J. 03/06/2005

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NO: LCC52/00

Held at **Polokwane**
Before **Gildenhuys J** and **E Ströh,** assessor.
Decided on: **3 June 2005**

In the matter between:

POPELA COMMUNITY Claimant

and

DEPARTMENT OF LAND AFFAIRS 1st Respondent

GOEDGELEGEN TROPICAL FRUITS (PTY) LTD 2nd Respondent

in re

RESTITUTION CLAIM: BOOMPLAATS 408LT
Presently consolidated into GOEDGELEGEN 566LT

JUDGMENT

GILDENHUYS J:

GENERAL BACKGROUND

[1] This is a claim for the restitution of rights in land under the Restitution of Land Rights Act.[1] I shall refer to it as the "Restitution Act". The claim is a community claim, or alternatively a claim by nine individuals, for the restitution of land forming part of the erstwhile farm Boomplaas, in the Moketsi area of the Northern Province.

[2] On 25 May 2000 the Regional Land Claims Commissioner for the Northern Province (to whom I shall refer as the "Regional Commissioner") referred a restitution claim by the Popela community to this Court. I shall refer to it as the "community claim". On 31 August 2001 the Regional Commissioner referred a

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[1] Act 22 of 1994, as amended.

restitution claim by nine individual claimants[2] to this Court. The nine individual claimants maintained that they are also members of the Popela community. I shall refer to these claims as the individual claims. Both the community claim and the individual claims are brought in respect of the same land. The individual claims are submitted as an alternative to the community claim, and will have to be considered if the community claim fails. It was agreed at a pre-trial conference that the community claim will be heard together with the individual claims.[3]

[3] In the original claim form filed by the Popela community,[4] the following farms were claimed: Boomplas 408 LT, Goedgelegen 409 LT, Vreedzaam 822 LS, Ramatoelaskloof 411 LT, Boschplaats 407 LT and Goedgedacht 382 LT. The claim for the restitution of Boomplaas was the only one referred to the Court. The *Claimant Verification Report* filed by the Regional Commisioner contains a list of 197 members of the Popela Community.[5] Not many of them live or have lived on Boomplaas.

[4] According to a research report submitted by the Regional Commissioner, the ancestors of the claimants were already living on the farms during the middle of the 19th century. When the whites came to settle on the farms, they found them there. The white settlers required them to render services for a certain period every year in return for being allowed to stay on and use the farms.

[5] The Regional Land Claims Commissioner stated in her report:[6]

> "It is submitted that the Popela Community satisfies the requirements of 'community' in section 1 of Act 22 of 1994 in that they used their land for their own benefit and subsistence to the exclusion of persons who were not regarded as members of the

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2 The nine individual claimants are: 1. Mamoribula Maake; 2. Johannes Tholo Maake; 3.Ramothaba Phineas Maake; 4. Mabule Isaac Maake; 5. Petrus Mabu Maake; 6. Wilson Malemela; 7. Abram Maake; 8. Mmaselelo Mosibudi Maake and 9. Mokwati David Maake. The 5th and 9th claimants have subsequently passed away, and were substituted by MM Maake N.O. by Order of this Court on 12 June 2002.

3 Par 7 of the minutes of the pre-trial conference held on 25 September 2001, page 8 of bundle 4 of the documents before the Court.

4 A copy of the claim form is in bundle 2 of the documents before the Court, pages 118-121.

5 A copy of the report and list is in bundle 1 of the documents before the Court, pages 241-252.

6 Pages 9 and 11 of bundle 1 of the documents before the Court.

> Community. The Community administered the land use amongst themselves in terms of their shared rules without the inference of successive landowners.
>
> Part of the community still resides on the farm today where the members of the community meet on a regular basis.
>
> The Community was dispossessed of their rights as labour tenants that they had held in the Farm for many years."

These submissions are for the most part not supported by the evidence, as will become apparent later in this judgment.

[6] Boomplaas was originally registered in the name of PDA Hattingh by Deed of Transfer T3343/1889. After several subsequent transfers, HMJ Altenroxel received title under Deed of Transfer T27963/1963. Thereafter the farm was transferred to August and Bernard Altenroxel by Deed of Transfer T10655/1987. Six years later, it was transferred to Goedgelegen Tropical Fruits (Pty) Ltd.[7] At some point in time the farm was subdivided, and the remaining extent has now been consolidated into the farm Goedgelegen 566LT. It presently forms part of Goedgelegen.

[7] The claimed land has been reduced by the claimants in terms of a notice dated 31 March 2003. It now comprises the cadastral unit formerly known as the remaining extent of Boomplaats 408LT,[8] but excluding certain land previously worked by the owners or tenants of Boomplaas, as shown on a map annexed to the notice.[9]

[8] The nine individual claimants lived, and some of them still live, on the claimed land. Each of the nine claims the land where his or her homestead is or used to be and also the land immediately around it, comprising some 800m². The balance of the claimed land is claimed jointly, to be held by the 9 individuals in undivided co-ownership.

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7 Investigation Report submitted by the Regional Commissioner, par 2.2, on pages 260 and 261 of bundle 1 of the documents before the Court.

8 The claimed land is now part of Goedgelegen 566 LT. See par [6] of this judgment.

9 The map is at page 138 of bundle 3 of the documents before the Court.

[9] After the claims had been referred to this Court, the claimants, the Department of Land Affairs and the present land owner [Goedgelegen Tropical Fruits (Pty) Ltd, a company within the Westfalia group] indicated that they wished to participate in the restitution proceedings. Each of them delivered a response in terms of the Land Claims Court Rules. The Department of Land Affairs became the first respondent and the land owners the second respondent. The first respondent supported the restitution claim; the second respondent opposed it. Mr Mashimbye appeared on behalf of the claimants, Mr Shakoane on behalf of the first respondent and Mr Steytler on behalf of the second respondent. After Mr Steytler passed away, Mr Nel appeared on behalf of the second respondent.

[10] The Court heard evidence in Polokwane on 25 March 2003, 26 March 2003, 27 March 2003, 31 March 2004, 16 August 2004 and 17 August 2004. Argument was heard in Randburg on 12 November 2004. The claimants called five witnesses and the second respondent (the landowner) also called five witnesses. The first respondent (the Department of Land Affairs) did not call any witnesses.

THE WITNESSES

Mr RP Maake

[11] The claimants' first witness was Mr RP Maake. He is one of the individual claimants. He was employed on Boomplaas since 1947. He is still living on Boomplaas, although he is no longer employed. Originally he was not paid. He had cattle on the farm and he was also allowed to cultivate fields. He testified that -

> "we used to go to the land owner and made a request that we need to plough, and he would show us where we should plough".[10]

In return for the right to live on the farm, the grazing of cattle and the use of ploughing fields, he had to provide labour to the farmer. In 1969, the system was changed. Any worker who owned stock had to remove it from the farm. The

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10 Record, 25 March 2003, p41 line 25 – p42 line 1.

ploughing of fields was no longer allowed. From then on, the workers' stay on the farm was "*by way of working and being paid*".[11]

[12] Mr Maake testified that the workers on Boomplaas had an induna. Originally, the induna was a person named Popela. After he died, the workers elected a person named Petrus Maake. He said that Petrus Maake "*was just our induna, no duties attached*".[12] The workers regarded him as their senior. There were no rules which Mr Petrus Maake had to apply. However, when the workers had a dispute that needed to be resolved, they would come together at Mr Petrus Maake's place, and the matter was discussed there. Mr Petrus Maake has now passed away. He was not replaced.

[13] Most of the workers who lived on Boomplaas, but not all of them, bore the surname Maake. Many of them have now left the farm. The few remaining families are all Maakes. Although they still live on the farm, they are no longer employed there. In 1995, the members of the Popela community elected a committee to institute and prosecute the restitution claim. Mr Maake is the chairperson of that committee.

[14] During cross-examination, Mr Steytler put to Mr Maake a minute of an interview which Mr Mark Wegerit of the Nkuzi Development Corporation had with him in preparation for the restitution claim.[13] According to the minute, one of the questions put to Mr Maake was "*why did* (August Altenroxel, the farmer on Boomplaas) *tell you to stop (ploughing)*". The reply was noted as being "*because some of the people want to be paid*". Mr Maake said that the minuted statement is not really his statement, and explained that[14] -

> "at the time he (Mr Wegerit) came to our place, he, the people were there, they were together and he was sitting in the middle. He would pose a question, and people would answer him from different directions."

The following evidence then followed:[15]

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11 Record, 25 March 2003, p41 line 7.
12 Record, 25 March 2003, p42 lines 6-7.
13 The minute is on pages 145-146 of bundle 2 of the documents before the Court.
14 Record, 26 March 2003, p105 lines 15-18.
15 Record, 26 March 2003, p107 lines 12-24.

"Q: Who spoke on behalf of the community?

A: It was not answered by one person, it was answered by different people. One would say this answer and the other one would say he agree with what the other person says. And the other one will also agree with what the previous speaker had said.

Q: Did you also make a contribution to this chorus?

A: Yes, I am one of those who said I agree with what they say.

Q: Okay, now the next question was: 'Who told you to stop ploughing?' To whom was this question addressed?

A: The question was directed to the community.

Q: Okay, so then now we must get to the next ghost voice. The answer was: 'Because some of the people want to be paid', was that the community's answer?

A: I have no knowledge of this answer."

The minuted statement gives the impression that some of the labour tenants wanted to become full-time farm workers so that they could earn wages.

Mr Theron

[15] The claimant's next witness was Mr Theron, an employee of the Transvaal Agricultural Union (Northern Region). Mr Theron was subpoenaed to bring to Court

> "all the correspondence between the Letaba Agricultural Union, all the notices and minutes of the union and its committees and all circulars and notices from that union to its members."

He did not bring the documents with him. His evidence is of no assistance.

Mr W Malemela

[16] The next witness to testify was Mr Wilson Malemela, one of the individual claimants. He described the conditions under which the workers were originally employed as follows:

> "There was no remuneration. What used to happen was a person would work six months on the farm, and the other six months he was free to stay at home."[16]

Illness caused him to stop working in 1969. His children continued working on Boomplaas.

[17] Mr Wilson Malemela said the workers on Boomplaas had an induna, Mr Petrus Maake. The induna would indicate where the workers could build their huts, and where they could plough. The farmer knew about these arrangements. In the event of a conflict amongst the workers, the induna (who the workers regarded as their *kgoshi*) would decide on the matter.

[18] At some point in time (Mr Malemela cannot remember when) the labour tenants were told not to continue ploughing, because they would henceforth be paid. Later they were told to remove their livestock. The farm owners "*told us that the law says we are not allowed to keep livestock there....*"[17] The "law" referred to was "*the law of that farm*",[18] because the owner "*was sowing some vegetables*". I interpret the use of the word "law" as referring, not to a statute, but to rules operative on the farm.

Ms M Maake

[19] Ms Mmamolatelo Maake was the next witness called by the claimants. She is the wife of Mr Isaac Maake, an erstwhile herdman on Boomplaas. The family does not live on Boomplaas any longer, but at a place called Ga-popela near Moketsi. Originally, when they lived on Boomplaas, her husband had cattle on the farm, and she had a ploughing field allocated to her by the farmer, whom she knew as Madikana. Her husband also had a field. At some stage, Madikana stopped the family from ploughing, saying they "*shall start earning remuneration*".[19] Her husband's cattle grazed separately from the farmer's cattle. The payment for the grazing was the manure derived from the cattle, which Madikana used on his fields.

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16 Record, 27 March 2003, p147 lines 13-15.
17 Record, 27 March 2003, p155 lines 10-11.
18 Record, 27 March 2003, p160 line 22-24.
19 Record, 27 March 2003, p167 line 22.

[20] Ms Maake said that when there were conflicts between the workers on Boomplaas, they would get together to discuss the matter.[20] She did not say that the induna had any particular role in this regard.

Dr SF Schrimer

[21] The claimants then called Dr SF Schrimer as an expert witness. Dr Schrimer is a lecturer at the University of the Witwatersrand in the school of economic and business sciences. He received a PhD degree in history in 1995. His dissertation

> "... was about the history of the conflict over land in one particular district that is now in Mpumalanga, it used to be in the old Transvaal. The Lydenburgh district. I traced that conflict from about 1930 to 1970. Focussing heavily on the issue of labour tenancy but also on so called black spots and rent tenancies."

[22] Dr Schrimer testified that in 1960 a commission was established that went around the country "*to ask farmers about their labour situation*".[21] Subsequent to that Commission and in 1964, legislation was passed[22] "*to ban labour tenancy throughout the country*".[23] Under cross-examination, Dr Schrimer conceded that the legislation did not ban labour tenancy, but left it to the Minister to decide in respect of each individual area either to do nothing about labour tenancy, or to prohibit further labour tenancy agreements, or to abolish labour tenancy.[24]

[23] It is common cause that in 1969 there were no ministerial decisions relating to labour tenancy in force in the Moketsi area. Further labour tenancy agreements were prohibited in the area only from 1 August 1970.[25] The thinking behind discouraging or prohibiting labour tenancy agreements, according to Dr Schrimer, was to remove

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20 Record, 27 March 2004, p170 lines 14-15.
21 Record, 31 March 2004, p10 lines 1-2.
22 An amendment made in terms of section 22 of the Bantu Laws Amendment Act (42 of 1964) to chapter 34 of the Native Trust and Land Act, 1936, by inserting a new section 27 *bis*.
23 Record, 31 March 2004, p10 lines 10-11.
24 Record, 31 March 2004, p22 line 23 - p23 line 6.
25 The prohibition is contained in Government Notice 1224 dated 31 July 1970, and is quoted in par [66] of this judgment.

black persons from white-owned farms and bottle them up in so-called "homelands", from where they would constitute a source of cheap labour for white farmers.

[24] The pivotal thesis put forward by Dr Schrimer was that the racially motivated and government supported strategy to end the occupation of white-owned farms by black labour tenants, permeated every decision by a white farmer to abolish the labour tenancy system on his farm. He said that -

> "any eviction of labour tenants that took place in the late 1960's in the old Transvaal province, could not have been, it was impossible for it to have been a purely business decision".[26]

Even if a farmer alleges that his decision to abolish the labour tenancy system was a business decision, it would have been made in an environment where cheap alternative labour is available because of racially discriminatory laws and practices, specifically the bottling up of black people in the so-called homelands.[27]

[25] His defence of this thesis appears from his cross-examination as follows:

> "Q: Would it be possible for a farmer to decide for other reasons to convert from his (labour tenancy) system?
>
> A: Yes, it would be possible but the decision was also made in the context of apartheid. That is the way I was making the argument.
>
> Q: So every farmer who converts would have apartheid in the back of his mind, even the most vociferous opponent of apartheid?
>
> A: Yes. Not that there were many vociferous opponents of apartheid but yes the decision would have still been influenced by the context created by apartheid. That is the point I am making."[28]

> "Q: So if I follow your argument it is that because there was racially discriminatory legislation therefore it follows that all subsequent decisions taken by a landowner is tainted by that?
>
> A: Yes.

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26 Record, 31 March 2004, p8 lines 4-7.
27 Record, 31 March 2004, p16 lines 11-24.
28 Record, 31 March 2004, p26 line 17 – p27 line 2.

Q: Is that your argument?

A: Tainted is a good word, yes."[29]

"Q: .... although it may be so that farmers generally or a great majority of them would organise their affairs so as to pay the minimum. That does not mean that then owners of Boomplaas and Goedgelegen were part of that group. They may be one of the few with a social conscience.

A: Right. Now I accept that, I accept so."[30]

[26] Dr Schrimer admitted that he did not do any research in the Moketsi area. He has some general knowledge of what went on in the Tzaneen area, which is close by. He does not know Boomplaas and has never been there. Although his research into the labour tenancy system included, in broad outline, the whole of the country, he concentrated on the Lydenburg area.

Mr F Joubert

[27] The first witness to testify on behalf of the land owners was Mr F Joubert, a civil engineer and an expert in interpreting aerial photographs. He used aerial photographs taken in 1938, 1968 and 1998 to prepare a map of the remaining extent of Boomplaas (now consolidated into Goedgelegen). The map shows the clusters of the claimants' huts on Boomplaas. He identified six clusters shown on the 1998 photograph. The map was also used to identify the portion of Boomplaas to which the claimants now lay claim.

Mr A Altenroxel

[28] The land owner's main witness was Mr August Altenroxel. He was born in 1934. He started working on Boomplaas from age 17. At all relevant times he and his brother farmed on Boomplaas in partnership, originally as lessees, later as owners. Although Mr Altenroxel is now retired, he still lives on Boomplaas. He has no interest in the 2nd respondent.

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29 Record, 31 March 2004, p30 lines 14-19.

30 Record, 31 March 2004, p41 lines 1-6.

[29] Mr Altenroxel testified that when he and his brother started farming, there were labour tenants on Boomplaas. The labour tenants were allowed to build huts for themselves and their families, and they had cropping and grazing rights. The white farmer showed them which fields they were allowed to plough. They were also -

> "..... allowed a maximum of about ten head of cattle per *stat*, and several goats and sheep".[31]

In return, they had to work for the farmer (Mr Altenroxel and his brother) for two days a week.

[30] The labour tenancy system did not work well for the Altenroxels. They could not keep proper control. Sometimes, when the services of labour tenants were needed, they were not available. In 1969 the Altenroxels changed the system, for reasons which Mr August Altenroxel described as follows:

> "Because of our improved and progressive farming we needed a regular well controlled labour force and the past system was not fulfilling that."[32]

Under cross-examination he conceded that another reason for them changing the system was that other farmers in the area were also doing it. They noticed that, after the other farmers had converted, it went better with them.[33] Mr Altenroxel was adamant that they did not change the system because of any law or regulation. They did so for business purposes.

[31] In changing the system, the workers were stopped from ploughing, and their stock were reduced to zero over a period of about two years. The erstwhile labour tenants became full time wage earners. They were paid what the surrounding farmers were paying at the time. The labour tenants who did not accept the new employment conditions left Boomplaas. There was no pressure on them to leave.[34] None of the erstwhile labour tenants (now wage earners) were stopped from living on

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31 Record, 16 August 2004, p5 lines 11-13.
32 Record, 16 August 2004, p6 lines 9-11.
33 Record, 16 August 2004, p25 lines 23-24.
34 Record, 16 August 2004, p42 lines 20-21.

Boomplaas.[35] They "*were allowed to stay where they were until they passed away.*"[36] Three families are presently still living on the farm, although they no longer work on the farm.

[32] Mr Altenroxel furthermore testified that they (the farmers) appointed Petrus Maake as foreman. If something was wrong, they would discuss it with him, and find a solution. Some problems were resolved by the labour tenants amongst themselves.[37]

[33] The Altenroxels obtained supplementary labour from the homelands when required.[38] The nine claimants, however, became permanent farm workers and continued residing on Boomplaas after the labour tenancy system was abolished.

[34] Although the Altenroxels "occasionally" attended farmers meetings when there was something on the agenda that concerned them, they were not "regular members" of any farmers' association.[39] When it was put to Mr Altenroxel in cross-examination that they must have been aware of legislation by the government aimed at abolishing the labour tenancy system, he replied that "*they never saw or heard about ...that legislation during our time*".[40] He also said that he has never heard of the Native Land Act of 1913, the Native Trust and Land Act of 1936, the Bantu Laws Amendment Act of 1964, Government Notice 2761 of 1970 or the government's intention to eradicate labour tenancy completely by 1970.[41] Mr Altenroxel knew of the government's policy to establish "homelands" for black people, however.

Mr Bertie van Zyl

[35] Mr LB ("Bertie") van Zyl, a very prominent retired farmer of the area, was called by the land owner to testify. He started farming in the Moketsi area in 1949. At that time, the system of labour in the area was -

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35 Record, 16 August 2004, p7 lines 1-2.
36 Record, 16 August 2004, p46 lines 22-23.
37 Record, 16 August 2004, p19 line 8 – p20 line 20.
38 Record, 16 August 2004, p41 lines 10-12.
39 Record, 16 August 2004, p21 lines 18-21.
40 Record, 16 August 2004, p34 lines 3-4.
41 Record, 16 August 2004, p39 lines 8-22.

> "... dat die swart mense op die plaas vry werk vir twee dae in 'n week voorsien het aan die boer vir die reg om 'n gedeelte aan hom uitgewys te ploeg en sekere beeste, hoeveelheid aan te hou, vry."[42]

He was reluctant to call such black workers "labour tenants", preferring to use the form "*batho ba go berekela boroko*".

[36] The *batho ba go berekela boroko* system was not satisfactory, for reasons which Mr van Zyl explained as follows:

> "Dit was total onwerkbaar as gevolg van periodieke reëns wat hoegenaamd nie droëlandsboerdery bevorder nie en as gevolg van oorbeweiding met sporadiese reëns waarop baie groot erosieprobleme ontstaan het en dat dit jammerlik was om te sien hoedat die swart mense moet ploeg en wag op reën en niks oes nie en so ook met hulle beeste wat wanneer dit nou droogte is vrek van die honger en nogtans hulle vrye werk moet lewer aan die plaaseienaar."[43]

[37] Mr van Zyl converted the then existing *batho ba go berekela boroko* system on his farms into a monthly wage system in 1953. He said that, under the new system, he provided housing to the workers and their families -

> "... en het hulle ooreengekom dat hulle gaan die beeste verkoop, nie meer ploeg nie en voltyds vir my werk en hulle wie nie daarmee wou saamstaan nie het vrywillig vertrek met my hulp om hulle te vestig waar hulle ookal gevestig wil word."[44]

Mr van Zyl stated that there was no government interference or pressure leading to the decision to convert. It was entirely a voluntary decision.

[38] Mr van Zyl said he was the first farmer in the Moketsi area to change the system. Later, other farmers followed, because -

> "... baie duidelik het dit algemeen bekend geraak dat dit is 'n onwerkbare stelsel, onregverdig teenoor die swart mense en hoegenaamd nie volhoubaar nie."[45]

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42 Record, 16 August 2004, p56 lines 13-16.
43 Record, 16 August 2004, p56 line 20 – p57 line 3.
44 Record, 16 August 2004, p57 lines 17-21.

[39] Mr van Zyl testified that he was a very active member and sometime chairman of the Moketsi Farmers' Association. The Moketsi Farmers' Association was affiliated to the Letaba District Agricultural Union. The Letaba District Agricultural Union was affiliated to the Transvaal Agricultural Union, which in turn was affiliated to the South African Agricultural Union. Mr van Zyl was for a period the national chairman of the South African Agricultural Union's marketing committee.

[40] Under cross-examination, Mr van Zyl said that he was not aware of any regulations relating to the employment of labour tenants on his farms. He cannot remember that he ever registered any labour tenants. Originally, did not know what the government of the day's attitude towards the labour tenancy system was. Later, it came to his knowledge that the government planned to abolish the system. He considered it to be "a late awakening" on the part of the government, because the system was neither feasible nor fair.[46] At the time when the government was actively promoting the abolition of the labour tenancy system there was, according to Mr van Zyl, no farmers in the Moketsi area who were still applying the system.

[41] Although Mr van Zyl knew the Altenroxels, they never visited each other. At the time when they were abolishing the labour tenancy system on Boomplaas, he was not aware of them doing so.

Mr WD Stephens

[42] The landowner's next witness was Mr WB Stephens, its human resources manager. In 2001 when he came to the area, there were six claimants still living on Boomplaas. Presently, there are three claimants. None of the individual claimants was compelled or will be compelled to leave the farm.

Mr MF Maake

[43] Mr MF Maake (called by the land owner) was the last witness to testify. He is a retired civil servant living in Lebowakgomo. He previously worked for the

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45 Record, 16 August 2004, p58 lines 22-24.
46 Record, 16 August 2004, p86 lines 18-21.

Department of Agriculture of the erstwhile Lebowa. One of his duties was to determine "*die grense van die stamme*".[47] He regards himself as an expert on the tribes living in the area of the erstwhile Lebowa, with special knowledge of the history, trials and tribulations of the Maake family. He gave expert evidence.

[44] In Mr Maake's opinion, the present claimants are from the Bakgaga tribe. They were originally part of a group known as the Bakgaga ba Maupa. He outlined their history as follows:

> "Oorspronklik ek sal sê as ek van die Maupa's praat hulle kom van Mogaba waar die oorspronklike stam is waar ek ook soos gesê is my pa 'n lid was van die stam afkomstig is en daar was in 'n paar jare terug oorloë tussen die Makes en Mafegres en Skororos en die Makes het gevlug na Mojadji se plek toe om beskerming daar te gaan vra en toe na die oorloë as hulle teruggaan na hulle oorspronklike plek hierdie Maupa's het agtergebly en daar by Westvalia, Duiwelskloof agtergebly."[48]

He said the possibility exists that the claimants are people who broke away from the Bakgaga ba Maupa community towards the end of the 19th century to eke out an existence as tribeless people, outside the boundaries of their tribe.[49] He did not know the farm Boomplaas before 1998. According to him, the Boomplaas land was never occupied by Maupa's group. The land originally belonged to the Rakwadu tribe. He has never heard of a person called Popela (or Bopele) Maake.

[45] Mr Petrus Maake was, in his opinion, not a *ntona* but an *induna*. He testified that a *ntona* is a person appointed by a tribal chief or *kgoshi* to be his "*waarnemer vir 'n sekere wyk*".[50] The word *induna*, on the other hand, comes form the mines. He said –

> "So induna is amper soos 'n voorman. Hy word deur die werkgewer aangestel om namens die werknemers of hy is 'n skakel tussen die werkgewer en die ander werkers, 'n induna."[51]

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47 Record, 17 August 2004, p147 line 22.
48 Record, 17 August 2004, p150 lines 12-20.
49 Par 13.6 of Mr Maake's affidavit of 31 July 2000.
50 Record, 17 August 2004, p152 lines 6-8.
51 Record, 17 August 2004, p152 lines 10-13.

[46] He motivated his opinion that Mr Petrus Maake was not a *ntona* as follows:

> "Ek sal nie sê hy was 'n ntona nie, want daar was mos nie 'n kgoshi wat hom sou aangestel het om namens hom daar waar te neem nie, want dit was nie, daar was nie, dit was nie 'n kgoshi se grond wat hom kon aangestel het om namens hom waar te neem nie. Hy sal blykbaar 'n induna wees wat deur die grondeienaar daar aangestel sou gewees het."[52]

THE ENTITLEMENT TO RESTITUTION UNDER THE RESTITUTION ACT

[47] The entitlement to restitution of a right in land (which includes the interest of a labour tenant) is contained in Section 2(1) of the Restitution Act. Section 2(1) provides that:

> "(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) .....; or
>
> (c) .....; 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 that 31 December 1998."

[48] Section 2(2) of the Restitution Act contains a disqualification of a restitution claim in certain circumstances. It reads as follows –

> "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
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> (b) any other consideration which was just and equitable,
>
> calculated at the time of any dispossession of such right, was received in respect of such dispossession."

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52 Record , 17 August 2004, p152 lines 17-23.

[49] To succeed with the present claim, the claimants must show:

(a) that they are a community or part of a community, or alternatively that they are nine individual persons;
(b) that they had a right in land;
(c) that they were dispossessed of that right;
(d) that the dispossession occurred after 19 June 1913;
(e) that the relevant past law or practice is racially discriminatory;
(f) that the dispossession was a result of that past law or practice;
(g) that a claim for restitution was lodged before 31 December 1998; and
(h) that just and equitable compensation was not received for the dispossession.

The above analysis was made by Dodson J in the matter of *In re Kranspoort Community.*[53]

Can the claimants claim as a community, or must it be as individual persons?

[50] Section 1 of the Restitution Act defines community as meaning:

> "..... any group of persons whose right in land are derived from shared rules determining access to land held in common by such group."

The definition has two elements, *viz* a right in land derived from shared rules and land held in common by the group.

[51] The rights in land of which the claimants (as members of a community, or as individuals) allege they were dispossessed, are labour tenancy rights, particularly rights to cropping and grazing. This is apparent from the claim forms. One of the claimants, Mr Wilson Malemela, gave the following reason for his claim in his claim form:

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53 2000 (2) SA 124 (LCC) at 138D-F.

> "The claim is based on the loss of rights to ploughing and grazing fields that I had as a labour tenant until they were taken away when labour tenancy was abolished in the late 1960's".[54]

In each of the claim forms, the year of dispossession was given as 1969.

[52] The evidence shows that each labour tenant had his own discrete labour tenancy relationship with the Altenroxels, and this relationship founded his right to use land on Boomplaas. The Altenroxels showed each of them which lands they may plough,[55] and determined the number and kind of animals which each of them were allowed to graze.[56] They did not, in 1969, hold their labour tenancy rights over Boomplaas "in common" with the other labour tenants. It is their relationship with the Altenroxels, and not their membership of a community which gave them access to the land on Boomplaas. This is well illustrated by the manner in which the conversion of the labour tenancy system into a monthly wage system was accomplished. Each individual (and not the group as a whole) was given the choice to accept the new system, or to leave. Some labour tenants did in fact leave.[57]

[53] There was an attempt on the part of the claimants to show that the group of labour tenants on Boomplaas was subject to the authority of their own *induna* or *kgosi*, Mr Petrus Maake, which it was suggested would indicate that they held their labour tenancy rights as members of a community. This is not supported by the bulk of the evidence.[58] It is clear that Mr Petrus Maake was little more than a farm foreman. When he passed away, he was not replaced. The contention that the claimants held their labour tenancy rights as members of a community also runs contrary to their response of 19 October 2001.[59] They pleaded that –

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54 Page 458 of bundle 1 of the documents before the Court.

55 See the evidence of Mr RP Maake (par [11] of this judgment), Ms M Maake (par [19] of this judgment) and Mr A Altenroxel (par [29] of this judgment). Only Mr W Malemela's evidence (par [17] of this judgment) is to the contrary.

56 See par [29] of this judgment.

57 See par [31] of this judgment.

58 See paras [12], [20] and [32] of this judgment. The only evidence to the contrary was given by Mr Malemela (par [17] of this judgment), which was not supported by any of the other witnesses.

59 Par 5 of the response, on page 184 of Bundle 2 of the documents before the Court.

"Every individual was supposed to work on the farm for a specific period for him to be able to access the right to stay and use of the land."

According to this, it was the "work on the farm" which gave the individual access to the land, not his membership of a community.

[54] The position of the present claimants differ from that of the occupiers in the case of *Ndebele-Ndzundza Community: In re Farm Kafferskraal,*[60] on which Mr Mashimbye relied. In that case the occupiers had an accepted identity, being the Ndzundza branch of the Ndebele tribe. Although they lived on a white-owned farm,

"(b) They lived under the authority of a chief designated by the traditional tribal hierarchy: ..... .

(c) They held the land as a group, and in common with each other.

(d) They occupied the farm exclusively and without immediate supervision or direct control from the white landowners.

(e) They did so in accordance with the ancient customs and traditions of the Ndebele-Ndzundza people."[61]

In the present case, the claimants did not prove an accepted tribal identity. They did not live on Boomplaas under the authority of a chief designated by tribal hierarchy. They did not occupy Boomplaas as a group in accordance with ancient customs and traditions. Each of the individual claimants were, at all relevant times, subject to direct control by white farmers.

[55] I conclude that the dispossession of the ploughing and grazing rights in 1969 was not a dispossession from a community, but from individual labour tenants. It follows from this that the community claim cannot succeed. That leaves the individual claims. Each individual claimant is a "person" as envisaged in section 2(1)(a) of the Restitution Act. If the other requirements of the Act are met, they would be entitled to restitution.

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60 [2003] 1 All SA 608; 2003 (5) SA 375 (LCC); an appeal against this judgment was dismissed by the Supreme Court of Appeal on 31 May 2005 [case no 136/2003, *sv Prinsloo and Another v The Ndebele-Ndzundza Community and Others,* not yet reported].

61 Par [29] of the Supreme Court of Appeal judgment in the *Ndebele-Ndzundza* case. See n60 *supra.*

Did the claimants have rights in land?

[56] The term "right in land" is defined in the Restitution Act as meaning -

> "..... any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question".

There can, in my view, be no doubt that in 1969 the individual claimants were labour tenants and that each of them had a *right in land.* Mr Shakoane submitted that they held their rights as "a community of labour tenants". The established facts do not support that submission.

Have the individual claimants been dispossessed of their rights in land?

[57] The Restitution Act does not define "dispossession". In *Khumalo N.O. v Minister of Land Affairs and Another*[62] it was accepted that it could mean "put out of possession" or "oust".

[58] In this case, the individual claimants were not given a choice on whether they were prepared to forego their rights to cropping and grazing on Boomplaas, in order to become full-time wage earners. If they did not want to do so, they had to leave Boomplaas. It would appear that at the time some labour tenants might have welcomed the change to monthly wages.[63] Others would not accept it and they left.[64] There is no clear evidence on whether the individual claimants in this case voluntarily accepted the new system in 1969 or whether they were forced into it. For purposes of this case I will assume, without so deciding, that the individual claimants were dispossessed of their cropping and grazing rights.

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62 2005 (2) SA 618 (LCC) at 625E-F. See also *Dulabh and Another v Department of Land Affairs*, 1997 (4) SA 1108 (LCC) at 1119B-1120B, paras [28], [29] and [30].

63 See para [14] of this judgment, and also the evidence of Mr Altenroxel who, when asked whether the workers were happy with the labour tenancy system, replied: "A person got the impression no" [record, 16 August 2004, lines 23-24].

64 Record, 16 August 2004, p42 line 18 – p43 line 5.

Did the dispossession occur after 19 June 1913?

[59] The claimants rely on a dispossession of labour tenancy rights during 1969. This is clear from the claim forms which give 1969 as the date on which the Altenroxels "*acquired the property*" (being the claimants' cropping and grazing rights).[65]

[60] Although neither Mr Mashimbye nor Mr Shakoane argued the case on that basis, there are indications in documents before the Court that the claimants might be attempting to rely on the loss of indigenous title, which existed over Boomplaas before the white farmers received registered title. In their claim forms, Abram Maake, Isaac Maake, Ramothaba Phineas Maake, Petrus Mabu Maake and Johannes Tholo Maake expressed the reason for their claims as follows:

> "My parents lived on this land before it was given to a white owner. I was born and lived all of my life on the land. When the first white farmer came here, we were forced to work for 3 months without pay and other months in our fields ploughing and grazing. In the late 1960's when the labour tenancy was abolished, we lost the right to fields for ploughing and grazing."[66]

The report of the Regional Land Claims Commissioner which accompanied the referral of the community claim to the Court, contains the following statement:[67]

> "The Community enjoyed historical rights to the land in terms of customary laws and practices. Dispossession of these rights occurred prior to 1913 when the Government of the Zuid Afrikaanse Republiek granted the land to Adriaan Jacobus Alberts.....The fact that the Community was residing on the land and had done so historically in terms of customary law and practice was not recognised. Non-recognition of these rights was a racial practice by successive governments that only recognised common

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65 The individual claim forms are on pages 448-492 of bundle 1, and community claim form is on pages 118-121 of bundle 2 of the documents before the Court.

66 Bundle 1 of the documents before the Court, pages 462, 474, 478, 482 and 486.

67 Paras 5.10 and 5.11 of the report, p15 of Bundle 1 of the documents before the Court. The referral report for the individual claims contains similar statements: see p441 of bundle 1.

law ownership based on freehold title as an appropriate legal basis for land holding. A form of landholding reserved for whites only."

[61] It might be that the claimants are part of an indigenous community which occupied Boomplaas before the Zuid Afrikaanse Republiek granted the land to white owners during 1889, thereby depriving the community of their communal ownership and forcing their members into labour tenancy.[68] Any such dispossession would have occurred prior to 1913 and falls outside the ambit of the Restitution Act. The non-recognition after 1913 of any extinguished communal ownership is not a dispossession. Although the Supreme Court of Appeal held in the *Nzebele-Ndzundza* case that the grant of registered title does not necessarily extinguish communal ownership under indigenous law,[69] in the present case it must have done so. The white owners took possession of the land, and compelled the inhabitants to become labour tenants.

Is the relevant past law or practice racially discriminatory?

[62] A dispossessed claimant cannot succeed in a claim for restitution unless he can show that the dispossession emanated from a racially discriminatory law or practice.[70] The Restitution Act[71] defines racially discriminatory laws to include:

"laws made by any sphere of government and subordinate legislation".

Racially discriminatory practices are defined as -

"practices, acts or omissions, direct or indirect, by

(a) any department of state or administration in the national, provincial or local sphere of government;

(b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation."

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68 It was, in my view, not established that the claimants are part of, or members of, such a community.

69 *Supra* n60, para [36] of the judgement.

70 Section 25(7) of the Constitution, 1996, read with section 2(1) of the Restitution Act. See also *Ndebele-Ndzundza Community: In re Farm Kafferskraal* [2003] 1 All SA 608 (LCC) at 621d-622a, 2003 (5) SA 375 at 389H-390E.

71 Section 1 of the Act.

It is apparent that any racially discriminatory practice on which the claimants might seek to rely, must be a practice of a state department or public functionary.

[63] Mr Mashimbye submitted that the dispossession emanated from the undermentioned laws and practices, which are all racially discriminatory.

[64] Firstly, Mr Mashimbye relied on the Bantu Laws Amendment Act No 42 of 1964 (hereinafter referred to as "the 1964 Act"). Section 22 provides for the insertion of a new section 27 *bis* in the Native Trust and Land Act, which reads as follows:

> "(1) Whenever the Minister considers it in the public interest to do so, he may by notice in the *Gazette* declare that as from a date fixed in such notice –
>
> (a) no further labour tenants' contracts shall be entered into and no further labour tenants shall be registered in respect of land in the area referred to in such notice; or
>
> (b) no labour tenants shall be employed on land in the area referred to in such notice."

There can be little doubt that the new section 27 *bis* in the Native Trust and Land Act is a racially discriminatory law, and that the government's attempts to implement the policy which underlies section 27 *bis* is a racially discriminatory practice.[72]

[65] Secondly, Mr Mashimbye relied on a so-called *Arbeidsvoorligtingsbrief.* On 25 August 1969, the year in which the claimants lost their cropping and grazing rights, the Department of Bantu Administration and Development issued the *Arbeidsvoorligtingsbrief.*[73] It is not clear to whom this *voorligtingsbrief* was addressed. It would appear from its contents that it was intended for the guidance of *Bantu-arbeidsbeheerrade*. It is stated in the first paragraph that -

> "besonderhede hierby verstrek [word] met betrekking tot beslissings en opdragte insake die werksaamhede van Bantu-arbeidsbeheerrade".

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72 See *Khumalo N.O. v Minister of Land Affaris and Another,* 2005 (2) SA 618 (LCC) at 625H-627A.

73 Paginated page 20 of bundle 2 of the documents before the Court.

In par 2(a)(ii) of the letter the following is stated:

> "Boere moet plakkersdiensbodes in hul diens geleidelik verminder sodat die stelsel aan die einde van 1970 verdwyn soos reeds voorheen aangedui".

Black labour tenants who at the time were living on white-owned farms were referred to as *plakkerdiensbodes*. Mr Mashimbye suggested that the letter was issued to further the policy of abolishing labour tenancy on white-owned farms. It is significant that none of the witnesses who testified in this case admitted to any knowledge of the letter. If the letter was not intended for general dissemination (and there is no evidence that it was), it is not surprising that the witnesses were ignorant of it.

[66] Thirdly, Mr Mashimbye relied on a prohibition contained in a notice published under section 27 *bis* of the Native Trust and Land Act. The Regional Commissioner relied on this notice as the source of the dispossession. Her report, which accompanied the referral of the case to the Court, contains the following averment:[74]

> "The dispossession was effected in terms of Proclamation No 2761 of 31 July 1970 published in terms of the 1964 Bantu Laws Amendment Act. The proclamation prohibited further labour tenants contracts in the area that falls within jurisdiction of Commissioner P Torlage, Bantu Affairs Commissioner for Duiwelskloof and several other districts. This proclamation furthered the aims of the Bantu Laws Amendment Act 42 of 1964."

The averment is not correct. There is no Proclamation No 2761 of 31 July 1970. Government Gazette no 2761 of 31 July 1970 contains a Notice (no 1224) relating to further labour tenant's contracts. It was signed by Mr PH Torlage, in his capacity as a member of the Bantu Affairs Commission. It states that –

> "..... as from the first day of August 1970, no further labour tenant's contracts shall be entered into and no further labour tenants shall be registered in respect of any land situated in the areas specified in the Schedule hereto...."[75]

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74 Paginated page 8 of bundle 1 of the documents before the Court.

75 Paginated pages 373-374 of bundle 1 of the documents before the Court.

Boomplaas falls within one of the areas specified in the Schedule. The notice prohibited future labour tenancy contracts, not existing contracts. Furthermore, the dispossession of the claimants occurred in 1969,[76] one year before the notice was published. The dispossession could not have been "effected in terms (there)of".

[67] Mr Mashimbye submitted that because the farmers in the area knew that the notice was coming, and also because they were not happy with the labour tenancy system, they acted in advance and abolished the system voluntarily. The notice (contrary to the submission) did not ban existing labour tenancy contracts, but prohibited new contracts. There is also no evidence to support Mr Mashimbye's submission that the labour tenancy system on Boomplaas was terminated in anticipation of the notice.

Did the dispossession occur as result of a racially discriminatory law or practice?

[68] Unless the dispossession occurred "as result of" a racially discriminatory law or practice, the claimants are not entitled to restitution. The phrase "as result of" has been judicially interpreted, albeit in a different context, as meaning "caused by", requiring the court to identify a "proximate", "immediate" or "direct" cause.[77] Relying upon a statement by Grosskopf JA in *Napier v Collett and Another*[78] that, despite differences between various branches of the law, the basic problem of causation is the same, Dodson J concluded in *Minister of Land Affairs and Another v Slamdien and Others*[79] that in restitution claims -

> ".... the use of the words 'as a result of' contemplates a casual connection being established between the dispossession being complained of and the racially discriminatory law or practice."

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76 See para [59] of this judgment.

77 See *Aswanestaal CC v South Africa Eagle Insurance Co Ltd* 1992 (1) SA 662 T at 664H-665A.

78 1995 (3) SA 140 (A) at 143E-F.

79 1999 (1) BCLR 413 (LCC) at 435D-E. Although the judgment was not followed by the Supreme Court of Appeal in *Richtersveld Community and Others v Alexkor Ltd and Another*, 2003 (6) SA 104 (SCA) at 137C-138B, the *dicta* on causation were not overruled. The same applies to the subsequent Constitutional Court judgement, reported at 2004 (5) SA 460 (CC), page 491G-492A.

[69] The causation enquiry is separated into two stages. Dodson J described them in the *Slamdien* case as follows[80]

> "The first involves an enquiry into what has been termed 'factual causation'. Generally, this involves the application of the '*condictio sine qua non*' or 'but for' test. In other words, but for the act or omission identified as a potential cause, would the result have followed. If this test identifies the act or omission as a necessary condition for the result to have occurred, there is a second enquiry into 'legal causation'. It is at this stage of the enquiry that the court must isolate that event or condition which was sufficiently determinative of the result to be treated not just as a necessary condition, but as a legally recognised cause of the particular result. In order to achieve this, the courts (at least in the fields of criminal law and delict) adopt a flexible approach which draws on one or more of the recognised tests and on the dictates of reasonableness, policy, common sense and the facts of the particular case".

The same approach was followed by this Court in *Boltman v Kotze Community Trust*[81] and in *In re former Highlands Residents: Naidoo v Department of Land Affairs.*[82] I will also follow it in the present case.

[70] The first stage of the causation enquiry is a determination of whether, but for the discriminatory laws and practices relating to labour tenancy, the Altenroxels would have terminated the claimants' ploughing and grazing rights. If it is concluded that they would still have done so, the requisite causal link is absent, and it will not be necessary to proceed to the second stage of the causation enquiry.

[71] Dr Schrimer stated that the government intended, by means of the 1964 amendment to the Bantu Trust and Land Act, to do away with labour tenancy throughout the country, so as to move black "squatters" off white-owned farms and into the "homelands". From there they could return to the white-owned farms, but only to provide (cheap) labour. He testified that any decision by a farmer to convert the labour tenancy system into a monthly wage system will necessarily be tainted by the discriminatory effects of the *apartheid* laws and policies of the time.

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80 *Supra* n79 at 435H-436C.
81 [1999] JOL 5230 (LCC).
82 2000 (2) SA 365 (LCC) at 368H-369C.

[72] Mr Van Zyl testified that he had abolished the labour tenancy system as long ago as 1953. He stated that he has done so because the labour tenancy system was not working. Other farmers followed him in abolishing the system. Some time later, Mr Van Zyl got to know, through discussions in the farming sector, that the government of the day was unhappy about the labour tenancy system. By then, the farmers in the Moketsi area had already abolished it.

[73] Mr Altenroxel testified that he and his brother did not know of the existence of the 1964 Act. They were also unaware of the policy of the then Government that the labour tenancy system must be brought to an end. Mr Altenroxel stated that he and his brother were a-political and their decision to oust the labour tenancy system was not influenced by any racially discriminatory law or policy of the then government.[83] It was their own business decision, taken to secure greater efficiency on their farm. They found the labour tenancy system frustrating, as it did not provide a regular, well controlled working force. Because the labour tenants were also responsible for their own cropping and grazing, they would "*all of a sudden ... not pitch up*" for scheduled work on the farm.[84] Hence they changed the system.[85] Other farmers in the area also did so, and were better off for it.

[74] Mr Mashimbye submitted that it is highly unlikely that the Altenroxels would have decided to change the labour tenancy system on Boomplaas just because of their business needs. There was no indication of economic hardship that could have necessitated their decision. In my view, prior economic hardship is not a prerequisite for improving efficiency.

[75] Mr Mashimbye further submitted that a person does not need to be a member of any political organization or support any political party to abide by the laws of the country. Although the Altenroxels claim to have been a-political, the evidence indicates that they did attend some meetings of the agricultural union. It is highly probable, so Mr Mashimbye argued, that in those meetings the policy of ousting the

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83 Paginated page 163 of bundle 2 of the documents before the Court, para 12.
84 Record, 16 August 2004, p33 lines 10-14.
85 Record, 16 August 2004, p6 lines 9-11.

labour tenancy system was discussed. It is also highly probable that, when interacting with other farmers, the landowners would have been made aware of the government's policy on labour tenancy. Mr Mashimbye suggested that Mr Altenroxel should not be believed when he testified that he and his brother did not do away with the labour tenancy system because of a racially discriminatory law or practice.

[76] There are uncontested facts which give credence to Mr Altenroxel's evidence. The racially discriminatory government policy, according to Dr Schrimer, was to move labour tenants off white-owned farms and into the "homelands", from where they would be a source of cheap labour. None of the nine individual claimants were removed from Boomplaas. They continued living on the farm.[86] The only change in their circumstances was that they received a monthly wage in lieu of their cropping and grazing rights. There are strong indications that the change actually benefited them. If the Altenroxels wanted to implement what was then government policy, I would have expected that the claimants and their families would have been moved to the "homelands", from where they would be available to render cheap labour.

[77] There can be no doubt that, on the evidence of Mr Altenroxel, he and his brother were not motivated by any laws or governmental practises in their decision to abolish the labour tenancy system on Boomplaas. Mr Altenroxel stuck to that evidence despite vigorous cross-examination. To reach a different conclusion, I would have to reject the testimony of Mr Altenroxel. There are not sufficient grounds to do so. Mr Altenroxel is not wordly-wise, but he was a good witness. He is independent, in the sense that he has no interest in the 2nd respondent. The gist of his evidence, *viz* that he and his brother changed the system to achieve greater efficiency in their workforce, is amply corroborated by Mr Bertie van Zyl, who testified that he himself and other farmers in the area moved away from the labour tenancy system because it was a bad system.

[78] I do not accept the thesis put forward by Dr Schrimer that every decision by a farmer to abolish the labour tenancy system is of necessity tainted by racially

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86 See the map, Exhibit 3, which was drawn in 1978 and which shows their huts.

discriminatory laws or practices. The thesis is unsubstantiated, particularly insofar as the Moketsi area is concerned.

[79] In the case of *In re Kranspoort Community*[87] Dodson J, following a somewhat different approach, held that before entering into the causation enquiry -

> "... one must first see whether the solution to the causal enquiry cannot be arrived at on a simple application of the terms of the statute. What this means is that, if, having regard to all the circumstances, the dispossession is patently one in respect of which the statute intended to provide a remedy, the enquiry need to go no further. If regard is had to the circumstances of the 1955/6 removals, they bear all the hallmarks of the type of dispossession which the Restitution Act seeks to remedy."

I am not convinced that a loss of cropping and grazing rights brought about by a change-over from a labour tenancy system to a wage earning system, is necessarily a loss which the Restitution Act seeks to remedy. As testified by Mr van Zyl, a system of direct employment was in most more cases beneficial to the workers.[88]

[80] I conclude that none of the past racially discriminatory laws and practices on which Mr Mashimbye relied,[89] constituted a *condictio sine qua non* for the conversion by the Altenroxels during 1969 of the labour tenancy system into a monthly wage system. The conversion would have happened irrespective of the racially discriminatory laws and practices. This conclusion means that the second stage of the causation enquiry becomes unnecessary. In the result, the nine individual claimants are not entitled to claim restitution under section 2(1)(a) of the Restitution Act.

Was a claim for restitution lodged by 31 December 1998?

[81] It is common cause that claim forms were lodged with the Regional Commissioner, both in respect of the community claim and in respect of the nine

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87 2000 (2) SA 124 (LCC) at 164C-D.

88 See also the minutes of the interview of Mr RP Maake by Mr Mark Wegerit, para [14] of this judgment.

89 See paras [64] to [66] of this judgment.

individual claims, before 31 December 1998. None of the claimants are precluded by section 2(1)(e) of the Restitution Act from pursuing their claims.

Did the claimants receive just and equitable compensation for the dispossession?

[82] Section 2(2) of the Restitution Act provides that no person shall be entitled to restitution of a right in land if just and equitable compensation was received in respect of the dispossession. It is common cause that no monetary compensation was paid. It is possible that the ensuing employment of the claimants at monthly wages which were market related, might have constituted just and equitable compensation for the loss of their cropping and grazing rights. Mr Nel submitted that it was. In the light of my finding on the causation requirement, I need not decide this issue.

CONCLUSION

[83] I have found that the Popela Community (if such a community exists) was not dispossessed of any rights in respect of Boomplaas during 1969. The community claim must therefore fail. The nine individual claimants might have been dispossessed of cropping and grazing rights which they held as labour tenants on Boomplaas. Because any such dispossession was not the result of a past racially discriminatory law or practice, the individual claims must also fail.

[84] It is a practice of this Court not to make costs orders in cases such as this, unless it is justified by exceptional circumstances. In my opinion there are no exceptional circumstances. I will therefore not make any cost order.

[85] The claim for restitution by the Popela Community and the alternative claims for restitution by the nine individual claimants, are both dismissed.

A GILDENHUYS
JUDGE OF THE LAND CLAIMS COURT

I agree

E STRöH
ASSESSOR OF THE LAND CLAIMS COURT

Appearances:

For the applicants
MR MASIMBYE
instructed by
NKUZI LAND RIGHTS LEGAL UNIT
POLOKWANE.

For the 1st respondent
MR SHAKOANE
instructed by
THE STATE ATTORNEY
JOHANNESBURG.

For the 2nd respondent
MR NEL
instructed by
STEYTLER, NEL AND ASSOCIATES
POLOKWANE.