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The Etosha case: Who can bring ancestral land rights claims?

The case of *Jan Tsumib v Government of the Republic of Namibia*, recently decided by Namibia's Supreme Court, has rejected attempts to remove a barrier to advancing ancestral land rights claims in Namibia.

Introduction

Since Namibia's independence in 1990, ancestral land rights claims have not featured as a land reform policy. The main reason is the complexities involved in proving such rights, as well as government's fears of competing claims from various ethnic groups that could undermine national unity.

However, the last few years have seen some noteworthy changes in government's approach to such claims. The reason is that the existing land reform strategy, which involves the buying of commercial farmland on the "willing seller principle", has been inefficient in dealing with the land losses that Namibia's minority groups experienced during colonial times.

During the Second National Land Conference in 2018, the question of ancestral land rights featured strongly on the agenda - so much so that the conference resulted in a Commission of Inquiry tasked to investigate the feasibility of recognising ancestral land rights in Namibia. The Commission's findings, released in July 2020, recommended that Parliament should enact legislation on ancestral land rights within two years of the conclusion of the Commission's inquiry – something which has not yet materialised.

In the meantime, the Hai||om People sought permission from the Namibian courts to bring a representative action to determine their ancestral land rights over Etosha National Park and Mangetti West.

Background

With Namibia's independence in 1990, several minority groups such as the San had expectations that the ancestral land they lost under German and South African rule might be returned.

The Hai||om, Namibia's largest San group in Namibia, were severely affected in the 1950s when the South African Administration in Namibia evicted them from their ancestral land in Etosha National Park. This decision was made when the prevailing view was that nature conservation areas are best protected without people living in them. The South African Administration also saw the clearing of the Hai||om from Etosha as an ideal opportunity to promote Etosha as a premier tourist destination.

The Hai||om were left destitute and landless after their eviction and had little choice but to work as farm labourers under often harsh conditions. They were never compensated for the loss of their ancestral land.

The Hai||om of Mangetti West managed to cling on to their land, but they also experienced a persistent denial of their land rights from both the South African and Namibian governments. During pre-independence times, large tracts of their land were used as emergency grazing by commercial farmers and later became a quarantine area for cattle being raised to generate government income.

Today the Namibian Development Corporation is still raising approximately 15,000 cattle on about 80,000 hectares. A few years ago, the Namibian government settled a number of Oshiwambo-speaking farmers in Mangetti West after an agreement was reached in a grazing dispute with the Rukwangali Traditional Authority in Kavango West.

As with the Hai||om of Etosha, the Hai||om of Mangetti West were never consulted nor compensated by either the South African or Namibian governments for the use of their land.

The battle over ancestral land rights

Since independence, several prominent Hai||om leaders have tried to engage with the government to find a solution to the issue of their ancestral land rights over Etosha National Park. Government responded by buying commercial farms and resettling Hai||om families on them, but the rights to the resettlement land remain in the government's hands. With no secure land rights and insufficient post-resettlement support from government, the Hai||om remain poor and dependent on sporadic handouts from government.

Around 2010, a few Hai||om who were still living in Okaukuejo in Etosha approached the Legal Assistance Centre after being threatened with eviction by park authorities. These threats fortunately never materialised. Instead, government undertook to assist residents with resettlement outside the park if they left voluntarily.

A few Hai||om left Etosha, but nothing came of the promised resettlement support. After another failed attempt to engage with government on their ancestral land rights in Etosha, the Hai||om decided to approach the courts for a remedy.

The High Court application for representative action

After several community meetings, Hai||om from all over Namibia chose eight applicants to bring a court case on their behalf. In addition, approximately 2500 Hai||om signed up to support the application.

The purpose of the application was to ask the High Court for permission for this small group to bring an action on behalf of the Hai||om People, with the principal aim of restoring their ancestral land rights. However, the applicants made it clear that they had no intention of attempting to disrupt the tourism activities currently taking place in Etosha National Park, but would rather want to participate in the Park management and receive some benefit from the tourism proceeds.

The case was launched in the High Court in 2015 but heard only in November 2018. It was opposed by the Namibian Government and the Hai||om Traditional Authority. Initially the Chief of the Hai||om promised in writing that the traditional authority would not object to the request to bring the matter as a representative action. The Chief stated that the Hai||om Traditional Authority would remain neutral because they did not want to compromise their working relationship with the government.

However, at a later stage, the Hai||om Traditional Authority decided that they wanted to join the government in opposing the application for a representative action. The main argument of both the government and the Hai||om Traditional Authority is that the Traditional Authorities Act 25 of 2000 strips the Hai||om People of their ability to enforce their rights independently, allowing only the Traditional Authority to represent the Hai||om community in legal matters.

In August 2019, the High Court dismissed the application for a representative action.

Appeal

On 8 November 2021, the opposing parties were back in court, this time in the Supreme Court of Namibia. The key argument of the Hai||om appellants was that constitutional democracies such as Namibia recognise that it is not only traditional authorities that can enforce rights held under customary laws, but that any affected person is entitled to enforce their rights directly.

The appellants argued that the Namibian Constitution, as well as international law, which forms part of Namibia's legal system once it has been ratified by the State, both recognise the rights that the Hai||om People want to assert and their capacity to act on their own initiative, independently from the traditional authority.

In reply, the Government and the Hai||om Traditional Authority stuck to their guns, arguing that only the Hai||om Traditional Authority can represent the Hai||om community in matters asserting their rights.

The Supreme Court dismissed the appeal on the basis that the common law already has mechanisms that enable legal action by communities, such as the formation of a voluntary association. However, the Supreme Court agreed that it is not only traditional authorities that can represent a community or a group of people seeking to assert customary rights.

Case analysis

Representative actions, which are similar to class actions in jurisdictions such as South Africa and the United States, have not yet been recognised in Namibia. Namibian law requires that a person must show a direct interest in a matter in order to approach the court. This is

understandable, because the court wants to avoid situations where people come with frivolous matters that clog up the system and waste the court's time.

However, in the *Tsumib* matter, the eight applicants asked the court to relax the usual rules on who is entitled to approach the court. They argued that the Hai||om applicants are part of a "People" as defined under international law, and thus should be able to represent the Hai||om People. They also asserted that the explicit support by some 2500 members of the Hai||om community was sufficient to support a representative action.

The Hai||om applicants may well find themselves without a suitable remedy to assert their ancestral land rights claim now. Forming a voluntary association comes with its own complexities, and at the same time, the Hai||om Traditional Authority continues to be unwilling to approach the courts for a determination of the ancestral land rights of the Hai||om People.

Had the Hai||om appellants succeeded in the Supreme Court, the judgment could have given valuable direction to the development of ancestral land rights legislation recommended by the Commission of Inquiry. Instead, the Hai||om People must consider a new way forward.

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