any borders or reference to the disputed land.[78] Giliomee maintains that such a claim is extraordinary because all 'frontier conflicts' over land were between political authorities over contested boundaries. In his opinion, there was no evidence of the existence of a 'community' as contemplated in the Restitution of Land Rights Act.[79]

Giliomee refuted Legassick's contention that the amaXhosa attack on Grahamstown in 1819 was to recover land lost in the expulsion, as not based on any factual or documentary evidence. He pointed out that all writers on the frontier have commented that the attack was to recover cattle seized from the amaXhosa by British forces.[80]

With regard to whether an autonomous 'community' of black African farmers – an 'African peasantry' – emerged in the Albany and adjoining districts, and Salem in particular, during the latter part of the nineteenth century, Giliomee pointed out that a large number of black Africans settled on alienated Crown land or the farms of absentee landlords making a living as labour-tenants or as rent-paying tenants.[81] So, in the vicinity of Salem, the farmers were likely to have permitted their labourers to graze their stock on the commonage. But there is no reference to black African farmers living there in any capacity other than as wage labourers and labour tenants, who received cattle as a supplement to, or in lieu of, wages. Such labourers were allowed to

76 Ibid, para. 158 and Giliomee, 'Notes on Court Proceedings 21-22 January, 2013'.

77 H. Giliomee, *An historical evaluation of the claims made by the claimant community pertaining to their rights in and to the land that is claimed, the historical perspective in regard thereto and comments on the evidence given by Professor Legassick and his theories*, obtained with permission from Hermann Giliomee, 43.

78 Ross, 'Wizards of Salem', 648-649.

79 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 160.

80 Giliomee, 'Notes on Court Proceedings 21-22 January, 2013'. Some writers contend that the attack may have additionally been precipitated by a devastating drought which forced the amaXhosa to raid the Zuurveld area. See J. Hodgson, 'A Study of the Prophet Nxele (Part II)', *Religion in Southern Africa*, 7, 1, January 1986, 3-23 and R. Marshall, A Social and Cultural History of Grahamstown, 1812 to c1845 (MA thesis, Rhodes University, 2008).

81 Giliomee, 'Notes on Court Proceedings 21-22 January, 2013'.

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graze their cattle on the commonage, but it is unlikely that they would have 'built up' rights as Legassick contends they did.[82] The documentary evidence, Giliomee maintained, suggests the contrary.

Giliomee also cast his doubts on Nondzube's evidence that his great-grandfather trekked past a kraal that existed where the Grahamstown Cathedral was established (in 1824) *en route* to the commonage before 1811. This is because if there was a kraal at that spot there would probably have been reports indicating this in district documents. Giliomee was also quite sceptical of Nondzube's account as a whole. He reasoned that given Nondzube's age at the time of the hearing[83], which was 68, it was unlikely that he would have had a great-grandfather over 100 years of age who would have been a young man at the dawn of the nineteenth century as he claimed.

Furthermore, Giliomee explained the purpose of a 'hut tax' – that it was 'imposed on indigenous people throughout British colonies to force them into wage labour, and to inject more cash into the economy; they were not aimed at white people at all. If a farmer in Salem did not want an African to live in a hut, or if the tax was not paid, he could simply terminate the employment and evict him from the property'.[84] So, black Africans living anywhere in Salem did so at the behest of the owner.

After Giliomee's evidence, Legassick submitted a supplementary report in response. In it he asserted that to prove indigenous rights, 'it is merely necessary to show that Salem was within the bounds of amaXhosa territory at the time that European settlers established officially-titled farms in the Zuurveld'.[85] The implication for this approach would obviously be that anyone showing some sort of affiliation with the amaXhosa would be entitled to assert a claim over the entire territory. Under cross-examination, when he was asked whether this was what he had meant, he insisted that it was.[86]

iii. 'Court as historian': Courts' approaches to expert testimonies

Section 30(2) of the Act makes provision for expert evidence to assist the court to establish 'historical facts relevant to a particular claim'. The courts view expert historical testimony as a vital component of evidence when determining whether a claim is valid or not. The historian is regarded as a person with 'specialised knowledge' who could potentially aid a court in determining the facts of a case. In addition, an historian could help to identify, gauge the reliability of, and interpret evidence that would otherwise 'elude, mislead, or remain opaque to a layperson'.[87]

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82 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 162.

83 The LCC judgement was delivered in 2013.

84 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 164.

85 M. Legassick, 'Response to supplementary report by Professor Giliomee: In the matter between The Salem Community and the defendants (landowners) concerning the remainder and portions 1 to 38 of the farm Salem No 498, District of Albany. Land Claims Court Case No LCC 217/2010', (Date Unknown), cited with permission from Professor Hermann Giliomee, 27 February 2017.

86 As far as I understand it and as the minority judgement also pointed out, Legassick was not qualified to answer such a question of law, nor is such a type of claim recognised in the Restitution of Land Act. Nonetheless, the LCC admitted his opinion into evidence.

87 *Marvel Characters Inc v Kirby* 726 F.3d 119 (2d Cir. 2013) at 16-17 in *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 299.

The courts must, in turn, approach such evidence as it would any other expert testimony.[88] But courts are also cautious of the pitfalls of expert evidence. Arguments are sometimes put forward on the basis of untested and seemingly neutral facts. Conclusions are then often drawn to confirm those theories. A court will therefore look for the same qualities in historians as it would in other expert witnesses: appropriate specialisation, thorough research, and conclusions that are well supported by the record.[89]

With regard to establishing 'historical facts', Cachalia stressed that fact finding – even of historical facts – is the responsibility of the courts, not the historian.[90] The historian may give their opinion on the facts established from historical texts and documents and provide their reasons for these conclusions. This may aid the court, but it cannot displace the court's duty to establish the facts. He therefore warns that a court must be alert to the dangers of such testimony particularly when it is directed towards supporting partisan causes, as in the Salem case. In addition, and very importantly, the expert historian's opinion as to what the law is or what a document means is generally not admissible as that falls outside the ambit of the historian's expertise. However, if the courts are uncertain about the meaning of a certain provision, it will admit the historian's interpretation but will not necessarily rely on it. Cameron agreed with Cachalia that fact finding is the sole responsibility of the courts. He also emphasised that limitations to the capacity of determining a fact with sufficient certainty on the basis of opposing experts' views do exist.[91]

Here, Cameron touches upon the thoughts of Italian historian, Carlo Ginzburg who points out that the 'judicial model … urges historians to focus on events … that could be easily ascribed to specific actions performed by one or more individuals' while 'it disregards those phenomena (like social life, mentalities, and so on) that resist an approach based on this explanatory framework'.[92] Similarly, Richard J. Golsan questions whether the courtroom is 'an ideal space for establishing the truth of history' at all because of these limitations imposed on historians in court.[93] Indeed, the interpretation of history is particularly difficult, especially in the context of rights in land. Ginzburg acknowledges that the historian as investigator has far more freedom to manoeuvre than a court, because unlike the courts, historians do not have to make

88 *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) 569B-C.

89 J. A. Neuenschwander, 'Historians as Expert Witnesses: The View from the Bench', available at https://archives.iupui.edu/handle/2450/6017.

90 *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 302.

91 *Salem Party Club v Salem Community* CCT 26-17, para. 63.

92 C. Ginzburg, 'Checking the Evidence: The Judge and the Historian', *Critical Inquiry*, 18, 1, Autumn 1991, 79-92, 81-82. Ginzburg used court documents to scrutinise the conviction of his friend, the Italian radical leftist, Adriano Sofri. Sofri, along with his two co-defendants, was pronounced guilty for the murder of a police superintendent. Almost the entire case against Sofri rested on the testimony of a former militant in Sofri's organisation, Leonardo Marino. Ginzburg criticised the judge's 'complete reliability [of] Marino's statements'. While Ginzburg acknowledged that historians and judges both contextualise their evidence, he insists on a 'higher threshold of proof' from judges. See also C. Fink, 'Review: A New Historian', *Contemporary European History*, 14, 1, February 2005, 135- 147

93 R. J. Golsan, *Memory, the Holocaust, and French Justice: The Bousquet and Touvier Affairs* (Hanover: University Press of New England, 1996), 176. Golsan has written extensively on the role of historians in court cases involving the indictment of members of the Vichy regime in France. In *Memory, the Holocaust, and French Justice*, he analyses the role played by historians in the trial of Paul Touvier, a Nazi collaborator responsible for the executions of a number of his countrymen between 1943 and 1945.

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a definitive judgement.[94] However, Cameron is adamant that the law is obliged to provide finality in the interpretation of historical events 'where finality, according to the professional historian, is not possible'.[95]

He also pointed out that the 'often acrid' conflicts between Legassick and Giliomee illustrates the deep division in determining how history should be understood. Both were prominent, accomplished and distinguished professional historians. As Ross notes, both scholars had 'done substantial work in the various archives of the Cape, and in Europe' and had illustrious careers 'in the borderlands between academia and political activism'.[96] However, their approaches to the same historical materials differed radically. Giliomee suggested that Legassick approached the sources with a view to attaining a particular goal or outcome. But this seemed true also of Giliomee's evidence.

Giliomee himself conceded that 'no historian is free from a particular theoretical and ideological approach'.[97] His own testimony was laden with the assertion that the claimants could not and did not acquire rights in or over the commonage. That deduction, as Cameron puts it, was 'a normative conclusion – one inescapably requiring the attribution of value or judgment – for the court, and not the experts, to draw from the established historical facts in the light of the Constitution and the Restitution Act'.[98]

Cameron asserts that there is no objective way of understanding, interpreting or writing history that can be understood, interpreted or written, outside one's own time, material circumstances or social allegiances. That is true of court judgements as well. It does not mean that history should become a 'free-for-all' of subjective interpretation.[99] He reiterates that it merely serves to direct scrupulous care in acknowledging one's own ideological positioning within the 'disciplinary constraints and commitments of one's craft'.[100] So, understanding history is a necessarily value-laden task. But the courts are guided by the Act, as well as the usual techniques available to any court, in assessing expert evidence, mentioned above.

The Act requires courts to 'admit any evidence' they consider relevant and cogent to the matter even if it is not admissible in any other court of law.[101] This specifically includes historical expert evidence. Therefore, courts are obliged to interpret the Act to afford claimants the fullest possible protection to advance the true purpose of the Act, which is to provide restitution and equitable redress to as many victims of racial dispossession of land rights after 1913 as possible.[102]

The Act should be viewed as 'an extraordinary piece of legislation' which generates processes and approaches not normally associated with normal rules of litigation.

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94 See K. Polasik, 'Historian an Investigating Magistrate. Carlo Ginzburg's "Circumstantial Paradigm" Marginalia', *Sensus Historiae*, 2, 2011, 43-50.
95 *Salem Party Club v Salem Community* CCT 26-17, para. 63.
96 Ross, 'Wizards of Salem', 641.
97 *Salem Party Club v Salem Community* CCT 26-17, para. 67.
98 *Salem Party Club v Salem Community* CCT 26-17, para. 67.
99 *Salem Party Club v Salem Community* CCT 26-17, para. 68.
100 *Salem Party Club v Salem Community* CCT 26-17, para. 68.
101 Section 30(1) of the Restitution in Land Rights Act 22 of 1994.
102 *Salem Party Club v Salem Community* CCT 26-17, para. 26.

The Act implores the courts to lean towards granting rights in land where it would be just and equitable to do so.

Cameron emphasised that the Act is not a victor's charter, intent at 'whatever cost' on depriving those who have of what they have.[103] It is a 'nuanced and generous' framework for restoring rights and dignity to those dispossessed of their land after 1913, while affording compensation to those who are affected by successfully proven claims. The rationale of the courts in the Salem case is a clear example of how the Act's just balance operates.

Conclusion

The Salem Commonage land claim offers unique insight into the complex processes followed by courts when determining the admissibility of both oral and expert historian testimony. Despite scornful criticisms aimed at the credibility of Nondzube's hearsay evidence, it was not rejected by the LCC nor by the majority of the SCA and the CC. Both Cachalia and Cameron were concerned about the 'dangers' of admitting any and every hearsay evidence placed before the courts. However, as this was an issue of fairness, Cameron agreed that the laws of evidence must be adapted so that this type of evidence can be accommodated and placed on an 'equal footing' with the written historical record. Ross omits this point by dismissing the role of oral evidence in this instance. This is part of the problem. South Africa has a chequered history of obscuring oral history in favour of the written record. Thus, the courts have a responsibility in terms of the Act and the Constitution to help uncover oral histories wherever possible.

The Salem case also demonstrated in detail the role expert historians were expected to play when testifying in land claim cases. In addition, given the polarising views of Legassick and Giliomee, this case became a historiographical battle fought in the courts, 'between the various schools of historiography which emerged in the second half of the twentieth century'.[104] Though neither historian represented a particular school, their conflicting views complicated matters for the courts. In the end, the courts did not necessarily reject Giliomee's historical testimony in favour of Legassick's. Instead, the role of historical testimony is to assist the courts in establishing facts to support land rights or dispossession, as long as they are applicable and persuasive. In addition, while Ross emphasises the role of the historian in the courts, it is imperative to also recognise the role of the court as historian. The courts are vital in establishing what we as a society understand to be 'facts' of the past. Through Cameron it can be seen that the evidence and interpretation of evidence is actually viewed abstractly, rather than concretely. By doing so, the courts applied a democratic, post-racist approach to the case enabling the emergence of 'truth claims' over other forms of evidence.

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103 *Salem Party Club v Salem Community* CCT 26-17, para. 73.
104 Ross, 'Wizards of Salem', 641.

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The purpose of land restitution is not to avenge the past, but rather to erode through it, to reveal a hidden part of it. By doing so, it restores an element of justice for victims of dispossession of land rights. Thus, while eroding the past seems destructive, it is not. The Salem case underscores the need for historical narratives to be scrutinised, weathered and unearthed, as this, in turn, exposes the bedrock of historical justice.