

Why the Fish River Sun land claim case took 20 years

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On 10 April 2018, the Land Claims Court delivered judgment in a case involving three competing land claims for a large area of land between the Fish and Keiskamma Rivers in the Eastern Cape. The disputed territory includes the land upon which the Fish River Sun Resort is situated. The judgment brings to an end a nearly 20-year-long legal dispute.



The area where Sun International's popular Fish River Sun resort used to be has been claimed by three communities. Image from [Google Maps](#)

Background

If your community wants to make a land restitution claim, you need to meet four requirements according to the Restitution of Land Rights Act:

You must prove that you are a “community” with “rights in respect of land”; that you were dispossessed of your land rights as a result of racially discriminatory practices after 19 June 1913; that you did not receive just and equitable compensation; and you must have lodged your claim before 31 December 1998.

Three separate “communities” – Mazazini, Prudhoe and Tharfield – claimed that they were the rightful owners of the land in question.

The Land Claims Court noted that all three communities had lodged claims before the cut-off date (i.e. before 31 December

1998). But, for reasons not explained, the Land Claims Commission only referred the claim of the Mazazini community — and not the Prudhoe and Tharfields communities — to the Land Claims Court for adjudication. In March 2010, the Land Claims Court awarded the entire disputed territory, including the Fish River Sun property to Mazazini.

Subsequently, in September 2011, the Prudhoe community had the land award rescinded (repealed/made void) in the Supreme Court of Appeal (SCA) as its claim had never been considered.

Mazazini unsuccessfully started protracted litigation to quash the Prudhoe claim.

A trial commenced in early 2017 with all the claims.

However, in May 2017, several landowners and other parties who had an interest in the affected land notified the Land Claims Court that the commission had not made them aware of the proceedings. This caused more delays, which the court blamed on the conduct of the commission. The court then ordered the commission to make sure that all interested parties were made aware of the proceedings.

The trial started again in October 2017 and finished in November.

At the time of going to trial, the claim of the Tharfield community had already been settled, though it had not yet been made an order of court. The court said that the parties were free to approach it in a separate application to have this done. For this reason the court only had to adjudicate the competing claims of Mazazini and Prudhoe.

The Mazazini claim

The present day Mazazini community is made up of three distinct tribal groupings dating from the pre-colonial era: the Ntloko, amaZizi and the Mpekweni. In the judgment, the court refers to the land claim collectively as the “amaZizi land claim”.

In 1845, the British Empire and the amaZizi entered into the Maitland Treaty, which acknowledged that portions of the disputed territory belonged to the amaZizi. The court found that this did not include the portions of land which were being claimed by the present-day Prudhoe community.

But in 1847, under the leadership of Sir Harry Smith, the British Empire issued a new proclamation which extinguished the land rights that the amaZizi or any indigenous group had in respect of the disputed territory. The court found that the purpose of that proclamation was to make the indigenous people of that area subjects of the British Empire and to give ownership of the territory to the British Empire.

But the court found that the amaZizi had exercised rights in terms of customary laws and practices for a considerable period of time and established beneficial occupation of the territory.

As far as the question of dispossession after 1913 was concerned, the court found that the amaZizi had been dispossessed as a result of the “betterment” policies of the Ciskei Homeland. This was a policy whereby people were moved around to make optimal use of land (according to apartheid officials). This could involve people being removed from their scattered homes to central locations to enable commercial farming.

The court found that the amaZizi had therefore established a valid claim in respect of the Jaji, Dabi and Msuthu tribal areas as well as the Heaton Farm.

Prudhoe claim

The most contentious issue for the Prudhoe claim was whether it met the requirements for a “community” in terms of the legislation. The present-day Prudhoe community derive from the amaGqunukhwebe chiefdom which was destroyed in 1847

after the War of the Axe. Their land was subsequently handed over to white farmers and the descendants of the amaGqunukhwebe tribe continued to live alongside them.

The Restitution Act defines a “community” as any group of people who had shared rules governing access to land. But the amaGqunukhwebe chiefdom collapsed and the land fell under the control by white farmers. But the court found that a number of headmen continued to carry out customary functions even after the collapse of the chiefdom. So the court found that there was a “hybrid” system of governance on the farm, where both the white farmers and headmen had important roles in respect of land rights, side by side.

In the 1970s, the land was expropriated by the Ciskei government and the present-day Prudhoe community continued to exist without the influence of white farmers. The role of the headmen increased significantly. In particular, they continued to resolve conflicts and had full control over the allocation of land.

The court found that although there was shared ancestry with the amaZizi tribe, the Prudhoe is an independent community in terms of the legislation and had been forcibly removed under apartheid from land to which it had valid rights in the 1980s.



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Significant judgment

The court granted full ownership of the Jaji, Dabi and Msuthu tribal areas as well as the Heaton Farm to the Mazazini Community. The Prudhoe were given full ownership of the rest of the claimed land, including the Fish River Sun farms, except for a few properties occupied by people who had purchased some of the land from the state in the early 1990s. The court made no cost order.

The court made scathing remarks about the conduct of the commission. It showed the crucial role the commission has in speeding up (or slowing down) the pace of land reform. The court found that the commission’s misconduct resulted in unnecessary delays and was inconsistent with its constitutional obligations.

The case also continued a trend in the courts to lower the qualifying criteria for what constitutes a community in terms of the land reform laws. This approach is consistent with understanding the history of colonial dispossession, which often sought to destroy black communities through discriminatory policies and practices.

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