

**IN THE LAND CLAIMS COURT OF SOUTH AFRICA**

Held at **RANDBURG**

**CASE NUMBER: LCC 85/98**

In chambers : **Dodson J**

In the case of:

**BATAUNG BA-GA SELALE**

Claimant

Concerning

**THE FARM ZEPHANJESKRAAL 251-JQ, DISTRICT OF RUSTENBURG, NORTH  
WEST PROVINCE**

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**RULING**

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**DODSON J:**

[1] The dispute to which this ruling relates arises from a claim for the restoration of rights in land in terms of the Restitution of Land Rights Act.<sup>1</sup> I will refer to it as “the Act”. The claimant describes itself as a community. A community is recognised as an entity which may claim restoration of rights in land in terms of the Act.<sup>2</sup> The claimant community says that it is regulated by custom. It is lead by a chief, who is the titular head and representative of the community. He acts together with his appointed tribal council. The land which the claimant claims is currently owned by a Mr Johannes

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1 Act 22 of 1994.

2 See the definitions of community and person in section 1 read with section 2(1)(d) of the Act.

Graham and Mrs Oelifina Graham, who oppose the claim. I will refer to them as “the land owners”.

[2] The claim was referred to the Land Claims Court by the Chief Land Claims Commissioner in terms of section 14(1) of the Act.<sup>3</sup> Subsequent to the referral of the matter, the land owners filed a response to the referral report in terms of rule 38(7)(b) of the Land Claims Court Rules.<sup>4</sup> I will refer to them as “the rules”. The response fulfils a similar function to that of a plea. In broad terms the land owners dispute each and every allegation pertaining to the claim. The response includes averments which specifically place in issue whether the members of the group which has lodged the claim, in fact, constitute the community which they purport to be, namely the Bataung Ba-Ga Selale. They also say that restoration of the land is not feasible because:

“[it] is not a viable unit for agricultural purposes and transfer of the Land to the claimants will not enable them to make a living on the Land from farming”

and

“the Land is without infrastructure and cannot be used for residential purposes”.

[3] After the referral of the matter and the filing of responses, the Court convened a pre-trial conference in terms of rule 30.<sup>5</sup> Rule 30 confers wide powers on the Court to ensure, amongst other things, the early exchange between the parties of as much information about their respective cases

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3 The wording of section 14(1) at that time required such referrals to be effected by the Chief Land Claims Commissioner. The current wording of section 14(1) (as amended by the Land Restitution and Reform Laws Amendment Act No 18 of 1999) allows the Regional Land Claims Commissioner to do so.

4 The rules were published in Government Gazette No 17804 dated 21 February 1997 and amended by Government Gazette No 18728 dated 13 March 1998 and Government Gazette No 20049 dated 7 May 1999.

5 Rule 30(1) provides:

‘The presiding judge may, of his or her own accord or at the request of any party before or during the hearing of any case, convene one or more conferences of the participating parties to promote the expeditious, economic and effective disposal of the case.’

as possible in order to bring about an expeditious trial of the matter.<sup>6</sup> In the course of the pre-trial conference, the legal representatives for the land owners requested that the claimant provide the following information in respect of each and every person constituting the claimant community:

- (i) his or her identity number;
- (ii) a copy of the first page of his or her identity book or of the person's birth certificate;
- (iii) his or her full names;
- (iv) his or her residential address;
- (v) his or her place of employment; and
- (vi) in respect of those community members who are descended from a community member dispossessed of land rights, details of their relationship to the person originally dispossessed.

The claimant was of the view that it was only willing to provide this information in regard to community members who were heads of households and, in respect of such persons, they were not willing to provide details of their place of employment.

[4] It was accordingly agreed that the parties would make written submissions to the Court setting out their motivation for, or objections to, the provision of the information referred to, whereupon the Court would make a ruling. In broad terms, the land owners in their submission said that the information is necessary if the Court is to perform its function properly in adjudicating the matter and, should this be appropriate, in formulating an order in terms of section 35 of the Act. They also said that the information was needed to enable them to prepare for trial. The claimant adopted the attitude

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6 Rule 30(9) is the most important provision in this regard.

in its written submissions that the community is represented by its traditional structure consisting of the Chief and his councillors in their capacity as representatives of the community and the provision of the information requested in respect of the Chief and councillors (excluding places of employment) would suffice. In so far as the request extended beyond those parties it considered the request to be vexatious and intended to frustrate and delay the claim.

[5] In as much as the claimant agreed at the pre-trial conference to provide the information referred to in (i) to (iv) and (vi) in respect of all heads of household, that disposes of the matter in so far as that information is concerned. The claimant agreed, at the pre-trial conference, to provide this information and it must honour that agreement. The claimant cannot now say that it is only willing to provide the information in respect of the Chief and his councillors.

[6] That leaves the request in relation to persons who are not heads of households and the request for information about the current places of employment of all the members of the alleged community. To decide this aspect of the matter it is necessary to consider some additional rules relevant to the matter. Rule 10 deals with cases by and against partnerships, trusts, organisations, associations and communities. Subrules (4) and (5) of rule 10 read as follows:

- “(4) Should an entity referred to in subrule (1) [which includes a community] be a party in proceedings before the Court, any other party may, by delivering a notice to that effect, call for a copy of -
  - (a) its current constitution or other document in terms of which it is established;
  - (b) its registration certificate (if any); and
  - (c) a list of names and addresses of its members and office bearers and their respective offices at any time or during any period as may be specified in the notice.
- (5) Any notice under subrule (4) must be responded to within ten days of receipt. If any document or information called for does not exist or is not available, an affidavit to that

effect must be delivered, with full reasons.”

[7] If the land owners are entitled to the information referred to in rule 10(4)(c) simply by delivering a notice requesting such information, there is no reason why the claimant should not be obliged to provide the information through the medium of a pre-trial conference. It would simply add to legal costs unnecessarily to refuse the information in these proceedings and force the land owners to issue a notice in terms of that sub-rule. The land owners are, therefore, entitled, at the very least, to a list of the names and addresses of the members of the claimant community. It was never suggested on behalf of the claimant that there was anything amiss in the request for full names. There is accordingly no reason in this case why this should not include their full names, that is all forenames and surnames,<sup>7</sup> and their residential addresses.

[8] Who then are the members of the community? It was suggested on behalf of the claimant at the conference that the members of the community consist of the family heads or heads of household. In *Seymour’s Customary Law in Southern Africa*, the term “family head” is described generally as:

“The head of a family, namely, a Black male who has married one or more wives by customary rites, and may and does include the head of a family home, and also the person who is lawfully in control of a family after the death of the head of the family, being his heir or, if the heir is a minor, the legal guardian of the heir until the latter becomes emancipated.”<sup>8</sup>

If the community were only made up of family heads, it would, on this definition, only be made up of males. That cannot be. Such a conception of a community, which discriminates in favour of one gender, is not compatible with the Act. This is apparent from section 35(3) of the Act which provides:

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7 This appears to be how Wilson J interpreted “full names” in *Beukes NO v Mdhlalose; Mdhlalose v Mkhonza and another NO* 1990 (2) SA 768 (N) at 771C to 772D.

8 Bekker *Seymour’s Customary law in Southern Africa* 5<sup>th</sup> ed (Juta, Cape Town 1989) 71.

“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.”

[9] Customary law also does not envisage that the heads of household alone make up the community. Rather they have a representative function in respect of the family which they head. This is apparent from the following extract from *Seymour*:

“ A family head is by no means a despot in law as is sometimes supposed: he has control of each house, but its members have a collective interest in its affairs and property. Whenever a family head deals with the property of a house, he should, and usually does, consult the wife of that house, and also the eldest son....”<sup>9</sup>

In the circumstances, the land owners are entitled to the full names and residential addresses of every member of each household in the alleged community.

[10] The remaining information requested consists of that referred to in the following subparagraphs of paragraph 3: (i) (the identity numbers), (ii) (copies of the first pages of the identity documents or of the birth certificates), (v) (details of places of employment) and (vi) (relationship of descendants). The Court has the discretion to require the provision by the claimant of “any further information... on any issue before the Court”.<sup>10</sup> If any of the remaining information requested is relevant to the

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9 Ibid at 70.

10 Rule 30(9)(g) provides:

“(9) Without limiting the general powers of the presiding judge, the matters set out hereunder may be dealt with at a conference. The presiding judge may make orders or give directions in relation to these matters, insofar as it may be appropriate for the type of case concerned :

(a) . . .

. . . .

(g) information required :

(i) authorisation for any party to request further particulars from any other

issues to be decided in the claim, the hearing of the trial will no doubt be expedited by the prior provision of that information. It is on the basis of relevancy that it must be decided whether the land owners are entitled to the remaining information.

[11] Dealing firstly with items (i) and (ii), it seems to me that dates of birth may become relevant information relating to the claim. Persons who were alive at the time of the dispossession would be more easily able to show that they were part of the originally dispossessed community. Persons who were not born at the time of the original dispossession will have to show that they became part of the community concerned by way of being a descendant of a community member originally dispossessed or by some other means. Documentary evidence which discloses the date of birth is, accordingly, relevant. It is also discoverable. The parties have in any event been ordered, by agreement, at the pre-trial conference, to make discovery in terms of rule 46. In the circumstances, the claimant must make available for copying, or provide copies of, the first pages of identity documents or of birth certificates in respect of all the persons constituting the claimant community. An identity number is also evidence of date of birth. If any member of the claimant community does not possess an identity document or birth certificate, the identity number must be provided.

[12] I deal next with item (v) (place of employment). The provision of this information has, in the course of proceedings in similar claims, taken considerable court time. The Court has yet to rule on the meaning to be attached to section 33(cA) of the Act which provides that the Court must consider “if restoration of a right in land is claimed, the feasibility of such restoration”. However, depending on the view ultimately adopted by the Court, the current employment details of community members may be relevant to the feasibility of restoration and the consequential resettlement of those members. Considerable Court time could certainly be saved if this information was provided beforehand. The claimant should, therefore, provide this information.

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party under rule 45;

- (ii) any further information, evidence, documents, investigation or witnesses which the presiding judge may require on any issue before the Court;”

[13] Item (vi) relates to relationships of descendants to a person originally dispossessed. The provision of this information has also, in the course of proceedings in similar claims, taken considerable court time. As I have already indicated in paragraph 10, persons who were not part of the community originally dispossessed will have to show (if the point remains a contested one) that they are, nonetheless, members of the claimant community. Consequently, this information is also considered relevant. If the claimant community is not able to prove its existence as such, there may also be an argument to say that the persons themselves who were originally dispossessed, or, if they have passed away, their descendants, in their individual capacities, have a claim.<sup>11</sup> This, too, makes the information requested relevant. This information must be provided.

[14] The claimant indicated that the procedure for obtaining this information would be cumbersome. The Court has sympathy for the claimant's position. This information does not appear to have been elicited in the course of the investigation by the Commission on the Restitution of Land Rights.<sup>12</sup> The collection of the data may involve a considerable amount of work. In my view, the Commission should assist the claimant in collecting this data. In terms of the minutes of the pre-trial conference on 26 May 1999, the claimant is required to provide this information within 20 court days of the date of this ruling. If this proves insufficient, the claimant will have the opportunity at the next pre-trial conference on 5 October 1999 to seek an extension of the time period.

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11 This must not be taken to suggest that I have any view as to the validity of such an argument.

12 Rule 39(1)(b) requires the regional land claims commissioner to include in his or her report the following information if the claimant is a community:

- “(i) its name;
- (ii) its legal status and constitution (if any);
- (iii) the physical address of its offices (if any), its postal address and, where available, its telephone and facsimile numbers;
- (iv) a list of its office bearers and members, if available;
- (v) if the community is represented by a legal representative, his or her name and address and, where available, telephone and facsimile numbers.” (my emphasis)



[15] I do not intend to make an order as to costs at this stage. The parties will be given an opportunity at a later stage to argue the issue of costs. I accordingly make the following ruling:

15.1 The claimant is ordered to provide the following information in respect of each member of the alleged claimant community, including men (whether or not they are heads of households), women and children :

15.1.1 a copy of the first page of his or her identity book or of the person's birth certificate, or, failing that, his or her identity number;

15.1.2 his or her full names (which includes all the forenames and the surname);

15.1.3 his or her residential address;

15.1.4 his or her place of employment; and

15.1.5 in respect of those community members who claim to be descended from a community member dispossessed of land rights, details of their relationships to the persons originally dispossessed.

15.2 The Regional Land Claims Commissioner: Gauteng and North-West must provide reasonable assistance to the claimant to enable it to collect the data referred in this ruling.

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**PRESIDING JUDGE: A DODSON**

Handed down on: **2 September 1999**

For the claimant community:

*Mr M Makgale* from *Setshedi, Makgale & Partners*, Rustenburg

For the land owners:

*Mr HF Jacobs* instructed by *MacRobert, De Villiers, Lunnon & Tindall Inc*, Pretoria

For the Department of Land Affairs:

*S L Botes* for the *State Attorney*, Pretoria