

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at **RANDBURG** during 30-31 July, 1-3 August 2001 **CASE NUMBER: LCC 64/98**
20-24 August 2001, 8-9 November 2001 and 14-16 November 2001
before **Gildenhuis AJ** and **Wiechers (assessor)**

Decided on: 29 January 2002

In the case between:

THE BAPHIRING COMMUNITY	Plaintiff
and	
MATHHYS JOHANNES UYS	1 st Defendant
JAN HENDRIK LIEBENBERG	2 nd Defendant
WESSELS CORNELLIS CRONJE OOSTHUIZEN	3 rd Defendant
SAREL JOHANNES BUITENDAG	4 th Defendant
FRANCOIS JOHANNES JOUBERT	5 th Defendant
WOUTER BEKKER	6 th Defendant
HENDRIK BALTES NIEMAND	7 th Defendant
ANTOINETTE PRINSLOO	8 th Defendant
THE REGIONAL LAND CLAIMS COMMISSIONER FOR GAUTENG AND NORTH WEST PROVINCE	9 th Defendant
THE MINISTER OF LAND AFFAIRS	10 th Defendant
THE MINISTER OF PUBLIC WORKS	11 th Defendant
THE MINISTER OF MINERAL AND ENERGY AFFAIRS	12 th Defendant
THE REGISTRAR OF DEEDS	13 th Defendant
THE LAND AND AGRICULTURAL BANK OF SOUTH AFRICA	14 th Defendant
FIRST NATIONAL BANK	15 th Defendant
J H LIEBENBERG	16 th Defendant
J C LIEBENBERG	17 th Defendant

H KRUGER	18 th Defendant
SENWES LIMITED	19 th Defendant
N.W.K. LIMITED	20 th Defendant
PETRUS JOHANNES LIEBENBERG	21 st Defendant

JUDGMENT

GILDENHUYS AJ:

Background

[1] This judgment is mainly about who may, in terms of the Restitution of Land Rights Act (hereinafter referred to as “the Restitution Act”),¹ bring a claim for the restitution of rights in land dispossessed from a traditional African community. The claim in this case was brought by a group of persons who describe themselves as “the Baphiring Community”. According to the plaintiff’s statement of claim,² it “is not registered and has no written constitution”. Particulars of some 383 persons constituting the “community” were later given. Most of them are members of the Tswana tribe known as the Baphiring. They constitute only a small part of the entire tribe. They claim restitution of rights in land dispossessed from the tribe.

[2] The claim was brought directly to the Land Claims Court under Chapter IIIA of the Restitution Act for the following relief:

“71 An order restoring to the plaintiff the common law title, unencumbered by lease agreement or bonds, in both surface and mineral rights in the land known as portion 1 (excluding that portion of portion 1 which was previously known as portion 14 of the farm SYFERFONTEIN 451 JP), 5, 6, 7, 8, 9, 10, 12, 13 and the remaining extent of the farm ROSMINCOL 442 JP, subject to the following conditions:

71.1 the land shall be acquired or expropriated by the Minister of Land Affairs;

1 Act 22 of 1994, as amended.

2 Dated 11 June 1999.

- 71.2 the land shall be consolidated into a single farm;
- 71.3 the land shall be transferred into the name of the Baphiring Communal Property Association to be established by the plaintiff in terms of the Communal Property Association Act, no. 28 of 1996;
- 71.4 the terms of the constitution of the Baphiring Communal Property Association shall permit *bona fide* farm workers resident on the land at the time that the plaintiff takes occupation of the land to become members of the association;
- 71.5 the land shall be transferred subject to the existing servitude in favour of ESCOM.
- 72 An order declaring that the mineral rights in the land shall vest in the Baphiring Communal Property Association.”

[3] The present owners of the claimed land have been cited as defendants in the case. Some of them³ oppose the claim. I will refer to them jointly as “the objecting land owners”. They were represented by counsel at the hearing. The Minister of Land Affairs and the Minister of Mineral and Energy Affairs are also defendants in the case, represented by counsel at the hearing.

[4] The following persons were called by the plaintiff to give evidence:

- Mr G P Alberts, a deputy director of Statistics South Africa, and Mr J A Gerber, an image analyser.
- Mr L M Mabalane, acting chief of the Baphiring tribe.
- Mr P M Ntshoe, presently employed in the offices of the Regional Land Claims Commissioner, Mpumalanga. He was previously the chairman of a non-governmental organisation known as the Transvaal Land Restoration Committee. The organisation was formed by another non-governmental organisation, the Transvaal Rural Action Committee, commonly known as TRAC.
- Mr W Phiri, a projects manager employed in the Mpumalanga regional office of the Land Claims Commission, previously employed by TRAC.
- Mr C Mabalane, a Mophiring presently living in Kagiso, Krugersdorp. He is one of the leading members of the plaintiff group.
- Mr E Kgama, an assistant director in the office of the Regional Land Claims Commissioner for the provinces of North West and Gauteng.

3 The second, fourth to eighth, sixteenth and seventeenth defendant.

- Ms Durkje Gilfillan, previously an attorney practising at the offices of the Legal Resources Centre, Pretoria. She was, for some time, the Regional Land Claims Commissioner for the provinces of Mpumalanga and the Northern Province. She is presently again with the Legal Resources Centre.
- Ms M Segatlhe, Ms M S Poshoko and Mr D Thabane, all of them members of the plaintiff group.

All of the witnesses did their best to assist the Court. None of the defendants called any witnesses.

[5] A research report was prepared by Mr G de Lange on behalf of the Department of Land Affairs.⁴ The report has historical documents (including deeds and maps) annexed to it. It was handed up as “bundle F”. The objecting land owners put together a further bundle of historical documents, deeds and maps, handed up as “bundle B”. By agreement between the parties, the research report was admitted “as being the report, without admitting the weight of evidential value of opinions, views and conclusions expressed therein”. The parties also admitted the authenticity of the historical documents, deeds and maps contained in the two bundles.⁵

The facts

[6] The Baphiring tribe⁶ lived on portions of the farms Rietfontein, Syferfontein and Brakkuil in the district of Koster and Marico for many years prior to 1972.⁷ Their dwelling-place on these farms was known as “Mabaalstat”. I will in my judgment refer to it as the “old Mabaalstat”, to distinguish it from the “new Mabaalstat” which was subsequently established elsewhere.

4 Report no 65/1995.

5 The agreement was reduced to writing and constitutes Exhibit 14.

6 The Baphiring tribe is a traditional African community. Because both the plaintiff and the objecting land owners used the term “tribe” in their pleadings, I will, to avoid confusion, also do so in this judgment.

7 The full description of the portions concerned is set forth in para [35] of this judgment.

[7] Under the political thinking of the time the old Mabaalstat was considered to be a “black spot”. The tribe was moved from the old Mabaalstat by the Department of Bantu Administration during September 1971. Some time later, on 5 October 1972, the land comprising the old Mabaalstat was expropriated under section 13(2) of the Development Trust and Land Act,⁸ read together with the then Expropriation Act,⁹ and ownership transferred to the Republic of South Africa. It is common cause that the Development Trust and Land Act was a racially discriminatory law, and that the tribe was dispossessed of their land rights as a result thereof.¹⁰

[8] After the expropriation, the expropriated portions of three farms together with portion 14 of Syferfontein¹¹ were consolidated into a new property, known as Rosmincol 442 JP.¹² The land was resurveyed and subsequently subdivided. The subdivided portions were sold off to farmers of the “white” group. Over time, some subdivisions were further subdivided or consolidated. The presently existing subdivisions are as set out in paragraph 71 of plaintiff’s statement of claim.¹³ Each objecting land owner is the owner of a subdivided portion of Rosmincol. The State reserved all mineral rights when it sold the subdivided portions, and still owns the mineral rights.¹⁴

[9] Following upon the expropriation of the old Mabaalstat, the State allocated a sum of R586 900,03 as compensation for the land. According to the research report by Mr de Lange, section 13(7) of the Development Trust and Land Act required the Trustee of the South African Development Trust to offer for sale to black people whose land was expropriated, land of a

8 Act 18 of 1936, known at the time of its promulgation as the Native Trust and Land Act.

9 Act 55 of 1965, as amended.

10 See the case of *Minister of Land Affairs and Another v Slamdien and Others* [1999] 1 All SA 608 (LCC) at para [19].

11 Portion 14 of the farm Syferfontein, measuring 4,5554 hectares and registered in the name of Philippus Mabalane, does not form part of the dispossessed land.

12 Held by the Republic of South Africa under Deed of Transfer T 13709/1979, contained in pages 62-73 of bundle F.

13 Quoted in para [2] of this judgment.

14 It is so alleged in the plaintiff’s statement of claim of claim dated 11 June 1999 at para 44, and it was admitted by the objecting landowners in their amended plea dated 28 July 1999 at para 10 and likewise admitted by the tenth and twelfth defendants at para 19 and 17 of their respective replies.

pastoral or agricultural value not exceeding the amount of compensation agreed or determined for the expropriated land.¹⁵ A sum of R416 377,60 from the compensation monies was applied for the acquisition of compensatory land, later to become known as “the new Mabaalstat”. The new Mabaalstat was incorporated into the then Bophuthatswana during 1977. It was registered in the name of “the President of the Republic of Bophuthatswana in trust for the Baphiring tribe under captain Moefi Albert Sandy Mabalane”.¹⁶ The balance of the allocated compensation, together with a further sum of R10 670,00 for mineral rights, were (according to the historical documents) subsequently paid to the tribal authorities.¹⁷

[10] During August 1993, a claim was lodged with the Advisory Commission on Land Allocation established in terms of the Abolition of Racially Based Land Measures Act.¹⁸ It was lodged by persons who were not the tribal authority. Mr van Rooyen, on behalf of the objecting land owners, submitted that the claim lodged in terms of that Act was legally void, firstly because the person lodging the claim did not have the necessary authority to act on behalf of the tribe, and also because old Mabaalstat was then no longer State land.¹⁹ A claim lodged with the Commission on Land Allocation is, under some circumstances, deemed to have been lodged in terms of the Restitution Act.²⁰ On 25 August 1995 notification of the restitution claim was published in the *Government Gazette*²¹ in terms of section 11(1) of the Restitution Act as being a claim submitted by Ephraim Mabalane on behalf of the Baphiring tribe. On 17 March 1996 a meeting was held at the new Mabaalstat at which a “Baphiring Land Claims Committee” was elected and mandated to proceed with the restitution claim.

15 Page 14 of bundle F.

16 This is apparent from the deeds office printouts contained in pages 168-173 of bundle F, read with the annexed Deeds of Transfer T 429/1985 and T 431/1985.

17 This issue of compensation is dealt with in greater detail in para [36]-[39] below.

18 Act 108 of 1991.

19 See para [41] of this judgment.

20 Section 41(2) of the Restitution Act.

21 Government Notice 819 published in *Government Gazette* 16619 dated 25 April 1995.

[11] On 6 September 1996 a land claim form was filled out on behalf of the Baphiring land claims committee. That land claim form omitted the farm Brakkuil from the list of farms which were dispossessed from the tribe. On 19 February 1997 a second land claim form was filled out, which added the farm Brakkuil. Mr van Rooyen submitted that the plaintiff did not prove that the two claim forms were properly lodged with the Regional Land Claims Commission.²² On 11 April 1997 the initial notification of the restitution claim was withdrawn and a fresh notification of the claim was published in the *Government Gazettes*, this time as a claim by the Baphiring community.²³ On 17 January 1998 at a meeting held at the new Mabaalstat, the Land Claims Committee was (according to the plaintiff's statement of claim) authorised to bring these proceedings.²⁴ On 17 July 1998, by agreement with the Regional Land Claims Commissioner, these proceedings were instituted in this Court as a direct access claim in terms of Chapter IIIA of the Restitution Act.

[12] At all relevant times, the Baphiring tribe was governed by traditional authorities.²⁵ None of these authorities mandated or authorised the restitution claim.²⁶ On several occasions during 1997 and 1998, the Regional Land Claims Commissioner and the Department of Land Affairs were informed by the tribe's attorney that the tribe does not acknowledge the claim of the plaintiff, that the plaintiff had no *locus standi* whatsoever and that the plaintiff did not represent the Baphiring tribe.²⁷ That attitude persisted until about the middle of the year 2000. From then

22 The submission is dealt with in greater detail in para [42]-[43] below.

23 The withdrawal and re-publication is contained in Government Notice 672 and published in *Government Gazette* 17900 dated 11 April 1997.

24 The objecting land owners denied that the plaintiff was duly authorised to institute these proceedings. I will deal with that denial in para [29] below.

25 In para 2 of its further particulars of 12 June 2001, the plaintiff admitted that the Baphiring tribe has at all relevant times been an organised tribe, represented by a chief or acting chief and a council of elders or *Lekgotla*.

26 In para 9 of its further particulars of 12 June 2001, the plaintiff admitted that it was not acting for, and was not authorised by the organised tribal authority at the time of lodgement of the claim or institution of the action. The plaintiff stated that this admission should not be interpreted as meaning that the claim or the action did not have the tacit or the express approval of either the chief or the members of his council.

27 See for example the letter addressed by the tribe's attorney to the Regional Land Claims Commissioner dated 1 August 1997, page 147-148 of bundle C. Its contents were confirmed by Chief Mabalane in his evidence on 31 July 2001 (page 51-53 of the transcript).

on, the chief and his council started co-operating with the plaintiff. The change of heart occurred well after the 31 December 1998 cut-off date for lodgement of claims²⁸ and after this litigation had already commenced. During July 2001, Chief Mabalane was elected chairperson of the land claims committee. At the time when he gave his evidence, he had not yet attended any committee meeting in that capacity.²⁹

Issues identified for prior adjudication

[13] The plaintiff, in its pleadings, was ambivalent on the relationship between the Baphiring community (as the plaintiff describes itself) and the Baphiring tribe, and also on its *locus standi* to institute the claim, as the following excerpts from the pleadings will show:

Paragraph 2 of the Statement of Claim (dated 11 June 1999)

“The plaintiff [described as the ‘Baphiring Community’] is represented by the Baphiring Land Claims Committee, duly elected and mandated to represent the plaintiff at a meeting held at Mabaalstad (*sic*) on 17 March 1996. The Baphiring Land Claims Committee was duly authorised to bring these proceedings at a meeting of the plaintiff held at Mabaalstad (*sic*) on 17 January 1998.”

Paragraph 16 of the Statement of Claim (dated 11 June 1999)

“The plaintiff [described as the ‘Baphiring Community’] claims restitution of land dispossessed from it by the operation of racially discriminatory laws . . .” (my underlining)

Paragraph 52 of the Statement of Claim (dated 11 June 1999)

“The compensatory land was transferred to the community.” (my underlining)

Paragraphs 1.1, 1.2 and 2.1 of the Further Particulars (dated 30 May 2000)

“1.1 The Baphiring community, for purposes of this claim, is constituted by an association of persons which exist in terms of a written constitution and which association is to be incorporated as a communal property association.

28 The cut-off date is contained in section 2(1)(e) of the Restitution Act, quoted in para [17] below. See also para [33] below.

29 Evidence given by Chief Mabalane on 31 July 2001 (page 82 of the transcript).

- 1.2 Together with these answers, Defendants are supplied with a list containing the names of the members of the communal property association . . .^[30]
- 2.1 The Baphiring Land Claims Committee represents all people in the supplied list.”

Paragraph 5 of the Further Particulars (dated 30 May 2000)

“5 The present Chief of the Baphiring community is Lukas Manyane Mabalane.”
(my underlining)

Paragraph 11 of the Further Particulars (dated 12 June 2001)

“The Plaintiff community, for all intents and purposes, is the same as the Baphiring tribe.”

[14] The above excerpts indicate that in some parts of plaintiff’s pleadings, the “Baphiring community” is equated with the “Baphiring tribe”. In other parts it means a much smaller group, then comprising only 383 persons (whose names were given), to be incorporated at some future time as a communal property association.³¹ This led to the following statement by Mr van Rooyen and response by Mr Jansen (counsel for the plaintiff), at a pre-trial conference on 21 June 2001:

- “3 Adv Van Rooyen pointed out that the claimant in this matter is described as the Baphiring Community. If the Baphiring Community represents the Baphiring Tribe, there would be no problem. On the other hand, if the Baphiring Community does not represent the Baphiring Tribe, there may be problems with the *locus standi*, and also other problems.
- 4 In response, Adv Jansen recorded the following :
 - 4.1 that the claimant in this case is not the Baphiring tribe as represented by its tribal authority;
 - 4.2 that the individual members of the claimant community are members of the Baphiring tribe and they themselves or their forebears were affected by the dispossession;
 - 4.3 that the ‘rights in land’ at issue in this case were dispossessed from the Baphiring tribe;

30 Different list were supplied over time. The list of prospective communal property association members on which I worked, bundle E1, contains 589 names. The number was reduced to 383 in an analysis of the registration forms undertaken by counsel for the objecting land owners after eliminating duplications and other errors. The analysis is Exhibit 13 before the Court. It is not really important for purposes of this judgment whether the plaintiff group consists of 589 or 383 or any other number of persons. To avoid confusion, I will refer to the group as a group of 383 persons.

31 The draft constitution allows further members of the Baphiring tribe to become members of the Communal Property Association, should they wish to do so.

- 4.4 that the compensation for the dispossession of the 'rights in land' was given to the Baphiring tribe;
- 4.5 that the claim now before the court was not authorised by the tribal authorities of the Baphiring tribe."

[15] At the same pre-trial conference the parties agreed, in accordance with rule 57 of the Land Claims Court rules, to the prior adjudication of the following issues:

- "a is the claimant a community or person or entity entitled in terms of the Restitution of Land Rights Act to bring a restitution claim;
- b has the claim been properly authorised by the community or person or entity which is presently the claimant before the court;
- c is the claimant (being the community or person or entity presently before the Court) competent to claim restitution of a right in land which was dispossessed from the Baphiring tribe;
- d what 'rights in land' were dispossessed from the Baphiring tribe;
- e what compensation or other consideration was given to the Baphiring tribe in respect of the dispossession; and
- f was the claim properly lodged as required in terms of section 2(1)(e) of the Restitution of Land Rights Act."

The right to restitution of a community or tribe

[16] The most important issue in this case is whether a group of persons forming part of the Baphiring tribe may, without authority from the traditional tribal governance structures, claim restitution of a right in land dispossessed from the entire Baphiring tribe. I will undertake an analysis of the law (particularly of the Restitution Act) before applying the law to the facts.

[17] The entitlement to restitution is contained in section 2(1) of the Restitution Act, which reads:

- "(1) A person shall be entitled to restitution of a right in land if -
 - (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
 - (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or

- (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without 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.”
- (My underlining)

[18] The rights given to “part of a community” to claim restitution get special emphasis in the Restitution Act. The definition of “community” in section 1 includes part of any group which constitutes a community. The term “person”, according to its definition in section 1, includes “a community or part thereof”. Section 2(1)(d) explicitly awards a right to restitution to “part of a community”. This explicit award is significant. It indicates that the claimant entity must not necessarily be the entire dispossessed entity; it could be part of the dispossessed entity. Had the subsection read “a person shall be entitled to a right in land . . . if it is a community dispossessed of a right in land . . .”, the claimant entity and the dispossessed entity would have had to be the same. The inclusion of the words “or part of a community” in section 2(1)(d) makes it possible that the claimant entity could be part of (and not the full) dispossessed entity.³²

[19] The right of the Court to order the restoration of land is subject to the following restriction contained in section 35(1)(a) of the Restitution Act:

- “(a) . . . Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter’s ascendant, unless -
 - (i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land concerned; or
 - (ii) the Court is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right on land.”

This proviso supports my conclusion that it was not intended in the Restitution Act that the claimant entity must necessarily be the same as the dispossessed entity.

32 The word “dispossessed” in section 2(1)(d) relates to “community” only, not to “part of a community”. The words “part of” relates to the “person” who is entitled to restitution.

[20] The practical effect of the above provisions can be illustrated as follows. If a community was dispossessed of a right in land, not only that community, but also any part of that community, may claim its restitution. That could give rise to several restitution claims relating to the same dispossessed land.³³ The possibility of more than one claim in respect of the same land is recognised in the Restitution Act.³⁴ For example, if a person dispossessed of a right in land died after the dispossession and is survived by more than one direct descendant, each of them has a separate, independent restitution claim in respect of the same land.³⁵ If only one of them succeeds, he or she gets the full proceeds which the dispossessed person would have got if still alive.³⁶ If more than one claimant succeeds, the total proceeds are divided amongst the claimants by lines of succession.³⁷ The Regional Land Claims Commissioner must establish whether there are more than one claim in respect of a specific area or property.³⁸ This will make it possible for all claimants to be joined in the same action, and will enable the Court to ensure that an award to one claimant will not prejudice any of the others. In cases of multiple community claims,³⁹ or a claim by only a part of a dispossessed community, the Court must determine the manner in which any awarded rights are to be held or any awarded compensation is to be paid or held,⁴⁰ possibly through a communal property association.⁴¹ Such a determination could enable community members who were not part of a claimant group to participate in the restitution proceeds, for example by subsequently becoming members of a communal property association which holds the restored land.

33 Section 35(1)(a), quoted in para [19] above, envisages such a possibility.

34 See section 12(4), section 35(1)(a), section 38B(4), section 38D and section 42D(1)(a) of the Restitution Act.

35 Section 2(1)(c) of the Restitution Act, quoted at para [17] above.

36 *Former Highlands Residents concerning the area formally known as the Highlands: In re Sonny and Others v Department of Land Affairs* [2000] 1 All SA 157 (LCC), 2000 (2) SA 351 (LCC).

37 Section 2(4) of the Restitution Act.

38 Rule 5(i) of the rules regarding the procedure of the commission, published as Regulation R5505 in *Government Gazette* 16407, 12 May 1995.

39 Different parts of the community may each bring a restitution claim in respect of the same dispossession and the same land.

40 Section 35(2)(c), read with section 35(3) of the Restitution Act. Section 35(3) is quoted in n 62 below.

41 Section 2(1)(a) of the Communal Property Associations Act 28 of 1996.

[21] Nowhere in the Restitution Act is there any reference to “tribe”. A tribe would normally be a community,⁴² although all communities are not necessarily tribes.⁴³ Under section 10(1) of the Restitution Act, “the representative of any community [which includes part of a community] which is entitled to claim restitution of a right in land, may lodge such claim”. Under section 10(3), the person submitting the claim form must show that he or she represents the community concerned. If there is a dispute as to who legitimately represents a community for purposes of a restitution claim, the Regional Land Claims Commissioner may organise an election amongst the community members.⁴⁴ There is no indication in the Restitution Act that these provisions do not apply to tribes which have traditional governing authorities. On the contrary, they may well allow the election of a representative outside of the traditional tribal authorities to bring a restitution claim under the Restitution Act.⁴⁵ The election procedure laid down in the Restitution Act would in many cases be different from the traditional tribal procedures, where women and unmarried young men might not be allowed to participate in a tribal assembly (*pitso*). The provisions of the Restitution Act also make it possible for some tribe members to bring a restitution claim, where the entire tribe (for whatever reason) do not wish to do so.⁴⁶ However, such claimants take a risk. As I will indicate later in this judgment,⁴⁷ the Restitution Act does not deprive the traditional structures of their powers. If compensatory land has to be returned or compensation received has to be repaid as a precondition to the restoration of any dispossessed rights in land,⁴⁸ it might

42 It will conform with the definition of “community” in section 1 of the Restitution Act if it is a group of persons whose rights in land are derived from shared rules determining access to land held in common by such group.

43 For an example of restoration of land awarded to a community which is not a tribe, see *In re Kranspoort* 2002 (2) SA 124 (LCC). Brown (ed) *The New Shorter Oxford English Dictionary on Historical Principles* Vol 2 (Clarendon Press, Oxford 1993) at 3387 defines “tribe” as “a group of families claiming descent from a common ancestor, sharing a common culture, religion, dialect, etc., and usually occupying a specific geographical area and having a recognized leader.”

44 Section 10(4) of the Restitution Act.

45 Section 10(4). See also n 85 below.

46 Section 2(1)(d). See also para [18] above.

47 See para [24] and [31] below.

48 See sections 35(2)(b) and 35(4) of the Restitution Act.

prove impossible for the claimant group to comply. That might make restoration unfeasible and limit the group's restitution claim to equitable redress.⁴⁹

[22] Mr van Rooyen submitted that the word "person", where it is used in section 2(1)(a) of the Restitution Act, includes a juristic person.⁵⁰ If a company is dispossessed, its restitution claim would clearly be governed by section 2(1)(a) of the Act.⁵¹ The term "person" in section 2(1)(a) also includes (by definition⁵²) a community. If that would include every form of community, so Mr van Rooyen argued, all community claims could be accommodated under section 2(1)(a). Section 2(1)(d) would then be superfluous. He suggested that section 2(1)(d) was intended to apply only to those communities which do not have legal personality. Communities with legal personality will have management structures, and such communities would fall under section 2(1)(a).⁵³ A part of such a community will be unable to claim restitution, since a part of a juristic person cannot act independently from the whole. Such an interpretation, although superficially attractive, is not consonant with the general intent of the Restitution Act. In my view, the term "community", where it occurs in the Restitution Act, includes all groups which fall within its definition, irrespective of legal personality. They are all entitled to claim under section 2(1)(d) of the Restitution Act.⁵⁴ The reason for awarding a claim for restitution to part of a community is not only to provide for cases where only part of a community's land was dispossessed, but also to make it possible for some of the people constituting a community to bring a restitution claim in respect of land dispossessed from the whole community. That power is intended to cater for the situation where the whole community, or its governing structures, is unable or unwilling to bring the claim. There would be no logical reason to restrict such power only to communities that

49 See the definition of "equitable redress" in section 1 of the Restitution Act.

50 See Hutchison et al *Wille's Principles of South African Law* 8th ed (Juta, Cape Town 1991) at 241.

51 See for example *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC), [1998] 1 All SA 490 (LCC).

52 Section 1 of the Restitution Act, s.v. "person".

53 In terms section 19 of the Upgrading of Land Tenure Rights Act 112 of 1991, any tribe "shall be capable of obtaining land in ownership . . . of selling, exchanging, donating, letting, hypothecating or otherwise disposing of it."

54 Those without legal personality derive their *locus standi* from the Restitution Act. See *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC) at para [116].

do not have legal personality, which would be the case if communities with legal personality have to claim restitution under section 2(1)(a) instead of under section 2(1)(d) of the Act.

The governance of tribes

[23] Most tribes, including the Baphiring,⁵⁵ have traditional governing authorities. In the case of a Tswana tribe, these could consist of a chief (*kgosi*) assisted by a council (*lekgotla*). Important matters are decided in general assembly (*pitso*), membership of which is restricted in some tribes to adult males. Such governing authorities exist and function under indigenous law and custom. Legislative recognition of the authorities can be found in the Black Authorities Act⁵⁶ and, in the case of the Baphiring, in the Bophuthatswana Traditional Authorities Act.⁵⁷ Section 181 of the Interim Constitution⁵⁸ acknowledged traditional authorities by providing as follows:

“A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable law and customs, subject to any amendment or repeal of such laws and customs by a competent authority.”

In the case of *President of the Republic of Bophuthatswana and Another v Milsell Chrome Mines (Pty) Ltd and Others*⁵⁹ it was held that both the Black Authorities Act and the Bophuthatswana Traditional Authorities Act applied to traditional authorities observing a system of indigenous law immediately prior to the commencement of the Interim Constitution. The authorities governing the Baphiring tribe complied with that requirement. Accordingly, section 181 of the Interim Constitution applied to those authorities. Section 211 of the Final Constitution⁶⁰ also

55 See the evidence of Chief Mabalane given on 31 July 2001, pages 15-17 of the transcript, and also n 25 above.

56 Sections 2 and 4 of Act 68 of 1951, known at the time of promulgation as the Bantu Tribal Authorities Act.

57 Section 3 of Act 23 of 1978. That Act applies because the new Mabaalstat is situated within the territory of the erstwhile Bophuthatswana.

58 Act 200 of 1993.

59 1996 (3) SA 831 (B) at 845-847.

60 The Constitution of the Republic of South Africa, Act 108 of 1996.

gives recognition to traditional leaders, tribal authorities and the application of customary law.

It reads:

- “(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

[24] It is necessary for whoever purports to bring a restitution claim on behalf of a community or part of a community, to establish his or her authority to do so.⁶¹ Mr Jansen suggested that the neutral language of the Restitution Act, which contains no reference to “tribe” or “tribal authorities”, opens the door for the “democratization” of a tribal community for purposes of a restitution claim. He continued to submit that the Court will always require a community, whether tribal or otherwise, to “democratize” itself before awarding restoration of a dispossessed right in land or compensation, because section 35(3) of the Restitution Act mandates such “democratization”.⁶² I do not find anything in section 35(3) which would prevent the Court from awarding restitution to a tribe in cases where its governing tribal authorities have not been “democratized”. On the contrary, it was held by Dodson J (Bam P concurring) in *Chief Nchabeleng v Chief Phasha*⁶³ that:

“. . . it is well recognised that in terms of customary law ‘as leader of his people a traditional ruler has the power to control land use and to allot portions to members of his community’. Moreover the applicant’s

61 Section 10(3) of the Restitution Act. See also *The Ga-Magashula Community Trust v Marsfontein and Others* 2001 (2) SA 945 (LCC), [2001] 1 All SA 602 (LCC) at para [23]-[30].

62 Section 35(2)(c) of the Restitution Act enjoins the Court, in cases where the claimant is a community, to determine the manner in which the restored rights are to be held or the compensation is to be paid or held. Section 35(3) then provides as follows:

“(3) An order contemplated in subsection (2) (c) shall be subject to such conditions as the Court considers necessary to ensure that all the members of the dispossessed community shall have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community.”

63 1998 (3) SA 578 (LCC), [1997] 4 All SA 158 (LCC).

position as kgosi or chief and his right, together with his tribal council, to exercise powers under customary law may well enjoy statutory and constitutional recognition.”⁶⁴

A court must apply customary law when it is applicable, subject always to the Constitution and to any legislation that specifically deals with customary law.⁶⁵ It should be slow to find implied curbs on the powers of traditional authorities in the wording of enactments. I find no such implied curbs in the Restitution Act. I have been referred to several articles in legal journals which highlight the tension between the powers of traditional authorities on the one hand, and the principles of democratic governance on the other.⁶⁶ That conflict must be resolved by legislation. It is not for the courts to do so.

[25] Although the Restitution Act does not derogate from the powers of functioning traditional authorities which govern tribes, it does give a right to claim restitution of rights in tribal land to community groupings. Such right exists separately from, and in addition to, the powers possessed by the traditional authorities. Its ambit is restricted to the powers given explicitly or by necessary implication to such community groupings. The limited powers given to community groupings by the Restitution Act may well make it impossible for such a grouping to implement the return of compensatory land awarded to a larger community at the time of dispossession, or to effect repayment of compensation monies paid to a larger community, should it be ordered by the Court. That is particularly so where the larger community is not a party to the restitution proceedings.

The plaintiff's *locus standi*

64 At para [22]. Dodson J relied on section 2(1)(a) and section 4 of the Black Authorities Act 68 of 1951 and on section 181(1) of the Interim Constitution. Section 181(1) is quoted in para [23] of this judgment.

65 Section 211(3) of the 1996 Constitution.

66 These articles include Klug “Defining the Property Rights of Others: Political Powers, Indigenous Tenure and the Construction of Customary Law” (1995) 35 *Journal of Legal Pluralism* at 119; Bank and Southall “Traditional Leaders in South Africa’s New Democracy” (1996) 37-38 *Journal of Legal Pluralism* at 409; Quinlan “The Perpetuation of Myths: A Case Study on ‘Tribe’ and ‘Chief’ in South Africa” (1998) 27 *Journal of Legal Pluralism* at 79; Cross, “An Alternative Legacy: The Property Rights Question in relation to South African Land Rights” (1992) 8 *South African Journal of Human Rights* at 305.

[26] It is convenient to consider the first three issues identified for prior adjudication together. These are whether the plaintiff before the Court is entitled to bring a restitution claim, whether such a claim was properly authorised, and whether the plaintiff before the Court is competent to claim restitution of a right in land dispossessed from the Baphiring tribe.⁶⁷ All three of these issues relate to the plaintiff's *locus standi*.

[27] The plaintiff's stance on its *locus standi* is contradictory. On the one hand it seems to argue that it is a group of persons which forms part of a larger community (the larger community being the Baphiring tribe), and that the group is entitled to bring a restitution claim under the Restitution Act.⁶⁸ On the other hand it seems to contend that, in bringing the restitution claim, it acts not only on behalf of its own group, but also on behalf of all the members of the Baphiring tribe. The plaintiff asked for an order that the old Mabaalstat, upon restoration, be transferred to a communal property association.⁶⁹ Mr Jansen suggested that, because the constitution of the association will provide that no Mophiring may be excluded from the benefit of the land claim, all members of the Baphiring tribe must be regarded as part of the plaintiff group. I will consider both approaches.

[28] According to paragraph 2 of the statement of claim, the "Baphiring Community" is represented by the "Baphiring Land Claims Committee", and that committee was duly mandated to bring the restitution claim by the people present at a meeting held on 17 March 1996. The chief and his council did not call the meeting. It was called by the Baphiring land claims committee.⁷⁰ Although the plaintiff alleged in its further particulars that approximately 600 people attended the meeting,⁷¹ this is not borne out by the evidence. Mr Peter Ntshoe, who chaired the meeting, estimated the number of people who attended at 100 or more than 100.⁷² Mr Chris Mabalane testified that the meeting was attended by 100 to 200 people or, as he put it, "100 something".⁷³

67 The complete formulation of the issues is set out in para [15] of this judgment.

68 This argument relies on the definition of "community" in the Restitution Act, which encompasses a part of a community.

69 Para 71.3 of plaintiff's statement of claim, quoted in para [2] of this judgment.

70 Para 6 of the further particulars dated 30 May 2000.

71 Para 9 of the further particulars dated 30 May 2000.

72 Page 96 of the evidence heard on 1 August 2001.

73 Pages 132 and 134 of the evidence heard on 1 August 2001.

Mr Elias Kgama confirmed that there were only a hundred or [a bit more] people at the meeting.⁷⁴ The fact that all tribe members might have been invited to the meeting does not turn it into a duly constituted tribal assembly. Further “community meetings”, “workshops” and “meetings with stakeholders” followed this meeting on 26 March 1996, 8-12 July 1996, 23 November 1996, 14 December 1996, 7 June 1997, 18 July 1997 and 17 January 1998. It is not necessary, for purposes of this judgment, to deal separately with each of the many meetings held to promote the restitution claim. The meetings were not well attended. The majority of the Baphiring people seemed to have distanced themselves from the claim, probably because it was not supported by the chief and the tribal authorities, and also because they might have been unwilling to risk the possible loss of the land occupied by them in the new Mabaalstat.⁷⁵

[29] According to the plaintiff’s statement of claim, the land claims committee was authorised to bring these proceedings at a meeting held at the new Mabaalstat on 17 January 1998. It is alleged in the further particulars supplied by the plaintiff that this meeting was convened by the Baphiring land claims committee, and that it was attended by approximately 600 persons.⁷⁶ This statement is also contradicted by the evidence. The “roll-call” for the meeting⁷⁷ shows only some 70 names. The Baphiring who attended the meeting form a minute portion of the entire tribe.⁷⁸ No minutes taken of the meeting of 17 January 1998 record a resolution to institute these proceedings. Mr Chris Mabalane, when giving evidence, could not remember when and at what meeting the resolution to bring these proceedings was taken.⁷⁹ He was, however, adamant that

74 Page 388 of the evidence heard on 21 August 2001.

75 On 1 April 1998 the then attorneys of the Baphiring tribe, Messrs Ross and Jacobsz, wrote to “Die Transvaalse Landbou Unie” (which was at the time negotiating with the Commission) as follows:

“[D]ie Stam stel geensins belang om terug te trek na die ou Mabaalstad nie en wil bly waar hul tans is.”

[Bundel C, page 230.] Chief Mabalane confirmed in evidence on 31 July 2001 (page 65 of the transcript) that the letter was written in accordance with his instructions.

76 Para 12 and 15 of the further particulars dated 30 May 2000.

77 Contained in pages 213-215 of bundle C of the documents before the Court, and confirmed in evidence by Mr Chris Mabalane at pages 451-452 of the evidence heard on 21 August 2001.

78 According to the 1996 national census, there were then 925 households living in the new Mabaalstat, having some 4595 members, living in Holfontein and Rietfontein in the new Mabaalstat. See exhibits 1a and 1c, and the evidence given by Mr Alberts on 30 July 2001 (pages 33-34 of the transcript). There was no evidence on the number of persons living on Lemoenplaats, Uitval and Doornspruit. According to a letter from the tribe’s attorney dated 1 April 1998 and contained in pages 228-231 of bundle C, the tribe had some 6000 members during the nineteen seventies. The letter was confirmed by Chief Mabalane in evidence on 31 July 2001 (pages 63-66 of the transcript).

79 Page 442 of the transcript of the evidence which he gave on 21 August 2001.

such a decision had been taken.⁸⁰ I am satisfied that some members of the Baphiring tribe (and those members form part of a community) at some or other time during 1998 decided to institute these proceedings in this Court. Furthermore, the 383 persons whom the plaintiff claims to represent (most of them tribe members) all signed forms to register as members of the proposed communal property association.⁸¹ In these forms they expressed their interest “to return” (to the old Mabaalstat).⁸² These registration forms endorse the plaintiff’s authority to act on behalf of those particular members of the Baphiring tribe.

[30] Approximately one quarter of the 383 persons constituting the plaintiff are farm workers on the various Rosmincol farms,⁸³ and not all of them are Baphiring. The non-Baphiring people were included in the plaintiff group on legal advice given by the Legal Resources Centre, in order to protect their position in the event of the Rosmincol farms being restored. Mr van Rooyen submitted that the inclusion of non-Baphiring people into the plaintiff group puts the group outside the ambit of a Baphiring community. In my view, their inclusion does not alter the fundamental nature of the group. There is sufficient commonality between the plaintiff group and the Baphiring tribe for the claimant group to be part of the Baphiring tribe. It is not necessary that every group member must be of Baphiring lineage.⁸⁴ It is also not necessary that all members of the claimant group must live on tribal land. Many of them have become urbanised. They do, however, keep traditional links with fellow tribe members living on the tribal land, and many of them will return to their traditional homes when they retire.

80 He testified as follows on 21 August 2001 (page 444 of the transcript):

“[The representative of the Legal Resources Centre] . . . advised you, you could go the direct route. - - - That is correct.

And the committee said yes to the direct route: our patience is finished. - - - Before the resolution was taken by the committee this was first conveyed to the community, and the committee then received a mandate from the community.

Now when was that? It must have been after, it must have been after 4 May and before 8 August [1998]? - - - It might have been between those dates but I do not quite remember a date.

Have you got any minutes referring to that meeting with the community? - - - Well I do not see these minutes here and I do not know where they are.”

81 The registration forms are contained in bundle E2 before the Court. Bundle E2 was analysed by counsel for the objecting land owners and their analysis was introduced in evidence as Exhibit 13.

82 See the wording of the forms in bundle E2.

83 See the analysis, Exhibit 13.

84 See *Kranspoort Community*, above n 43, at para [34] and *Richtersveld Community*, above n 54, at para [72].

[31] The evidence and the papers before me indicate that the plaintiff group is the group of 383 persons who declared their intention of becoming members of the proposed communal property association. The composition of the group may of course have been changed or may still change by existing members leaving or by new members joining. I have already concluded that, because the plaintiff group is part of a community (the full community being the Baphiring tribe), the Restitution Act makes it possible for that group to bring the restitution claim. That group will, however, be subject to some limitations, as the following extract from its pleadings will indicate:

Paragraph 1.2 of the Supplementary Statement of Case (dated 15 February 2000)

“It is not possible for the Plaintiff community to tender return of either the compensatory land or any money allegedly received by a Tribal Authority.” (my underlining)

Unless this Court can, at a later hearing, be convinced not to order the return of the compensatory land (the new Mabaalstat) or of the compensation monies received by the tribal authorities, the restoration of the dispossessed land (the old Mabaalstat) might not be feasible and the plaintiff may well (if its claim succeeds) have to make do with equitable redress.

[32] To consider the alternative approach, can it be found that the plaintiff was entitled to act, and did in fact act, for the full Baphiring tribe, or differently put, for the whole community constituting the tribe? Whatever the legal position may be on the representation of a tribe in a claim for the restitution of land rights, the plaintiff has not shown that it has the support of or that it represents the majority of the Baphiring people.⁸⁵ Although the constitution of the proposed communal property association designated to own the old Mabaalstat, if restored, provides that any Mophiring may join the association, that by itself is not sufficient to allow the plaintiff to claim restitution on their behalf, irrespective of whether they have joined the plaintiff group or not. A restitution award could have a downside, being a possible requirement by the Court to restore compensatory land or to repay compensation monies previously received, which most tribe members would in all likelihood not be prepared to do.⁸⁶

85 I make no decision on whether, if a group of tribe members should set themselves up as a quiddity with majority support for purposes of bringing a restitution claim, such support would allow them to bypass the traditional tribal authorities and to act on behalf of the tribe in all matters relating to the restitution of the dispossessed land rights.

86 The possibility of such a downside is one of the factors which distinguishes this case from cases such as *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (2) SA 609 (E), on which the plaintiff relied. In the *Ngxuza* case a small group of persons were allowed to apply for the retrospective reinstatement of cancelled or suspended social grants on behalf of a much larger group. In that case, members of the larger group were allowed to distance themselves from the proceedings.

[33] Chief Lucas Manyane Mabalane became acting chief of the Baphiring in 1990, and is still the acting chief. He is also the vice chairperson of the House of Traditional Leaders in the North West Province. Originally he and the Baphiring Council were not prepared to support the claim⁸⁷ because they feared that the restoration of the old Mabaalstat could result in them having to give up the compensatory land (the new Mabaalstat).⁸⁸ Subsequently he established that the Bakwena, Batalasigai, Batloug and Bagamaluka communities, in out-of-court settlements, obtained restoration of land dispossessed from them and were also allowed to retain the compensatory land which they received at the time of dispossession. That made him decide, some time during the year 2000, to support the claim.⁸⁹ He was appointed chairperson of the land claims committee, apparently on 6 July 2001. He and his Council did not, however, formally mandate the restitution claim or authorised the land claims committee to act on behalf of the tribe.⁹⁰ Nor does he support the following clause in the constitution of the proposed Communal Property Association, which might become the owner of the old Mabaalstat if the plaintiff's restitution claim succeeds:

“The chief shall remain the custodian of culture and tradition. He/she shall not interfere with the constitution of the CPA [Communal Property Association] nor will he/she allocate land.”⁹¹

[34] Mr van Rooyen conceded that it would have been open for the tribal structures to mandate the Baphiring Land Claims Committee to bring the restitution claim on behalf of the tribe. That did not happen in this case. There is also no evidence that the majority of tribe members

87 See para [12] of this judgment.

88 Chief Mabalane testified as follows on 31 July 2001 (page 7 of the transcript):

“The attitude of the council as well as the tribe was that who has got to pay for the costs or the claim in order that we should get the land back. The other residents who were elderly already who had already erected their houses, completed erecting their houses in the new Mabalstad and their contention was what would be the situation like should we acquire the other land that is - should that other land be reinstated to us what about the present land they were occupying.”

See also the letter of 26 July 2001 from the Legal Resources Centre, Exhibit 5, and Chief Mabalane's evidence relating to that letter, pages 34-37 of the transcript.

89 Chief Mabalane's evidence given on 31 July 2001 reads (page 11 of the transcript):

“I changed my attitude because of the suggestions that were made by the tribe, to show that if other tribes can get two lands or hold onto two lands we could also be in the same position without as that was their fear.”

90 The tribal authority and the land claims committee decided during July 2000, in the words of Chief Mabalane, “. . .we now are going to work together . . .” (page 12 of the transcript of evidence of 31 July 2001). There is no evidence of any mandate given to the land claims committee to represent the tribe.

91 Evidence given by Chief Mabalane on 31 July 2001 (page 41 of the transcript).

authorised or support the land claims committee in its prosecution of the restitution claim.⁹² The plaintiff has therefore, in my view, not established that it is entitled to act on behalf of the full community constituting the Baphiring tribe, nor that it represents the majority of the Baphiring people.⁹³ The plaintiff has, however, established that it represents a group of some 383 persons, most of them Baphiring, and as such it has *locus standi* under the Restitution Act to claim restitution of rights in land dispossessed from the entire Baphiring tribe.⁹⁴

The dispossessed rights and the compensation for the rights

[35] I now proceed to consider the following two issues identified for prior adjudication, being what rights in land were dispossessed from the Baphiring tribe, and what compensation was given to the Baphiring tribe in respect of the dispossession. The historical documents before the Court contain the descriptions of the dispossessed land, and particulars of its subsequent consolidation and the new subdivisions.⁹⁵ The old Mabaalstat (the subject of the present claim) consisted of the following farms:

- portion 1 of the farm Rietfontein 453 JP, measuring 4498,5361 hectares, registered in the name of “die Minister van Bantoesake en Ontwikkeling in trust vir die Baphiring Bantoesam in die Transvaal onder Kaptein Philippus Mabalane”;⁹⁶

92 Authority or support by the majority of tribe members would not necessarily be sufficient to establish authority to act for the tribe and to bypass the traditional tribal authorities. See n 85 above.

93 The letter of 1 April 1998 from the tribes attorneys, referred to in n 75 above, states that explicitly:
“Ons instrukies is egter baie duidelik dat die Baphiring Stam geensins wil hê dat die CPA [Community Property Association] hulle moet probeer verteenwoordig by die regering of enige ander Grond Eise Hof of instansie hoegenaamd nie. Die Stam voel dat hulle ‘n behoorlik geregistreerde Stam en Stam Owerheid is, behoorlik Grondwetlik verkies en ingestel is terme van die Wet op Stam Owerhede.”

Chief Mabalane, in his evidence confirmed that the letter correctly reflected the position at the time (page 66 of the transcript of 31 July 2001).

94 That is also how the plaintiff’s attorney, Ms Gilfillan, approached the claim. She testified as such on 8 November 2001 (page 29 of the transcript).

95 These facts are set out in para [8] of this judgment, and need not be repeated.

96 The description of the Rietfontein property was taken from Deed of Transfer 31251/1972, Annexure F to plaintiffs request for further particulars dated 5 November 1999.

- portion 1 of the farm Syferfontein 451 JP, measuring 127,5804 hectares, registered in the name of the “Baphiring Bantoestam in die Transvaal”; and
- portion 1 of the farm Brakkuil 449 JP, measuring 3068,2546 hectares, registered in the name of the “Baphiring Bantoestam in die Transvaal”.⁹⁷

It is not disputed that at the time of dispossession the mineral rights were not severed from the land, and that the Baphiring tribe were also dispossessed of the mineral rights. It is common cause that the present description of the dispossessed land is correctly set out in plaintiff’s statement of claim.⁹⁸ It is also not disputed that, although a portion of the dispossessed land was registered in the name of the Minister of Bantu Affairs and Development in trust for the Baphiring Tribe, the tribe in reality lost ownership of that land.

[36] It is apparent from the historical documents that a sum of R586 900,03 was allocated as compensation for the dispossession of the old Mabaalstat,⁹⁹ and that the sum represented the market value of the land only, not including improvements.¹⁰⁰ It was calculated at R120 per morgen for fields and R50 per morgen for grazing.¹⁰¹ Of that amount, a sum of R416 377,60 was applied towards the acquisition of the compensatory land (to become known as the new

97 The description of the Syferfontein and Brakkuil properties was taken from Deed of Transfer 31250/1972, annexure E to plaintiff’s request for further particulars dated 5 November 1999.

98 See para 71 of the statement of claim, quoted in para [2] of this judgment.

99 The amount was calculated as follows:

Portion 1 of Brakkuil	R192 103,66
Portion 1 of Syferfontein	R 7 379,00
Portion 1 of Rietfontein	<u>R289 600,70</u>
	R489 083,36
Plus 20% loss and inconvenience	<u>R 97 816,67</u>
TOTAL	<u>R586 900,03</u>

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(See page 12 of the report by Mr de Lange, page 14 of bundle F.)

100 Although it is clear from para 7.1 of Mr de Lange’s report (p 17 of bundle F) and from the historical documents in bundles B and F that the valuers at the time based their valuation of the old Mabaalstat land on its market value, the plaintiff persisted in its claim that the compensation for that land was based on its pastoral and agricultural value. See para 2 of the plaintiffs’ answer to admissions sought by the 14th and 10th defendants, dated 17 September 1999.

101 Page 15 of the report by Mr de Lange, page 17 of bundle F.

Mabaalstat),¹⁰² leaving a balance of R170 522,43, which was allegedly paid to the tribal authorities.¹⁰³ In addition, individual members of the tribe were compensated for improvements which they erected on the old Mabaalstat.¹⁰⁴ Lastly, during 1978, the tribal authorities allegedly received a further sum of R10 670,00 in respect of the mineral rights of the old Mabaalstat.¹⁰⁵ The new Mabaalstat was incorporated into the then Bophuthatswana the year before.

[37] The plaintiff stated in its further particulars of 12 June 2001 that the land comprising the new Mabaalstat was transferred into the name of “the President of the Republic of Bophuthatswana in trust for the Baphiring tribe under captain Moefi Albert Sandy Mabalane”.¹⁰⁶ For practical purposes, that constitutes the tribe to be owner of the land.¹⁰⁷ The plaintiff denied payment of a cash amount of R170 000,00 to the tribe, or alternatively, receipt thereof by the tribe.¹⁰⁸ The historical documents¹⁰⁹ showing such payment to the Magistrate at Madikwe, where

102 The compensatory land comprised the following farms and all subdivisions thereof:

- Rietfontein 179 JP, measuring 4800,9290 hectares in extent, held under Deed of Transfer T177/1982;
- Doringspruit 196 JP, measuring 3309,6967 hectares in extent, held under Deed of Transfer T432/1985;
- Holfontein 160 JP, measuring 4611,3224 hectares in extent, held under Deed of Transfer T429/1985;
- Uitval 198 JP, measuring 1225,0192 hectares in extent, held under Deed of Transfer T430/1985; and
- Lemoenplaats 180 JP, measuring 3223,7851 hectares in extent, held under Deed of Transfer T431/1985.

The sizes of the farms were taken from the deeds office printouts contained in bundle F. The sum of R416 377,60 represents the agricultural value of the land, calculated at R35 per morgen for fields and R15 per morgen for grazing. See also para [38] of this judgment.

103 The amount was paid to the Magistrate of Madikwe, where the tribal funds were kept. See bundle B, page 80 and the evidence by Chief Mabalane, pages 16-17 and page 82 of the transcript.

104 Apart from physical structures such as buildings, the improvements included fencing, trees, kraals and lapas. Schedules of such improvements and the amounts paid to tribe members in respect thereof are annexed to Mr de Lange’s report, bundle F, pages 192-218.

105 The amount was also paid to the Magistrate at Madikwe. See bundle B, pages 83-84 and the evidence by Chief Mabalane, page 83 of the transcript.

106 This is evidenced by Deed of Transfer 429/1985 annexed to the report by Mr de Lange, bundle F.

107 See the reasoning of Friedman JP in the case of *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BH) at 550H-551A.

108 Para 13.3 of the further particulars of 12 June 2001.

109 Particularly the document at page 80 of bundle B.

the tribal funds were kept, were traversed by Mr van Rooyen with Chief Mabalane,¹¹⁰ Mr Chris Mabelane¹¹¹ and Mr Elias Khune.¹¹² None of them could deny that the payment was made. The plaintiff admitted that “an amount” was paid in respect of the mineral rights. Such amount was similarly paid to the Magistrate at Madikwe. I have no reason to doubt that the amount of R10 670,00 was received, as indicated by the historical documents.¹¹³

[38] The Baphiring tribe was given the right to utilise the monies allocated for compensation to “purchase” compensatory land from the State. It elected to “purchase” the farms Rietfontein 179 JP, Doornspruit 196 JP, Holfontein 160 JP, Uitval 198 JP and Lemoenplaats 180 JP.¹¹⁴ Most of the five farms were subdivided into different portions. The “purchase price” was determined in accordance with their agricultural and grazing value, at R35 per morgen for lands and R15 per morgen for grazing. This resulted in a “purchase price” of R416 377,60, calculated as follows:

Agricultural lands, 4 287 morgen @ R35 per morgen	R150 045,00
Grazing, 17 755,5067 morgen @ R15 per morgen	<u>R266 332,60</u>
Total	R416 377,60
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The agricultural value of the compensatory land is not necessarily equal to its market value. The compensatory land was “sold” to the tribe at its agricultural value because the State was required to do so in terms of the Development Trust and Land Act.¹¹⁵ In my view the Baphiring tribe received the compensatory land and not its “purchase price” of R416 377,60 as part compensation for the dispossession of the old Mabaalstat.

[39] In terms of section 33(eA) of the Restitution Act, the Court must, when adjudicating a claim for restitution of land rights, have regard to the amount of compensation or any other consideration received in respect of the dispossession. It may require a claimant to make a

110 See pages 16-17 and 81-82 of the record of evidence given on 31 July 2001.

111 Evidence on 21 and 22 August 2001, page 465 of the transcript .

112 Evidence on 20 August 2001, page 316 of the transcript .

113 Pages 83 and 84 of bundle B.

114 Memo dated 5 October 1972 from the Deputy Secretary of Community Affairs to the Deputy Minister, contained in pages 68-70 of bundle B.

115 Section 13(7) of Act 18 of 1936. See page 14 of the report by Mr de Lange, page 16 of bundle F, and para [9] of this judgment.

payment before a right in land is restored,¹¹⁶ and it may make an order in respect of compensatory land granted at the time of the dispossession.¹¹⁷ At this stage of the proceedings, I need not decide whether any such orders should be made. All I need to determine is what compensation or other consideration was given to the Baphiring tribe in respect of the dispossession. The historical documents indicate, and they are not contradicted by any evidence, that the Baphiring Tribe received compensatory land now constituting the new Mabaalstad, plus R170 522,43 in cash, plus R10 670,00 for the mineral rights. I do not include compensation paid to individual tribe members for improvements, because those amounts were not paid in respect of property belonging to the tribe and were not received by the tribe. I also do not include the costs incurred by the government on the provision of water and other infrastructure at two villages on the compensatory land. Although the responsibility of the government for the provision of the water and the infrastructure constituted part of the tribe's compensation, the presence of the water and infrastructure will be reflected in the value of the new Mabaalstad. The costs thereof are not an item of compensation which must be considered separately.

The lodging of the claim

[40] I now come to the last issue identified for prior adjudication, namely whether the claim for restitution was properly lodged. It is a threshold requirement for a restitution claim in terms of the Restitution Act that it must have been lodged with the Commission by not later than 31 December 1998.¹¹⁸ Section 10(1) of the Restitution Act deals with the lodgment of claims. It must be done on a prescribed form.

116 Section 35(2)(b) of the Restitution Act.

117 Section 35(2)(f) of the Restitution Act.

118 Section 2(1)(e) of the Restitution Act. See also the definition of "claim" in section 1 of the Restitution Act.

[41] Because a restitution claim in this matter was lodged with the Commission on Land Allocation, the Regional Land Claims Commissioner originally dealt with the claim as a claim deemed to have been lodged under the Restitution Act.¹¹⁹ Mr van Rooyen submitted that the Commissioner could not do so, because the claim lodged with the Commission on Land Allocation was invalid, firstly because it was not lodged by a person authorised to do so by the tribal authorities and secondly because the old Mabaalstat was at that time no longer State land. Nevertheless, the Regional Land Claims Commissioner accepted the claim and published a notice thereof in the *Government Gazette*, as required under section 11(1) of the Restitution Act. The claim was described as a claim lodged on behalf of the Baphiring Tribe. After the notice in the *Gazette* was published, the plaintiff (according to the evidence) lodged two claim forms in accordance with section 10(1) of the Restitution Act. In both claim forms the claimant was described as the Baphiring community. The first of the claim forms inadvertently omitted portion 1 of Brakkuil as part of the dispossessed land, and it was added by way of the second claim form.

[42] Mr van Rooyen called into question whether the two claim forms on which the plaintiff relies for compliance with section 2(1)(e) of the Restitution Act, were actually lodged with the Commission. Copies of the claim forms were handed up as exhibits.¹²⁰ Their receipt was never formally acknowledged by the Commission, nor are they listed on the control pages of the relevant files in the Commission's office.¹²¹ Ms Durkje Gilfillan gave evidence on the lodging of the forms. She was, at the time, an attorney working at the Pretoria offices of the Legal Resources Centre (the plaintiff's attorneys). She was in charge of the Baphiring file and responsible for lodging the claim. She testified as follows:¹²²

“Then if you consider pages 106 to 109, that is a Land Claims form. Do you recognise that one? - - - Yes, I do.

Do you recognise the handwriting on it? - - - Yes, I certainly do. I recognise it as my handwriting. Now it has a date of 6 September 1996 in your handwriting, page 109. - - - Yes.

119 See para [10] above.

120 Exhibits 11 and 12.

121 The control pages were handed in as Exhibit 10. They list the contents of the files to which they relate. They are subsequent reconstructions, necessitated by the fact that the previous control sheets got lost. See the evidence on 3 August 2001 given by Mr Kgama (page 283 of the transcript).

122 Pages 9 and 10 of the transcript of evidence given on 8 November 2001.

Do you remember how this was handed in at the Commission? - - - No, I do not clearly remember that whether I took it personally or whether it was sent. I am not sure.

Now we do not seem to have any copy which on the face of it bears a date stamp or something from the Commission. - - - Hmm.

In your experience firstly, this was not the only land claim you were dealing with at the time. Is that correct? - - - That is correct, ja.

What was the practice in those days? Did you get some form of acknowledgement of receipt from the commissioner? Did they have a formal registrar putting on stamps on these documents? - - - No, I think those are very much still the beginning days of the Commission and their administration at that stage certainly was not what it should have been, I would imagine. But I think what did happen at the time was that I discussed the claim with the Commission very often and the Commission was actively working with the claim. Also it was a claim which had been dealt with by ACLA [Advisory Commission on Land Allocation] before which had been submitted to ACLA before and therefore it did automatically in any case serve before the Commission.

With who at the Commission did you discuss the claim? - - - Mainly with Tony Harding but also with Elias Kgama. The two officials working with the claim.

Now can you remember what some of those discussions entailed? Was there any specific things which you discussed in respect of this claim which was peculiar to this claim? - - - Well, what was peculiar to this claim which I remember very clearly, was that originally we only claimed for two of the farms because the farms, the boundaries or the farms had changed. They had become consolidated into one bigger farm and we initially only claimed two of the farms and we later had to hand in another claim form for the third farm.”

[43] After the two claim forms were lodged by Ms Gilfillan, the Regional Land Claims Commissioner must have realised that the claim, as published, cannot be a tribal claim. With the consent of Ms Gilfillan, the Commissioner withdrew the previous publication of 25 August 1995, and on 11 April 1997 re-published the notification, this time describing the claim as a claim by the Baphiring community. The re-publication of the notice of claim on 11 April 1997 indicates that the Regional Land Claims Commissioner must have received fresh inputs. Considered with the evidence of Ms Gilfillan, that would in all probability be the two claim forms wherein the claimant is described, not as the “Baphiring Tribe”, but as the “Baphiring Community”.

[44] Mr van Rooyen criticised at great length the procedures followed by the Commission at the time. It is not necessary to consider the criticisms in detail, except to say that many of them are justified. The administration of the Commission at the time was clearly in disarray. That could explain why the existence of the claim forms was not noted on the control sheets. The absence of such noting and the absence of a formal acknowledgement of receipt are, in my view, not sufficient reason, in the light of Ms Gilfillan’s evidence and the probabilities, to conclude that the two claim forms were not lodged with the Commission. I conclude that the claim was

properly lodged as required in terms of the Restitution Act. Any shortcomings which there might have been in the contents and in the lodging of the claim forms, have been tacitly condoned by the acceptance and re-publication of the claim on 11 April 1997.¹²³

Costs

[45] The Act is social legislation. It has been the practice of this Court not to make costs orders unless there are good reasons for doing so. No good reasons have been established in this case. I will therefore not make any order on costs.

Finding

[46] For the reasons set out above, the following finding is made:

- 1 The plaintiff, comprising mostly members of the Baphiring tribe, is part of a community constituted by the Baphiring tribe, and as such it is entitled in terms of the Restitution of Land Rights Act, Act 22 of 1994 to bring a restitution claim in its own name.
- 2 The restitution claim was properly authorised by the group of people constituting the plaintiff.
- 3 The plaintiff, although it does not represent or act for the Baphiring tribe, is competent to claim restitution of a right in land which was dispossessed from the Baphiring tribe.

123 See section 11(2) of the Restitution Act.

- 4 The right in land dispossessed from the Baphiring tribe is ownership of the land (including all rights to minerals in respect thereof), now known as portions 1 (excluding that part of portion 1 previously known as portion 14 of the farm Syferfontein 451 JP), 5, 6, 7, 8, 9, 10, 12, 13 and the remaining extent of the farm Rosmincol 442 JP.
- 5 The Baphiring tribe received compensation for the dispossessed rights in land as follows:
- (a) for land value:
- (i) compensatory land, being the following farms:
- Rietfontein 179 JP, measuring 4800,9290 hectares in extent, as held under Deed of Transfer T 177/1982;
 - all subdivisions of Doringspruit 196 JP, totaling 3309,6967 hectares in extent, as held under Deed of Transfer T 432/1985;
 - all subdivisions of Holfontein 160 JP, totaling 4611,3224 hectares in extent, as held under Deed of Transfer T 429/1985;
 - all subdivisions of Uitval 198 JP, totaling 1225,0192 hectares in extent, as held under Deed of Transfer T 430/1985;
 - all subdivisions of Lemoenplaats 180 JP, totaling 3223,7851 hectares in extent, as held under Deed of Transfer T 431/1985; and
- (ii) the sum of R170 522,43.
- (b) for mineral rights, the sum of R10 670,00.

- 6 The claim by the plaintiff was properly lodged as required in terms of section 2(1)(e) of the Restitution of Land Rights Act.

ACTING JUDGE A GILDENHUYS

I agree

PROF M WIECHERS

***ASSESSOR**

- * (Assessor appointed in terms of section 28(5) of the Restitution of Land Rights Act, Act 22 of 1994).

For the plaintiff:

Adv C R Jansen, instructed by Legal Resources Centre, Pretoria.

For the second, fourth to eighth, sixteenth and seventeenth defendants:

Adv P R van Rooyen SC, Adv H S Havenga, instructed by Phillip du Toit Incorporated, Pretoria.

For the tenth and twelfth defendants:

Adv M I E Ismail, instructed by State Attorney, Pretoria.