THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 806/12

Reportable

In the matter between:

THE BAPHIRING COMMUNITY	FIRST APPELLANT
THE REGIONAL LAND CLAIMS COMMISSIONER: GAUTENG AND NORTH WEST PROVINCES	SECOND APPELLANT
THE MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM [Formerly THE MINISTER OF LAND AFFAIRS]	THIRD APPELLANT

and

TSHWARANANI PROJECTS CC [Formerly MATTHYS JOHANNES UYS]	FIRST RESPONDENT
JAN HENDRIK LIEBENBERG	SECOND RESPONDENT
WESSELS CORNELIUS CRONJé OOSTHUIZEN	THIRD RESPONDENT
SAREL JOHANNES BUITENDAG	FOURTH RESPONDENT
FRANCOIS JOHANNES JOUBERT	FIFTH RESPONDENT
WOUTER BEKKER	SIXTH RESPONDENT
HENDRIK BALTES NIEMAND	SEVENTH RESPONDENT
ANTOINETTE PRINSLOO	EIGHTH RESPONDENT

THE MINISTER FOR PUBLIC WORKS	NINTH RESPONDENT
THE MINISTER FOR MINERALS AND ENERGY AFFAIRS	TENTH RESPONDENT
THE REGISTRAR OF DEEDS, PRETORIA	ELEVENTH RESPONDENT
LAND AGRICULATURAL BANK OF SOUTH AFRICA	TWELFTH RESPONDENT
FIRST NATIONAL BANK OF SOUTH AFRICA LTD	THIRTEENTH RESPONDENT
J C LIEBENBERG	FOURTEENTH RESPONDENT
H KRUGER	FIFTEENTH RESPONDENT
SENWES LIMITED	SIXTEENTH RESPONDENT
N W K LIMITED	SEVENTEENTH RESPONDENT
P J LIEBENBERG	EIGHTEENTH RESPONDENT
J C C CILLIERS	NINETEENTH RESPONDENT

Neutral citation: *The Baphiring Community v Tshwaranani Projects CC* (806/12) [2013] ZASCA 99 (6 September 2013)

Coram: Cachalia, Shongwe, Majiedt JJA, Van der Merwe and Mbha AJJA

Heard: **2 May 2013**

Delivered: **6 September 2013**

Summary: **Restoration of land under Restitution of Land Rights Act 22 of 1994. State obliged to lead evidence regarding cost of restoration. Failure of Land Claims Court to call for such evidence constitutes a material irregularity that vitiates a non-restoration order.**

ORDER

On appeal from: Land Claims Court (Mia AJ sitting as court of first instance):

'1. The appeal is upheld.

2. The order of the Land Claims Court dated 19 January 2010 is set aside.

3. The matter is remitted to the Land Claims Court to consider and determine anew the feasibility of restoring portions 1 (excluding the portion of portion 1 which was previously known as portion 14 of the farm Syferfontein 451 JP), 5, 6, 7, 8, 9, 10, 12 and 13 of the farm Syferfontein 451 JP and the remaining extent of the farm Rosmincol 442 JP, district Koster to the first appellant.

4. In making the determination as set out in paragraph 3 above, the Land Claims Court shall consider the following:

4.1 The nature of the land and the surrounding environment at the time of dispossession, and any changes that have taken place on the land itself and in the surrounding areas since dispossession.

4.2 Official land use planning measures governing the land concerned.

4.3 The cost of expropriating the land, including the costs of any mineral rights if compensable in law.

4.4 The institutional and financial support to be made available for the resettlement.

4.5 The extent of the compensation that shall be payable to the current owners of the land.

4.6 The numbers of the current occupants of the land, including both the current landowners and their families as well as any employee farm workers and their families. Furthermore, the extent of social disruption – including possible loss of employment – to these current occupants should they be compelled to vacate the land concerned.

4.7 The number of individuals and families who are expected to resettle. Moreover, to the extent that the entire community does not wish to resettle, the form and extent of restoration and/or restitution.

4.8 The extent to which the land, in its current state, can support those community members wishing to resettle both physically and financially.

4.9 The envisaged land usage should the land be restored, and the resultant extent – if any – of the loss of food production and any impact thereof on the local economy should farming activities not be continued at current levels.

4.10 Should the land be restored to the first appellant, the extent of 'overcompensation', if any, and how the problem of 'overcompensation', if it should occur, will be avoided.

5. Any other issue that has a bearing on the determination of the feasibility of restoring the land or any part thereof to the first appellant.

6. There is no order as to costs.'

JUDGMENT

CACHALIA JA (SHONGWE, MAJIEDT JJA, VAN DER MERWE AND MBHA AJJA CONCURRING):

[1] This appeal, from the Land Claims Court (LCC), concerns a 'land claim' under the Restitution of Land Rights Act 22 of 1994 (the Act). The land, colloquially known as 'old Mabaalstad', is situated in the North West Province, and is now referred to as the farm Rosmincol. It was expropriated through racially discriminatory laws from a community known, under its tribal affiliation, as the Baphiring in 1971. The community was relocated to compensatory land, now known as the 'new Mabaalstad', some 80 km north of the expropriated land.

[2] The claimants seek restoration of the land to a communal property association that was created for this purpose. Their claim relates to portions 1 (excluding that portion of portion 1 previously known as portion 14 of the farm Syferfontein 451 JP), 5, 6, 7, 8, 9, 10, 12, 13 and the remaining extent of the farm Rosmincol 442 JP, and is opposed by most of the current land owners. The Regional Land Claims Commissioner: Gauteng and North West Provinces and the Minister of Rural Development and Land Reform, the second and third appellants, support the claim. It shall be convenient to refer to them together, where appropriate, as the state.

[3] Like most other land claims this one has had a protracted history. Lodged in 1998, it has been the subject of three decisions of the LCC. The first, on 29 January 2002, involved several issues separated for prior adjudication.[1] These included the competence of the communal property association to bring the claim, the nature of the 'rights in land' lost and the extent of compensation received. The court upheld the association's competence to institute the claim, confirmed that the dispossessed right was of ownership of the land – which included mineral rights – and found that the compensation received by the tribal authorities, and also of its individual members, amounted to R181 million (rounded off).[2]

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[1] *Baphiring Community v Uys & others* 2007 (5) SA 585 (LCC) para 3.
[2] Ibid para 4; See also *Baphiring Community v Uys & others* (Unreported) (LCC 64/98) [2002] ZALCC 4 (29 January 2002) para 36.

[4] The second decision, on 5 December 2003, involved another separated issue: whether the compensation was 'just and equitable' within the meaning of s 2(2) of the Act, and thereby had the effect of precluding the claim.[3] The court found the compensation insufficient and the compensatory land unsuitable for the successful relocation of the community. It thus held that the community had not received fair recompense.[4] So s 2(2) did not bar the claim for restitution.[5]

[5] The third decision, which is the subject of this appeal, involves yet another separated issue: whether it is feasible, as envisaged by s 33(*cA*) of the Act, to restore the land to the community. The LCC (Mia AJ, Gildenhuys J and M Wiechers (assessor) concurring) held that it was not, and so the community was entitled only to equitable redress.[6]

[6] The claimants appeal this decision with leave of the LCC. They are supported in their appeal by the Regional Land Claims Commissioner: Gauteng and North West Provinces and the Minister for Rural Development and Land Reform, who are the second and third appellants. The Commissioner and the Minister are represented by the same counsel. The Nkuzi Development Association and the Association for Rural Advancement were admitted as amici curiae by order of this court on 6 December 2012. They too support the case of the claimants.

[7] There are eight landowners who own portions of Rosmincol. Five of them were represented by Mr Grobbelaar, an attorney, during the 'feasibility hearing' in the LCC.

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[3] '**Entitlement to restitution**
(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.'
[4] *Baphiring* n1 para 22.
[5] Ibid para 24.
[6] *Baphiring Community v Uys* 2010 (3) SA 130 (LCC) para 29.

They are Tshwaranani Projects CC (formerly Mr Matthys Johannes Uys), Mr Jan Hendrik Liebenberg, Mr Francois Johannes Joubert, Mr Hendrik Baltes Niemand and Ms Antoinette Prinsloo – the first, second, fifth, seventh and eighth respondents respectively. Mr Grobbelaar informed us before the hearing that his clients did not have the financial means to be represented in the appeal, but persist in their opposition to the relief claimed. Mr Grobbelaar was not able to participate in the second hearing – 'the compensation hearing' – for the same reason.

[8] Mr Wessels Cornelius Cronjé Oosthuizen, the third respondent, has not participated in any of the preceding hearings. His attitude to the litigation is not known. Mr Sarel Johannes Buitendag, the fourth respondent, has represented himself throughout this dispute. We have no indication of his stance in this appeal. Mr Wouter Bekker, the sixth respondent, opposed the claim during the first hearing, but was not legally represented. His attitude to these proceedings is also unknown. That accounts for the eight landowners. The remaining respondents are cited by virtue of their interest in this matter. None are represented or have shown any interest in the outcome of these proceedings.

[9] In the view I take of this matter, it is not necessary to set out the facts or the evidence that was led in this matter. They are dealt with adequately in the reported judgment of the LCC[7] and are not material to the main issue in this appeal, namely whether the court ought to have made a non-restoration order in the absence of material evidence from the state regarding the issue of feasibility.

[10] It is now well established that a claimant for restitution of a land right is entitled to have the land lost through dispossession restored whenever feasible. A court must

[7] *Baphiring Community v Uys* 2010 (3) SA 130 (LCC).

therefore restore the actual land to a claimant unless inimical to the public interest.[8] Other forms of equitable redress in the form of a grant of alternative state land or payment of compensation may only be considered thereafter. I turn to consider how the issue of feasibility ought to be addressed.

[11] Before the Act was amended to give the courts the authority to decide feasibility, the Minister of Land Affairs had this responsibility.[9] The LCC was initially reluctant to consider the cost of restoration as a factor relevant to feasibility because of its institutional aversion to assessing questions of social and economic viability, and also for fear that such an enquiry would greatly narrow the prospects of restoration awards being made.[10] So it confined its consideration of feasibility to an investigation of whether or not the claimant's intended use was out of kilter with recent developments of the land itself or in the surrounding area.[11] In this regard in the *Kranspoort Community* case, Dodson J laid down a test to be applied by the court in determining whether restoration was feasible, considering the following factors to be relevant:

'(1) the nature of the land and the surrounding environment at the time of the dispossession;

(2) the nature of the claimant's use at the time of the dispossession;

(3) the changes which have taken place on the land itself and in the surrounding area since the dispossession;

(4) any physical or inherent defects in the land;

(5) official land use planning measures relating to the area;

(6) the general nature of the claimant's intended use of the land concerned.'[12]

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[8] *Khosis Community, Lohatla v Minister of Defence* 2004 (5) SA 494 (SCA) para 30.
[9] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] 3 All SA 563 (LCC) para 18.
[10] *In re Kranspoort Community* 2000 (2) SA 124 (LCC) para 92.
[11] Ibid para 91.
[12] Ibid para 92.

[12] In *Mazizini Community v Emfuleni Resorts*[13] the LCC, in a similar vein, rejected a submission by counsel for the state that limited funds was a factor to be considered when deciding whether to restore the land to the claimant community. The court stated its view thus:

'[T]he courts are not in a position to deny claimants their primary right to restitution merely because they cannot determine what is affordable to the state and what is not in a given case. Nor are they in a position to determine in advance what projects will be viable and those that will not be viable before granting restoration.'

[13] In the instant case the LCC changed tack. It explicitly took the lack of financial assistance from the state into account in deciding that the restoration was not feasible.[14] It did so after hearing extensive expert evidence of the failure of other resettlement projects where the state had not provided adequate institutional and financial support for the restoration. This evidence was adduced on behalf of the claimants and confirmed by the evidence of the single witness called by the state. The court also took into account the huge cost that would result from the state having to restore the land to the claimants. Also of significance is that it regarded this fact as closely related to the public interest. Put differently it considered that it would not be in the public interest, and therefore not feasible, to restore the land to the claimants having regard to the prohibitive cost to the state.[15] And finally in *Mhlanganisweni Community v The Minister of Rural Development and Land Reform & others*[16] the LCC accepted that if the claimed land had to be expropriated 'at huge and prohibitive financial cost to the state' and restored to the claimants who were dispossessed of rural land, the claimants would be substantially overcompensated at public expense, which would be a relevant factor in

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[13] *Mazizini Community v Emfuleni Resorts (Pty) Ltd & others* [2010] JOL 25378 (LCC) para 38.
[14] *Baphiring* n6 paras 25-29.
[15] See in this regard *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] 3 All SA 563 (LCC) para 22.
[16] Ibid para 23; See also *Haakdoornbult Boerdery CC & others v Mphela & others* 2007 (5) SA 596 (SCA) para 58.

determining whether or not restoration is feasible. This is an issue of central importance in this case.[17]

[14] The LCC was, in my view, correct to consider the cost implications of the restoration because this lies at the heart of a proper assessment of feasibility. These costs would include the cost of expropriating the land from the current landowners, resettling the claimants on this land and supporting a sustainable development plan for the resettled community. The problem in this case was that the evidence presented by the state on these aspects was at best completely inadequate, which meant that the court was hamstrung in making this assessment.

[15] The Constitutional Court recently said that before a court makes a non-restoration order, it must be satisfied that this 'is justified by the applicable legal principles and facts'.[18] It went on to state that a public body seeking a non-restoration order must place the necessary facts before the court to enable it to make this finding. It follows that a non-restoration order granted in the absence of such evidence constitutes a material irregularity that vitiates the order.[19]

[16] It must be borne in mind that a claim for the restoration of land is a claim against the state; it is not a claim against the current landowners. The state cannot therefore adopt a supine stance, as it did in this case, when such a claim is made. The Act imposes a duty on the Commission to assist claimants in the preparation and submission of their claims, to advise them on the progress of their claims, investigate the merits of the claim, mediate and settle disputes arising from such claims, define issues that may be in dispute between claimants and other interested parties, and of

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[17] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* (above n16) paras 22-23.
[18] *Kwalindile Community v King Sabata Dalindyebo Municipality & others* (Unreported) (Case 52/12) [2013] ZACC 6 (28 March 2013) para 43.
[19] Ibid para 51.

particular importance, draw up reports on unsettled claims for submission as evidence to the court and present any relevant evidence to the court.[20] This means that when the question of feasibility arises, the Commission must take the lead in placing all the relevant facts before the court. And to the extent that there are budgetary issues, which the Commission is not able to assist the court with, that responsibility to place evidence before the court falls on the shoulders of the responsible Minister.

[17] In my view the state's approach to the litigation in this matter amounted to a dereliction of its duty to the parties and to the court. At the commencement of the hearing on feasibility it adopted the stance that the restoration of the land was feasible. But the evidence of the regional land claims commissioner – the only witness for the state – was of little assistance to the court. Importantly, he was not able to say whether or not the state had budgeted for the resettlement of the community. And there was no evidence that the state had conducted a feasibility study regarding this claim. Unsurprisingly after the state closed its case counsel, who appeared on its behalf, conceded in argument that the restoration was not feasible because the state could not afford it. And, on the available evidence, the LCC could hardly be faulted for also having come to this conclusion.

[18] What should have happened in this case is that the state ought to have conducted a feasibility study into the restoration of the land. That study should at the very least have taken into account the number of families who are expected to be resettled, the institutional and financial support for the resettlement and the envisaged land usage if the land is restored. In addition the following evidence should have been placed before the court: the cost of expropriating the land from the current land owners; the extent of the loss of food production to the local community should farming activities not be continued at current levels; the extent of social disruption of the current landowners and their families should they be required to physically leave their farms;

[20] Section 6.

the number of farm workers who are dependent upon their incomes from their employment on the farms and the extent and impact of social disruption, including the loss of employment, to them; and finally should the land be restored how the problem of 'overcompensation' of the claimants will be avoided.

[19] The evidence on all of these aspects was either absent or inadequate. The court was therefore not in a position to determine the issue of feasibility conclusively and ought to have ordered the state to lead evidence on these and any other issues it considered relevant. The failure to call for such evidence constituted a material irregularity and vitiates the order of non-restoration. I therefore consider it appropriate to remit the matter to the LCC for the purposes of considering further evidence on these and any other issues it considers relevant to a determination of this issue.

[20] This matter was heard on 2 May 2013. At the conclusion of the hearing before us the claimants and the state agreed that the matter ought to be remitted to the LCC to receive further evidence to determine the feasibility issue, and agreed to submit a draft order for this purpose by 2 August 2013. Counsel for the state also undertook to obtain instructions from his clients on the parameter of the order.

[21] The draft submitted covers the factors mentioned in para [18] above, but also purports to separate the factors that are relevant to the issue of 'feasibility' from the 'practical' issues that will arise as part of the 'sustainable resettlement plan'.[21] That

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[21] The draft reads as follows:
'1. The appeal is upheld.
2. The order of the Land Claims Court dated 19 January 2010 is set aside.
3. The matter is remitted to the Land Claims Court which is to consider and determine anew the feasibility of restoring portions 1 (excluding the portion of portion 1 which was previously known as portion 14 of the Farm Syferfontein 451 JP), 5, 6, 7, 8, 9, 10, 12, 13 of the Farm Syferfontein 451JP and the remaining extent of the farm Rosmincol 442 JP, District Koster (hereinafter referred to as 'the land') to the first appellant.
4. In making the determination as set out in para 3 above, the Land Claims Court shall consider the following:

approach, in my view, is conceptually flawed. The evidence before the LCC demonstrated conclusively that where restoration of the land has included resettlement, the absence of adequate financial and institutional support from the state has resulted in the restoration failing. And as I have said earlier the question of cost, including the cost of a sustainable resettlement plan, if the land is to be restored on this basis, must be considered as part of the court's assessment of feasibility.

[22] This does not mean that a court will second guess an assertion by the state that it is unable to fund the cost of the restoration. But it does mean that it will be required to place credible evidence before the court to justify this assertion.

The following order is made:

1. The appeal is upheld.

2. The order of the Land Claims Court dated 19 January 2010 is set aside.

4.1 The nature of the land and the surrounding environment at the time of dispossession.
4.2 The changes which have taken place on the land itself and in the surrounding areas since the dispossession.
4.3 Any physical or inherent defects in the land.
4.4 Official land use planning measures relating to the area.
4.5 Any other issue that has a bearing on the determination of the feasibility of restoring the land or part thereof to the first appellant.
5. In order to ensure that a restoration order, if granted, will fairly be implemented and will bring about a workable and practical result, the Land Claims Court shall further consider the following issues as part of a sustainable resettlement plan for those members of the first appellant who wish to relocate:
5.1 The number of individuals and families who are expected to be resettled.
5.2 To the extent that the entire community does not wish to resettle, the form and extent of restoration and/or restitution.
5.3 The institutional and financial support available or to be made available for the resettlement.
5.4 The envisaged land usage should the land be restored.
5.5 The cost of expropriating the land, including the costs of any mineral rights if same be found to be compensable in law.
5.6 The extent of the compensation that shall be payable to the current owners of the land.
5.7 The extent of the loss of food production to the local economy should farming activities not be continued at current levels.
5.8 The extent of social disruption of the current landowners and their families should they be required to physically leave their farms.
5.9 The number of farm workers and families who are dependent upon the incomes from their employment on the farms and the extent and impact of social disruption, including possible loss of employment, to them.
5.10 Should the land be restored to the first appellant, the extent of 'overcompensation', if any, and how the problem of 'overcompensation', if it should occur, will be avoided.
6. There is no order as to costs.'

3. The matter is remitted to the Land Claims Court to consider and determine anew the feasibility of restoring portions 1 (excluding the portion of portion 1 which was previously known as portion 14 of the farm Syferfontein 451 JP), 5, 6, 7, 8, 9, 10, 12 and 13 of the farm Syferfontein 451 JP and the remaining extent of the farm Rosmincol 442 JP, district Koster to the first appellant.

4. In making the determination as set out in paragraph 3 above, the Land Claims Court shall consider the following:

4.1 The nature of the land and the surrounding environment at the time of dispossession, and any changes that have taken place on the land itself and in the surrounding areas since dispossession.

4.2 Official land use planning measures governing the land concerned.

4.3 The cost of expropriating the land, including the costs of any mineral rights if compensable in law.

4.4 The institutional and financial support to be made available for the resettlement.

4.5 The extent of the compensation that shall be payable to the current owners of the land.

4.6 The numbers of the current occupants of the land, including both the current landowners and their families as well as any employee farm workers and their families. Furthermore, the extent of social disruption – including possible loss of employment – to these current occupants should they be compelled to vacate the land concerned.

4.7 The number of individuals and families who are expected to resettle. Moreover, to the extent that the entire community does not wish to resettle, the form and extent of restoration and/or restitution.

4.8 The extent to which the land, in its current state, can support those community members wishing to resettle both physically and financially.

4.9 The envisaged land usage should the land be restored, and the resultant extent – if any – of the loss of food production and any impact thereof on the local economy should farming activities not be continued at current levels.

4.10 Should the land be restored to the first appellant, the extent of 'overcompensation', if any, and how the problem of 'overcompensation', if it should occur, will be avoided.

5. Any other issue that has a bearing on the determination of the feasibility of restoring the land or any part thereof to the first appellant.

6. There is no order as to costs.

A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For first Appellant:	C R Jansen (with him M M Majozi)
	Instructed by:
	Gilfillan Du Plessis Attorneys, Pretoria
	Webbers Attorneys, Bloemfontein
For second and third Appellant:	M Naidoo SC (with him G Shakoane)
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
Amicus Curiae:	T Ngcukaitobi (with him M Bishop)
For Respondents:	No appearance