IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at **RANDBURG** on **15 September 2003** **CASE NUMBER**: LCC 64/98
before **Gildenhuys AJ** and **Wiechers (assessor)**

Decided on: **5 December 2003**

In the case between:

THE BAPHIRING COMMUNITY Plaintiff

and

MATHHYS JOHANNES UYS 1st Defendant

JAN HENDRIK LIEBENBERG 2nd Defendant

WESSELS CORNELLIS CRONJE OOSTHUIZEN 3rd Defendant

SAREL JOHANNES BUITENDAG 4th Defendant

FRANCOIS JOHANNES JOUBERT 5th Defendant

WOUTER BEKKER 6th Defendant

HENDRIK BALTES NIEMAND 7th Defendant

ANTOINETTE PRINSLOO 8th Defendant

THE REGIONAL LAND CLAIMS COMMISSIONER FOR GAUTENG AND NORTH WEST PROVINCE 9th Defendant

THE MINISTER OF LAND AFFAIRS 10th Defendant

THE MINISTER OF PUBLIC WORKS 11th Defendant

THE MINISTER OF MINERAL AND ENERGY AFFAIRS 12th Defendant

THE REGISTRAR OF DEEDS 13th Defendant

THE LAND AND AGRICULTURAL BANK OF SOUTH AFRICA 14th Defendant

FIRST NATIONAL BANK 15th Defendant

J H LIEBENBERG 16th Defendant

J C LIEBENBERG 17th Defendant

H KRUGER 18th Defendant

SENWES LIMITED 19th Defendant

N.W.K. LIMITED 20th Defendant

PETRUS JOHANNES LIEBENBERG 21st Defendant

JUDGMENT

GILDENHUYS AJ:

[1] A group of some 383 persons who describe themselves as "the Baphiring Community" brought a restitution claim directly to this Court under Chapter III A of the Restitution of Land Rights Act.[1] The group claimed an order restoring the common law title of certain land, commonly known as the "old Mabaalstat", to a communal property association which will be established under the Communal Property Association Act.[2] The old Mabaalstat was expropirated from a Tswana tribe known as the Baphiring. The tribe was moved to compensatory land (known as the new Mabaalstat) during 1971. The claimant group includes only a small fraction of the entire tribe. All members of the Baphiring tribe, will, however, be allowed to join the proposed Communal Property Association.

[2] There are 22 defendants in the case. Amongst them are the present owners of the land claimed. Most of them resist the claim. I will refer to them as the objecting land owners. The defendants also include various government departments. Most of them delivered documents in terms of which they abide the decision of the Court. The Department of Land Affairs, which is the 10th defendant, took up an impartial position, but was represented by counsel at the hearing which preceded this judgment. A small number of defendants did not enter a appearance to defend, and did not inform the registrar that they will abide the Court's decision.

[3] The claimant's restitution claim has many facets. Some of the issues were separated for prior adjudication in terms of rule 57 of the Land Claims Court Rules. These are the following:

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1 Act 22 of 1994, as amended.

2 Act 28 of 1996, as amended.

“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 issues were heard by myself and an assessor, prof M Wiechers. The objecting land owners opposed the matter vigorously and the hearing stretched over many days.

[4] We gave judgment on 29 January 2002, and found as follows:

“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.

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 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 Tranfer T 177/1982;
- all subdivisions of Doringspruit 196 JP, totalling 3309,6967 hectares in extent, as held under Deed of Transfer T 432/1985;
- all subdivisions of Holfontein 160 JP, totalling 4611,3224 hectares in extent, as held under Deed of Transfer T 429/1985;

- all subdivisions of Uitval 198 JP, totalling 1225,0192 hectares in extent, as held under Deed of Transfer T430/1985;
- all subdivisions of Lemoenplaats 180 JP, totalling 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."

[5] My finding of 29 January 2002 left several issues outstanding. The claimant agreed with the Department of Land Affairs and with the objecting land owners on a further separating of issues. As a result, I made the following order:

> "It is ordered in terms of rule 57(1) that the following issues will be heard separately from and prior to the remaining issues in the matter
>
> (a) Whether the Baphiring Community received just and equitable compensation, within the meaning of section 2(2) of the Restitution of Land Rights Act, No 22 of 1994; and
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> (b) In the event that the Court finds that the plaintiff's land claim is disqualified as a result of the provisions of section 2(2) of the Restitution of Land Rights Act, whether the provisions of section 2(2) are inconsistent with the Constitution and therefore invalid.

[6] Section 2(2) of the Restitution of Land Rights Act presently reads as follows:

> "(2) No person shall be entitled to restitution of a right in land if -
> (a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or
> (b) any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession."

The interpretation of section 2(2) is pivotal to this phase of the case.

[7] The hearing on these two issues commenced before me an my assessor on Monday 28 July 2003. The objecting land owners were represented on that day by an attorney, Mr Grobbelaar. Mr Grobbelaar informed me that, although he will not be formally withdrawing from the case, he will not participate (on behalf of his clients) in this phase of the hearing, due to a lack of funding. He then left the Court room.

[8] The first witness to testify on behalf of the claimants was Mr JA Gerber. He is an analyst

of photographs, particularly aerial photographs. He handed up, as exhibits, four mosaics compiled from aerial photographs, the first taken of the old Mabaalstat during July 1966, the second during May/June 1975, the third taken of the new Mabaalstat during April/May/June 1969 and the fourth during June 1985.

[9] The hearing was then interrupted to allow the claimant and the Department of Land Affairs to reach agreement on the facts on which the claimant wanted to rely in order to show that its claim is not precluded by section 2(2) of the Restitution of Land Rights Act. After some negotiation, Mr Jansen (who appeared for the claimant) and Mr Ismail (who appeared for the Department of Land Affairs) presented us with a *Statement of Agreed Facts* containing 63 paragraphs of "agreed facts". These facts indicate that the Baphiring tribe members could not re-establish themselves properly in the new Mabaalstat, and that they enjoy considerably less benefits in the new Mabaalstat. The "agreed facts" do not deal with monetary land values at all. In the light of the "agreed facts" statement, no further evidence was led and the matter was postponed to 15 September 2003 to allow the plaintiff to prove the "agreed facts" (which I ruled could be done by means of affidavits) and for argument.

[10] On 15 September 2003, Mr Jansen handed up affidavits by a large number of experts to establish the "agreed facts". Mr Havenga attended the hearing on behalf of the objecting landowners, who have since obtained additional funding for their legal costs. He objected to the issues being decided solely on the "agreed facts". Further negotiations followed. This resulted in an agreement between the plaintiff, the 10th and 12th defendants and the objecting landowners (being the 2nd, 4th to 8th and 16th defendants) as follows:

> "1. The valuation report of Mr D Griffiths is admitted as correct and proven (pp 115 to 189 of the bundle of expert summaries);
>
> 2. The affected land owners represented at this hearing agree to the correctness of the Statement of Agreed Facts, and these can be regarded as proven."

Mr D Griffiths is a valuer. His valuation report was obtained by the State Attorney of purposes of this case. I will revert to the valuation report later in this judgment.

[11] In terms of section 2(2) of the Restitution of Land Rights Act a claimant is not entitled

to restitution if he received just and equitable compensation, as contemplated in section 25(3) of the Constitution, calculated as at the time of dispossession. It therefore becomes necessary to determine what the words "just and equitable compensation" mean. Section 25(3) of the Constitution, with reference to compensation payable in respect of expropriation, reads:

> "The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances, including -
>
> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation.

Similar provisions are contained in the constitutions of many other countries. A useful exposition thereof is contained in the work of Van der Walt, *Constitutional Property Clauses.*[3]

[12] Compensation, to be fair, must recompense.[4] Lord Morris stated in the Appeal Court of England[5]:

> "The word 'compensation' would be a mockery if what was paid was something that did not compensate."

The purpose of giving fair compensation for the loss of land taken from a person or a community is to put that person or community, insofar as money can do it, in the same position as if the land had not been taken.[6]

[13] Fair compensation will not in all cases be the same as the market value of the property

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3 Juta & Co; Kluwer Law Int; 1999.

4 *Cultura 2000 and Another v Government of the Republic of Namibia and Others* 1993 (2) SA 12 (NM).

5 *Birmingham City Corporation v West midland Baptist (Trust) Association (incorporated)* [1970] AC 874.

6 See the Australian work of Douglas Brown, *Land Acquisition* (Butterworths 1996) at 81.

taken. Market value is but one of the items which must be taken into account when determining what would be fair compensation.[7] The introduction of items other than market value in the Constitution is, according to van Wyk, Dugard, de Villiers & Davis,[8]

> "...meant to force the court to accept a certain approach when taking its decision, namely an approach in terms of which not only the narrow market-orientated factors relating to owner's financial interests are considered but also a wider range of socially relevant factors concerned with the circumstances under which the owner acquired and uses the land and the interests of others who are affected by it."

Other items could include financial loss (including resettlement costs) caused by the taking and not made up through an award of market value[9], and also, in appropriate circumstances solace for emotional distress.[10]

[14] Claims for fair compensation by dispossessed communities are particularly difficult to decide. This was pointed out in a study included in a book entitled *Resources, Nations and Indigenous Peoples.*[11] The study relate to the relocation of indigenous communities to make land available for dams in South-East Asia. Hirsch remarked:[12]

> "If there are lessons for compensation to be learned from dams in South-East Asia, notably the three cases discussed, it is that failures derive principally from reluctance on the part of the state and dam proponents to accept that there are multiple levels of sovereignty over the resource on which dams encroach. Moreover, the resource values destroyed by dams are very difficult to replace in standard compensation and resettlement procedures, given the limited role of affected people in planning and the reductionism that simplifies complex aspects of culture, settlement, local history and relations between people and their resource base into a monetary figure or a settlement program designed by external consultants. There are important structural and politico-cultural reasons why indigenous people suffer disproportionately from these failures."

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7 See sec 25(3) of the Constitution, Act 108 of 1996.

8 *Rights and Constitutionalism*, Juta & Co, 1994 at 496. The reamark relates to the interim Constitution, but must also apply to the final Constitution.

9 See sec 12(1)(a)(ii) of the Expropriation Act, Act 63 of 1975.

10 *Hermanus v Deparment of Land Affairs* 2001(1) SA 1047 (LCC).

11 Oxford University Press, 1996.

12 Page 221 of *Resources, Nations and Indigenous Peoples* Richard Howitt (ed).

Similar sentiments were expressed in an Australian work by McRae, Nettheim and Beacroft, *Indigenous Leal Issues*[13], at 170:

> "'Compensation' also implies reparation for the wider damage inflicted as a result of dispossession and oppression. But of course, pragmatic considerations will always intervene: no government is going to compensate Indigenous people to the tune monetary value of the land which they have lost, and all the other incalculable suffering which has flowed from that loss. But some partial compensation, in money or in kind, is clearly feasible. The compensation principle manifests itself sporadically in the land rights legislation, but certainly it has been influential in providing a rationale for various extra benefits (such as funds to purchase land on the open market, diversion of mining royalties to Indigenous groups, and extensive rights to control mining on Aboriginal land) over and above restoring land to its original owners."

[15] J Roux, in an article in the *African Journal of International and Comparative Law*[14], pointed out that Western concepts of expropriation and compensation are not always suitable when dealing with community held tribal land. Insofar as it may be necessary, new concepts will have to be developed to ensure fair compensation for the relocation of indigenous communities. Such compensation will in most, if not all cases, comprise much more than the provision of compensatory land of equal value. Saad S Yahya wrote[15] that, in Kenya -

> "A shift in focus from value of the land to value to the landowner as the basis for compensation is evident. There is greater readiness on the part of the courts to consider the individual circumstances of a claimant and his claim rather than the characteristics of the land expropriated."

[16] The compensation actually allowed for the old Mabaalstat is set out by Griffiths in his valuation report[16]

Land value	
Eastern portion of Brakkuil 449 JP	R192 103.66
Portion of Syferfontein 451 JP	R 7 379.00
Portion of Rietfontein 453 JP	R289 600.70
	R489 083.36
Plus 20% loss and inconvenience	R 97 816.67
	R586 900.03
Less price of compensatory land (at agricultural value)	(R416 377.60)
Cash payment	R170 522.43

13 LBC Information Services 1997.

14 Constitutional Property Rights Review in Southern Africa: "A record of the Zimbabwe Supreme Court" (1996) 8 *Afr of Int and Comp Law,* 755 -788.

15 "Expropriation in Kenya", contained in *Compensation for Expropriation, a Comparative Study* (Erasmus ed), Jason Reese, Oxford 1990.

16 Page 4 of the report, page 123 of the record.

Mr Griffiths apportioned different values to cultivated land, open veld (grazing), bush and hilly veld and land under residential buildings in the old Mabaalstat, as follows:

	extent	value R/ha	total compensation
Cultivated land	874.0 ha	R140,0	R122 360
Open veld (grazing)	5924,1 ha	R 58,38	R345 849
Bush veld, hilly veld and residential land	906,95 ha	R 23,3	R 21 132
	7705,05ha		R489 341

According to Mr Griffiths, the compensation of R489 083,36 allowed for land value was in line with market values at the time.

An amount of R10 670 paid for the mineral rights must be added to the compensation. It is common cause that the mineral rights had a value of R22 170 at the time. The result is an undercompensation of R11 500 in respect of the mineral rights.

[17] Some 13321 ha of the land now constituting the new Mabaalstat were expropriated from its previous owners for a total sum of R902 620. The component of that amount which was allocated to bare land value is R563 882. According to Mr Griffiths, that comes to an average value of R67,7/ha including improvements, and R42,33/ha excluding improvements. If the average land value of R42,33/ha is applied to the entire new Mabaalstat (in extent 17167,1281 ha), it would indicate a market value of R726 679, which is well in excess of the agricultural valuation of R416 377.

[18] In the final analysis, the tribe got compensated as follows:-

New Mabaalstat (at market value)	R 726 679
Paid in cash to the tribe	R 170 522
Mineral rights (in cash)	R 10 670
	R 907 871

The market value of the land and mineral rights which the tribe lost is as follows:

Land	R489 083.36

Mineral rights	R 22 170.00
	R511 253.36

[19] The plaintiff submitted, firstly, that market value in the circumstances of this case was an inappropriate norm for determining compensation, ans secondly, that the cash amounts which were paid were insufficient to compensate the disruption of the move and the decline in amenities suffered by the tribe at the new Mabaalstat. Mr Jansen, who appeared for the plaintiff, suggested that this is amply borne out by the agreed facts.

[20] The following is a précis of the facts agreed to by the plaintiff, the 10th and 12th defendants and the objecting land owners:

(a)The old Mabaalstat

> The Baphiring community were the owners of the land and the mineral rights which comprised the Old Mabaalstat. The land was either registered in the name of the community or in the name of the community's chief, in trust for the community.
>
> At the time of removal in 1971, the Baphiring community at Old Mabaalstat comprised of approximately 450 households. The homes at Old Mabaalstat were all built of brick-blocks made from natural occurring clay soils, which the Baphiring blocked and baked themselves. Roofing was made from natural occurring grass and wood. Water occurred naturally in a number of streams.
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> Apart from individual exceptions, all the Baphiring households conducted small scale subsistence farming on the land (which constituted the Old Mabaalstat. The farming activities typically entailed cattle driven ploughing of 3 to 6 morgen per household, as well as vegetable gardening near sources of water. The community planted a range of food products, including maize, sorghum, beans, sugar beans, potatoes, spinach and watermelons. Enough food was produced to sustain the entire community. Surplus production was not uncommon and some households sold food commercially.
>
> A number of families received cash income by working for commercial farmers in the vicinity of Old Mabaalstat, either as permanent workers or seasonal workers. During the 1960's, some were also employed in a slate mine which became active at Old Mabaalstat.

(b)The new Mabaalstat

> The compensatory land, comprising of New Mabaalstat, was registered in the name of the President of the Republic of Bophutatswana, in trust for the Baphiring Community. The mineral rights were reserved for the State.
>
> There are presently approximately 925 homesteads at the New Mabaalstat. Individual households of the Baphiring community was compensated for improvements at Old Mabaalstat. They money received was not sufficient to rebuild houses of similar quality and functionality at New Mabaalstat. The community's households had to

purchase all their building materials at New Mabaalstat. There is no natural soils or building aggregate at New Mabaalstat that allow for brick making, as was the case at Old Mabaalstat. This resulted in slow re-establishment of brick homes. Some households were never able to build brick homes, and remain living in corrugated iron shacks.

New Mabaalstat is not suitable for the kind of agricultural activities which the Baphiring conducted at Old Mabaalstat. The land is significantly inferior to the land at Old Mabaalstat.

New Mabaalstat has no meaningful quantities of reliable surface water. Water for cattle and household use must be supplied by boreholes. Present boreholes do not yield sufficient water for cultivation. Successful cultivation of crops in New Mabaalstat requires irrigation with sub-surface water. To establish such requires capital, appropriate agricultural skills and appropriate business skills. The reliability of sub-surface water for irrigation must still be proven.

During the period 1982 to 1984, the Bophuthatswana Government, through its agricultural corporation, Agricor, attempted to establish dry land crops of sunflower and maize, using mechanized ploughing and local labour, on the southern portions of New Mabaalstat. These attempts failed and were abandoned.

The Baphiring community completely failed, despite attempts thereto, to re-establish their ploughing and planting activities at New Mabaalstat. This was caused by the dryer conditions and different soil types at New Mabaalstat and the lack of capital to establish irrigation. Since 1971 up to the present, the community did not produce any meaningful volumes of food.

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Large numbers of the community's cattle, the exact portions cannot presently be determined, died or were lost shortly after relocation to New Mabaalstat, due to a combination of factors involving lack of water, sickness and theft. A small percentage of community members successfully re-established cattle farming. At presentt only 40 families own the entire cattle stock.

A number of community members who were employed in 1971 at farms adjacent to Old Mabaalstat or at the slate mine, were forced to remain behind to keep their employment. This category of people suffered the following hardships:

- They had to find new housing.
- They were cut off from the community.
- They had no direct access to the fruits of any agricultural activities.

A number of community members, who chose to move to New Mabaalstat, lost their employment at farms adjacent to Old Mabaalstat or at the quarry after they moved to New Mabaalstat. There are no employment opportunities at New Mabaalstat similar to those at Old Mabaalstat. The Baphiring community at New Mabaalstat survive primarily on old age pensions and remittances of community members working in the city.

The abovementioned disruptions and hardships caused to the Baphiring community, affected the females in the community disproportionately. Due to cultural factors, Baphiring women are not involved in cattle farming, only vegetable gardening. At present no women are involved in agricultural activities at New Mabaalstat, due to the fact that no vegetable farming takes place.

(c)The resettlement

It is generally accepted by resettlement practitioners that failure to comply with

> acceptable resettlement practices, will lead to adverse social impacts, long term hardships, and often sends a relocated community in a downward spiral of poverty.
>
> Resettlement must be planned and implemented according to negotiated and accepted resettlement principles. Administrative practices followed in 1971 were neither planned, nor programmatic. The relocation of the Baphiring was socially and economically a failure. The absence of a proper relocation process caused this failure.

[21] The purpose of the expropriation was to remove the tribe from a so-called white area and to relocate the tribe in an area designated for occupation by black people. It must be accepted that the authorities responsible for the expropriation intended, or should have intended, that the relocation would be successful. When revisiting the expropriation in order to determine whether the compensation was just and equitable at the time, the purpose of the expropriation must be taken into account[17]. Meeting the requirements of a successful relocation could bring the compensation up to an amount well in excess of the market value of the property taken.

[22] Compensation should have been given to the tribe which would have been enough to make a successful relocation possible. To the extent that it was not, it fell short of being jsut and equitable. It is common cause that the relocation was not successful, due mainly to the nature and location of the compensatory land. It is not an answer to the question of whether the compensation received at the time of dispossession was just and equitable to state that the compensatory land had a market value far in excess of the land taken. Other factors also come into the equation.[18] Under the prevalent circumstances during the apartheid dispensation, the tribe was not free to sell the compensatory land and use the proceeds to buy other land of their choice. The compensatory land is not even registered in their name. It is entirely unsuitable for their purpose. It cannot constitute fair compensation, even taking into account the additional cash payments and other relocation assistance which the tribe and its members received from the government.

[23] As was the case with the judgment and order of 29 January 2002 and for the same reasons[19], no order will be made as to costs.

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17 Section 2(2) of the Restitution of Land Rights Act read with section 25(3)(e) of the Constitution.

18 See the recent unreported judgment of Moloto J in *Lappeman v Mphele N.O,* case no 37/2002, 27 November 2003.

19 See par [45] of the judment.

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

The Baphiring Community did not receive just and equitable compensation, within the meaning of section 2(2) of the Restitution of Land Rights Act, No 22 of 1994. The plaintiff's claim is therefor not disqualified as a result of the provisions of section 2(2) of that Act.

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JUDGE A GILDENHUYS

I agree

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PROF M WIECHERS
ASSESSOR[20]

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.*

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