

HAS THE LAW FAILED? LAND CLAIMS INVESTIGATIONS IN KWAZULU-NATAL

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WITH the promulgation of the Restitution of Land Rights Act (22 of 1994), decisions were made that were to indelibly alter the position of land ownership in South Africa. The writing into law of a temporal boundary, namely 1913, and the definition of community as a group of people with equally negotiated rights in land, while initially deemed as democratic and appropriate, have been problematic points of restitution. In addition, the grey areas in terms and conditions of tenure, as well as dispossession, are not provided for in the Act, and have only been addressed to some degree as a result of rulings of court, in which these non-empirical issues have arisen. This is particularly so in KwaZulu-Natal, which is not only densely populated but has a complex tribal matrix that also has recently begun to emerge, as part of a post-apartheid, and ironically, post-Zulu identity formation.

This paper is not an academic one: it is written from the heart as a result of the experience that the author has acquired through working on nearly one hundred historical reports with regard to land claims investigations in KwaZulu-Natal. It is written primarily as an attempt to understand the position of land claims in KwaZulu-Natal, which are complex and generally not framed within the definitions or limits of the Restitution of Land Rights Act, yet do have deep seated reasons for being addressed. It is written to express the conflicting positions occupied by claimants and the claimed, as well as the central position that is occupied

by the State on the one hand, and the Regional Land Claims Commission on the other. It will begin by addressing the issues with regard to definitions in the Restitution of Land Rights Act, particularly with respect to the idea of 'community', commensurate 'rights in land', the idea of 'dispossession', and the cut-off date for claims at June 1913. The paper will then continue with other grey areas: namely competing oral and other histories of the claimed; the articulate, enabled and the legally armed, usually white; and the claimants, generally inarticulate, politicised and poorly legally armed, and usually black. It will continue by expanding upon the permeable legal framework, as one which rests on the Natal Code of Native Law; a guideline document deployed for over a century in order to assist amaKhosi address tribal court issues, but at the same time subject to prodding, poking and penetration to suit the environment and the situation. It will conclude by noting that restitution of land and the issues contained therein is not well served in the current situation: if South Africa as a nation intends considering a functioning social and agricultural environment, the disjuncture in these fundamental understandings in the framing of the law should have been interpreted in a more culturally responsive manner.

First, the definitions in the Land Restitution Act are key components of the legislation, and problematic in their interpretation. The Act defines community as 'any group of persons whose rights in land are derived from

shared rules determining access to land held in common by such group, and includes part of any such group.’ For many years, this definition formed the key strategy of people defending the claims. In KwaZulu-Natal, such ‘community’ rarely existed, except on Ingonyama or Tribal Trust lands. People living on mission stations and mission reserves paid rent, which made them subject to the rules of the church; and while they may have been a community of church-going people, they were not strictly speaking, a community in terms of the Act. KwaZulu-Natal also had much land tied up in the hands of property speculators such as the Natal Lands and Colonisation Company, which allowed ‘squatters’ to reside on their properties, paying rentals of between £1 and £3 per dwelling. This obviously limited the extent to which people could expand, and indeed, had effects on the fragmentation of a polygamous society. They were also charged rates for running stock. Individual farmers, black and white, also carried out tenant farming, and had similar restrictions. Fundamentally, tenants had little say over what they could do on the land, and also did not form a community in the view of the legislation. Labour tenancy was common in the midlands and interior of the colony and province; and in this instance, specific farmers had specific agreements with their labour tenants on their land, which differed from owner to owner and farm to farm, again limiting viability in terms of the legislation. Most claims that I have investigated are submitted by farm labourers, who may have been resident on the properties for generations. These people were waged workers, thus not qualifying as claimants. The last

category of occupation on property in KwaZulu-Natal is on sugar and timber lands: in the former, immigrant labour was extensively used since the end of the nineteenth century, comprising indentured Indians, and Shangaan and Pondo labourers. These people were housed on sugar farms in an informal and desultory manner until after the malaria outbreak in 1930, which compelled farmers to provide barrack and compound housing. Thus access to land was limited and housing was provided in a space determined by the farmers. Many timber farmers on the other hand, could not risk the possibility of homesteads being in plantations, and thus when a property was purchased for timber, or put under timber, people living on the farm were moved into compounds. So, basically, in most instances, the definition of community fails the potential for land restitution in terms of the Act.

Second, rights in land is defined as ‘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’. The above paragraph has detailed quite closely the varieties of residence on white-owned land, really allowing only for labour tenants.

Then, dispossession refers specifically to ‘dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices’ and includes ‘racially discriminatory practices, acts or omissions, direct or indirect, by – (a) any department of state or administration in the national, provincial or local sphere of government;

and (b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation.' Government sanctioned removals did occur, and in well-documented cases. However, what is absent from the conversation is the dispossession that occurred through change of ownership, change of land use, change in conditions of any beneficial access to land, change in housing from self-constructed dwellings to removal to compounds, removals through construction of roads and railways, expansion of suburban areas, internecine rivalry, and scores of other complex and inscrutable reasons. Further, while the date of dispossession may have been strongly debated, in the original deliberations of the Act, it fails to address specific issues in KwaZulu-Natal such as the Delimitation of Lands Commission in Zululand (1904), which also had an indelible effect on the landscape and presented palpable instances of official sanction of removal for the settlement of white people between 1905 and 1913.

So, the law provided for some empirical boundaries, and at the same time assumed common interpretations in law and of law, perceptions of truth and history, and social and political conventions that allowed for the construction of memory and the interpretation of orality. The paradigmatic assumptions have ended up being the points of contention and the grey areas between the claimants and the claimed. It is these that are tested in court in processes which now tend to blur the focus on the legislation and concentrate on peripheral issues to establish a finding and a settlement rather than restitution and redistribution.

Claimant groups are generally an assemblage of older people from varying places in life, drawn together by a common goal and a perceived common past. Claimant groups have support from the Regional Land Claims Commission in that pursuance of the claim is the job of the commission. However, the reality is that the people employed by the commission themselves are historically and culturally inarticulate, politically biased and lacking in research and legal training. This results in 'case reports' produced by the commission that are incorrect, emotional, cut-and-pasted standard texts, as the basis for legal documentation that serves in court. The lack of rigour in the production of documents to legal standard is of serious concern at face value. However, these documents still serve in court as the basis for the claim. In a similar position is the legal team of the State; frantic and overworked civil servants who have little or limited interest in historical contexts, and are invidiously positioned in a legal process that continually emasculates them.

Landed farmers are generally assertive of their inheritance of the property in question, and have written family records and constructed memories of occupation based on chronological frameworks referential to events of national and international importance that add gravitas to their stories. They are simultaneously often oblivious to the key issues at hand, rarely seeing the bigger picture at a human rights level. They employ legal teams which engage with the legislation, and defend occupation within the framework of the Act. The vast dichotomy of these two poles of contention has no common thread as the perceptions, rights, memories, and histories are

constructed through vastly different understanding and seeing of the world. And in the middle is the law.

I find the investigations interesting and sometimes exciting, from an historical point of view. At the same time I have myriad other emotions that swing between anger, frustration, and betrayal. I am conflicted, as they say. On the one hand a fundamental position in what I perceive as right and wrong, what I perceive as truth and untruth, what I perceive as history and the past, cloud immediate response. At the same time, these same perceptions viewed reflexively, allow me to step back and understand, to some degree, the disconnection between the two poles. The frustration that the 'law' (that is Act) is not followed, ignored; wrongs are not identified and acted upon; and that justice is not being done from an empirical point of view, is to some degree, contextualised. Similarly, I have had to digest the fundamental conflict in equality in which the alarm at the mercurial interpretation of oral histories is acceptable from one party, whilst oral histories from the other are automatically discounted.

For many years, most claims did not get as far as being contested in court, and were settled outside the court process. However, increased exposure to these conflicts in the process in the last couple of years, and my consequent confusion, caused me to try to establish an understanding of how these two poles continued to be maintained: how the claimants on one hand were allowed a somewhat paternalistic leeway in the judgement of their claims; and on the other, landed farmers were subject to rigorous court processes that were lodged within the law and the frameworks of the law. Why were oral

histories fine for one group, yet white people, as it ends up in most cases, were not considered to be bearers of oral history?

And I came back to the Natal Code of Native Law. This was a document crafted in the late Shepstonian era of colonial Natal in order to regulate the manner in which Africans living in the locations conducted their decisions in civil law. It was largely based on the interpretation of traditional legal systems, but sought rather to regulate and organise areas in which there were always contested issues, such as the demand and payment of lobola cattle and the general rules for succession. This Act, Law 19 of 1891, was amended repeatedly in the next century and was the basis for legal deliberations in the post-Natal colony, and in fact continued as the structure of legal frameworks for the tribal courts. So, at face value the Natal Code of Native Law framed legal systems for Africans living in KwaZulu-Natal. Added to this was the fact that the deliberations and decisions on the fate of misdemeanours within the framework of this law continued to be assessed in a traditional fashion in a tribal court, whereas the local magistrate would address any criminal matters.

So this law, the one which most African people may have come into contact with in general day-to-day operations, largely revolved around African tribal systems, and perpetuated a loose framework of guidelines that could be malleable depending on circumstance. It could be prodded and poked to deal with resource changes, stressors in society, and environmental situations. Unlike the inherited Roman-Dutch legal system of twentieth-century South Africa, it had less rigid

characteristics and in this way provided for the perpetuation of a two-tier legal system, retrospectively paternalistic or otherwise.

Finally, I need to speak about the issues of oral history. As mentioned above, oral history is perceived as an empirical 'fact' amongst claimants, although the fragilities of oral history and its role in identity formation are well-known, and is the subject of many scholarly works. In the court cases, many of the oral histories on which the court depends are literally constructed as the trial continues, with new angles being added through interference and also group discussion between the claimants. Often what is presented in the original claim form becomes a totally different set of

statements, peppered with rhetoric and 'memories' of being forcibly removed by Government Garage trucks or being chased by men with guns. The oral histories presented in court thus suit an interpretation necessary for the present purpose. Long ago I abandoned interviewing farmers and farm workers as not only did it become dangerous for some of the people living on farms, it also perpetuated a dual duel of hearsay, as it were. Now, I interview nobody and use the layers of documented 'evidence' present in the public realm in the investigation. Contestations of oral histories have, indeed, framed the way in which I have evolved my methodology of investigation, in order to remain as objective as possible and to be as independent as possible.