



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION: POLOKWANE**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED

[Handwritten signature]
31/7/18

CASE NO:2844/2017

IN THE MATTER BETWEEN:

KGOSI J.E.M RAMOKOKA
BAPHALANE BA RAMOKOKA
TRADITIONAL COMMUNITY

And

BAPHALANE BA MANTSERRE
COMMUNITY DEVELOPMENT
TRUST IT2178/02
RAMOKOKA SALTIEL DIGWAMAJE NO
MARAKALLA PAULUS NO
LEMI CORNELIUS MONENE NO
NTHOBE MPETE DELINA NO
DITLEBE MONEGI PETRUS NO
SELLO SHADRACK RAMOKOKA NO
GLADYS RANGWETSI NO
MPOYANA LAZARUS LEDWABA NO
THE REGISTRAR OF DEEDS
THE MASTER OF THE HIGH COURT: PRETORIA

FIRST APPLICANT

SECOND APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

SIXTH RESPONDENT

SEVENTH RESPONDENT

EIGHTH RESPONDENT

NINETH RESPONDENT

TENTH RESPONDENT

ELEVENTH RESPONDENT

JUDGMENT

MULLER J:

[1] The applicants are Kgosi Ramakoko and the Baphalane Ba Ramokoko traditional community.¹ The respondents are the Baphalane Ba Mantserre Community Development Trust² together with the trustees of the said trust.³ The trust was registered on 30 October 2002. The registrar of deeds and the master of the high court Pretoria are also cited as respondents.

[2] The applicants are neither beneficiaries under the trust nor is the first applicant a trustee of the trust.

[3] The applicants seek declaratory orders:

(3.1) that the provisions of the trust deed of the Baphalane Ba Mantserre Community Development Trust which limits the beneficiaries to the Baphalane Ba Mantserre community contravenes the settlement agreement which was entered into on 4 June 2003 and which was made an order of the land claims court⁴.

(3.2) that the second respondent, as founder of the trust, contravened the said order by failing to include the other heirs and/or descendants of the originally dispossessed members of the Baphalane Ba Ramakoka community to the trust deed.

(3.3) And in addition ancillary orders to rectify the trust deed to *inter alia* include the whole of the Baphalane Ba Ramokoko traditional community as beneficiaries be granted.⁵

[4] At present, the trust deed defines the beneficiaries as:

“the Baphalane Ba Mantserre community who are depicted in Appendix 2 (list of Beneficiaries attached hereto) who shall benefit from the income of the Trust by virtue of the discretionary powers vested in the Trustees in regard to the allocation and distribution of Trust income. The words “Beneficiary and “Community” shall be used interchangeably and shall mean one and the same thing.”

¹ Also referred to in this judgment as the Baphalane community.

² Hereinafter “the trust.”

³ Not all of the trustees oppose the application. The ninth trustee ML Ledwaba did not oppose the application.

⁴ Dated 7 June 2003.

⁵ Counsel appearing for the applicants did not rely on s 13 of the Trust Property Control Act 57 of 1988 as a basis for the amendment of the trust deed.

Appendix 2 contains the names of the beneficiaries consisting of the members of the Baphalane Ba Mantserre community.⁶

[5] The respondents raised a preliminary point that this court has no jurisdiction to adjudicate this application on the basis that the claimed falls within the exclusive jurisdiction of the land claims court.

[6] A brief background of the respective facts and the view points of the litigants will be useful to understand the basis of the relief sought.

[7] It is common cause that the land in question is situated within the Limpopo province.⁷ It is contended by the applicants that the Baphalane Ba Ramokoko community consists of nine villages which are scattered over a large area consisting of various local municipalities and other provinces. The head village is called Ramokokostad. One of the villages which consist of the Baphalane community is the Mantserre village. This village is in the centre of the dispute. The second respondent is the headman of the Mantserre village. In 1917, kgosi Mokgatle Saltiel Ramokoko purchased the land on behalf of the Baphalane tribe.⁸ The land was dispossessed under apartheid rule.⁹ The land was subsequently subdivided into two portions namely, "portion 1" and the "remaining extent."

[8] The Baphalane community instituted a land claim in respect of both portions. The land claim was successful. A written settlement agreement was entered into between the owners, the claimants and the state to facilitate the transfer of the land as a whole to the claimants. The second respondent signed the settlement agreement on behalf of the Baphalane Ba Ramokoko community. The settlement agreement was made an order of court.

⁶ Appendix 2 and annexure A to the trust deed are identical.

⁷ The land means portion 1 of the farm Schilpadsnest 385 measuring 428 KQ, 2660 hectares, held by title deed T83406/1998 and the remaining extent of the farm Schilpadsnest 385 KQ, measuring 1456,1044 hectares held by title deed T9913/1963

⁸ The mineral rights were reserved in favour of the Transvaal Lands Company Ltd.

⁹ The land according to the title deed was transferred to the republic of South Africa on 26 April 1963.

[9] I will deal with the contents of the settlement agreement and the order of court later in this judgment.

[10] The contentions of the first and second respondents are the following. The second respondent, who deposed to the answering affidavit, states that he is the traditional leader (kgosana or sub chief) of the Baphalane Ba Mantserre which is a traditional community situated at Mantserre village. He, as the founder, established the Baphalane Ba Mantserre Community Development Trust for the Mantserre community in 2001. The Baphalane community consists of 8 villages, but according to him, does not include Ramokokstad village (which the first applicant claims to be its head). The second respondent states that the land in question was purchased by the Baphalane Ba Mantserre community in 1917.

[11] I need not to resolve the dispute of who purchased the land in 1917 or who was dispossessed of the land at this juncture. It seems clear that the second respondent does not acknowledge the first applicant as the senior traditional leader of either the Baphalane Ba Ramokoko community or the Baphalane Ba Mantserre community. This is an underlying dispute which forms the focus of the dispute whether the Baphalane Ba Mantserre community is included in the Baphalane Ba Ramokoko community and, also, whether the members of the Baphalane Ba Mantserre community are the sole beneficiaries of the Baphalane Ba Mantserre Community Development Trust to the exclusion of the other members of the Baphalane Ba community.

[12] Jurisdiction must be determined on the pleadings. The applicants assert that this court has jurisdiction in the present proceedings based on the *forum rei sitae* principle, as the land is situated in the Limpopo Province. Reliance on that principle to establish the jurisdiction of this court in the present context cannot be not decisive. The Restitution of Land Rights Act¹⁰ was

¹⁰ Act 22 of 1994 (Hereinafter referred to as 'the Act').

promulgated as a result of section 25(7) of the Constitution.¹¹ It was held in *Florence v Government of the Republic of South Africa*¹² that:

“The ‘restitution of a right in land’ as defined is the full redress cognisable by the Restitution Act for the dispossession of a right in land. Where a statute creates a new cause of action and prescribes a specific remedy for that cause of action, the prescribed remedy is the only remedy available for that cause of action. Therefore, a claimant who has been awarded restitution of a right in land, be it in the form of the restoration of a right in land or equitable redress, has been awarded full redress for the dispossession of a right in land and is not entitled to any other relief in addition.”¹³

[13] Section 2(1)(a) of the Act reads:

“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.”

[14] A settlement agreement was concluded as a result of the successful land restitution claim by the Baphalane community for the restoration of a right in the land in question. In this respect it is important to take cognisance of the following definitions contained in section 1 of the Act.

“**‘restoration of a right in land’** means the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices;”

And also:

“**‘right in land’** means 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;”

[15] The settlement agreement states the following in clause 2:

¹¹ s 25(7) of the Constitution reads: “A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.” See *Mphela and Others v Haakdoornbult Boerdery CC and Others* 2008 (4) SA 488 (CC) para 24.

¹² 2014 SA 456 (CC). Also *Macassar Land Claims Committee v Maccsand CC and Others* 2017 (4) SA 1 (SCA) para 8.

¹³ Para 170.

"2.1 The State shall acquire Portion 1, as it stands, from BHP Billiton Properties (Pty) Limited on behalf of its nominee, being the Baphalane Ba Mantserre Community Development Trust ("The Trust"), being a Trust duly established in terms of the provisions of the Trust Property Control Act, 57 of 1988 and so established by the Baphalane Community and consisting of the members of the said community as more fully illustrated in annexure "A" attached to the Trust Deed.

2.2 The State shall acquire the said Portion 1 as aforesaid to be resituated and restored to the Trust. The claimants confirm that the trust is established to receive all the benefits pursuant to this land claim on its behalf."

[16] The land claims commissioner of Limpopo referred the successful claim to the land claims court in terms of section 14(1)(b) of the Act.¹⁴ Section 14(6) provides that the land claims court, if satisfied, after taking into account the settlement and various other factors and subject to the provisions of Chapter IIIA of the Act, shall make an order in terms of section 35 of the Act.

[17] The land claims court is constituted in terms of the Act with the power to grant the remedy provided for in section 2(1) of the Act.¹⁵ The land claims court issued an order in terms of section 35(a) of the Act. The referral to the court to make the settlement agreement an order of court and the power of the land claims court to make such an order, thus had a statutory basis which is conferred on the lands claim court by section 22(1), read with sections 2(1), 14(1)(b) and 14(6) of the Act. There can be no doubt that the land claims court had exclusive jurisdiction to entertain the claim.

[18] Clauses 1, 3 and 4 of the consent order are relevant:

Clause 1 states:

"THE BAPHALANE BA MANTSERRE COMMUNITY DEVELOPMENT TRUST, established in terms of the Trust Property Control Act 57 of 1988 and registered with the master of the High Court Transvaal Provincial Division on the 30th of October 2002 (hereinafter referred to as "THE CLAIMANTS") as indicated in

¹⁴ s 14(1)(b) states: "If upon completion of an investigation by the Commission in respect of a specific claim – (b) the regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such a claim by mediation and negotiation the regional land claims commissioner having jurisdiction shall certify accordingly and refer the matter to court."

¹⁵ s 22.

annexure "A" attached to the Trust Deed is declared entitled to the restitution of and to be restored to ownership and possession of the following properties"

Clause 3 reads:

"The said restitution and restoration of Portion 1 be subject to the terms and conditions of the Deed of Transfer of the land as well as the terms and conditions of the Settlement Agreement attached hereto as "BC1."

Clause 4 states:

"The restitution and restoration of ownership and possession of The Remaining Extent be subject to the terms and conditions contained in the Deed of Transfer of the land as well as the terms and conditions of the Notarial Deed annexed hereto as annexure "BC 2."

[19] The settlement agreement foreshadowed the acquisition of the land by the state and the subsequent transfer of the land to the Baphalane Ba Mantserre Community Development Trust, as its nominee as a result of the claim. The consent order declared the restoration of the right of ownership in the land in question to the trust.

[20] The consent order, furthermore, expressly includes the terms of the settlement agreement which named the beneficiaries of the trust in annexure "A" attached to the trust deed. The *causa* for the definition of "Beneficiaries" in the trust deed (or the "Claimants" as they are referred to in the order) is to be found in the settlement agreement. The settlement agreement, therefore, is inextricably part of, and formed the very basis of the consent order, which, in my judgment, can only be rectified together with or after rectification of the settlement agreement to include the other members of the Baphalane community as beneficiaries under the trust. For a court to be able to rectify the settlement agreement or the trust deed to include the applicants it must first determine whether the applicants have a right to restoration of a right in respect of the land. Put differently; to grant the declaratory orders in particular, the court must first determine whether the Baphalane Ba Ramokoko community, other than the beneficiaries of

Baphalane Ba Mantserre community named in the trust deed, has a right in the land in question. The present application, if successful, will determine a right to restitution of a right in land in question in respect of a wider group of beneficiaries than those mentioned in annexure A to the trust deed. It is a matter in terms of which the land claims court has exclusive jurisdiction by virtue of sections 22(1)(a) or 22(1)(CA) of the Act, which state:

“There shall be a court of law to be known as the Land Claims Court which shall have the power to the exclusion of any court contemplated in section 166 (c)(d) or (e) of the Constitution-

(a) to determine a right to restoration of any right in land in accordance with this Act;

(CA) at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section 25(7) of the Constitution or to this Act or to any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such a person might not be able to claim any relief consequential upon granting such order.”

[21] I pause here to add that the settlement agreement contains an indemnification clause in terms whereof the claimants indemnify the parties to the settlement agreement against any loss, liability, damage or expense which may be suffered by any of them pursuant to any claim made in respect of the land in question by any person who is able to prove to be an heir and/or direct descendent of the members of the Baphalane community as defined in the Act and further defined by the lists of claimants attached to the trust deed. It was further recorded that the trust deed includes a provision for the unqualified inclusion of any person who proves to be an heir and/or direct descendent of the originally dispossessed members of the Baphalane community.¹⁶ If the land was acquired in 1917 on behalf of the Baphalane community as a whole, the rights of the larger Baphalane community consisting of persons with a real and substantive interest in the claim have to be determined before the definition of “Beneficiaries” in the trust deed may be rectified. Any subsequent claim to a right in the land in question by an

¹⁶ Clause 4.

heir or direct descendent of a member the community originally dispossessed is a claim for the restoration of a right in land which is cognisable under the Act.

[22] It must also be recalled that the land claims court issued a declaratory order declaring the beneficiaries as indicated in annexure A to the trust deed to be entitled to restoration of the land in question.¹⁷

[23] An order to comply with the undertaking in the settlement agreement which is included in the consent order that a provision be included in the trust deed to provide for the unqualified inclusion of persons other than the beneficiaries who are able to prove that they are heirs and or direct descendants of the originally dispossessed members of the Baphalane community does not relate to the claim in respect of a right to restoration of land which had been successfully finalised in terms of the consent order, but is a claim by persons with an interest in the right to the land. The right to claim the inclusion of the provisions in the trust deed flows from the undertaking in the settlement agreement and is not a right to restoration of a right in the land as envisaged by the Act. Such a claim pre-supposes that such applicants have a right to restoration of a right in land as heirs or descendants of members of the Baphalane Ba Mantserre community as defined in the settlement agreement and in the consent order.

[24] If a proper case is made for the restoration of a right in the land by the Baphalane Ba Ramokoko community and it is proved that the land has been restored to that community as a whole and not only to the named members of the Baphalane Ba Mantserre community, the rights of those members of the Baphalane Ba Ramokoka community that are excluded from the restoration order, may well be restored. Such a finding may have an effect on the meaning of the court order and trust deed. It is the land claims court that must determine the rights of the applicants, and not this court.

¹⁷ Clause 1 of the consent order.

[25] This court cannot enter upon the domain of the land claims court to determine a right to restoration of a right in land by issuing declaratory orders that the applicants seek or to rectify the trust deed, the essence of which is to restore a right in land to the applicants which right will ultimately affect the interests of the beneficiaries named in annexure A (the claimants referred to in the consent order) under the trust arrangement.

[26] A court is *functus officio* after pronouncement of a definitive order and cannot supplement, amend or correct the order unless it contains an error, ambiguity or omission.¹⁸ Both the Act and the common law make provision for a mechanism whereby any person affected by an order of the court may apply to rescind or vary the consent order.¹⁹ I venture no opinion whether the applicants are entitled to the declaratory orders or rectification of the settlement agreement, the consent order or the trust deed.

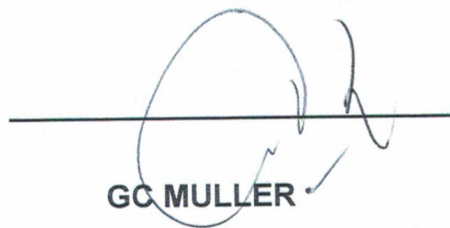
[27] In my considered view, the land claims court has exclusive jurisdiction to grant the relief that the applicants seek. The preliminary point taken by the respondents is therefore upheld. In the result, the application falls to be dismissed with costs in this court.

Order

The application is dismissed with costs.

¹⁸ *Ex Parte Willis and Willis* 1947 (4) SA 740 (CPD) 742. *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (AD) 306F-307H.

¹⁹ s 35(10) – 35(12). Also *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 168-169. *Gollach & Gomperts (1967) Pty Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (AD) 922H-923B.



GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO DIVISION: POLOKWANE

APPEARANCES

- | | |
|------------------------|------------------------|
| 1. For the applicants | : Adv M.S Mphahlele SC |
| 2. For the respondents | : Adv T.J Bruinders SC |
| 3. Date of hearing | :28 June 2018 |
| 4. Date of judgment | :31 July 2018 |