G:ENESIS

Implementation Evaluation of the Restitution Programme

Literature review

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This literature review provides a brief synopsis of the multiple mechanisms of dispossession and sketches the variety of social contexts, historical and spatial settings which the restitution programme has had to try and address. This aims to illuminate the deep historical, legal, methodological, social and institutional complexities embedded in the restitution programme. Secondly the review examines what has been written about the approaches and mechanisms for actually implementing the programme which together comprise what is referred to as the 'restitution business process'.

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1. IMPLEMENTATION EVALUATION OF RESTITUTION PROCESS

The overarching aim of the evaluation commissioned by the Department of Performance Monitoring and Evaluation in the Presidency (DPME) is to undertake an analysis of the **restitution business process**. The evaluation aims to provide information on the manner in which the Commission on Restitution of Land Rights (CRLR) has implemented the various stages of the restitution process including validation, verification and settlement of claims. However the evaluation TOR **excludes** the overall design of the process and the actual implementation of settlement awards/agreements.

1.1. KEY QUESTIONS TO BE CONSIDERED IN THE IMPLEMENTATION EVALUATION

- Are the set outcomes of Restitution Programme being achieved?
- Is the restitution programme implemented efficiently, effectively?
- What has made this intervention difficult to implement?
    - Examples of challenging cases and successful cases.
    - Are there good examples of practises that we could learn from?
- How could we strengthen the process for the next phase of Restitution (given that it is proposed to reopen the land claims process)?
- How can we implement this programme more cost effectively?

2. AIM OF THE LITERATURE REVIEW

The evaluation study requires a rapid review of the literature on Restitution with a primary focus on what has been written about the business processes at the heart of the programme, together with a succinct review of the programme purpose, success, challenges, and associated critique. The literature review seeks to draw together existing research and evaluation to provide a critical review of the implementation of restitution programme.

In the process it sets out to provide a commentary on existing national restitution policies, regulations and interventions. The literature review provides the background to help frame the evaluation study. This report aims to acquaint the assessment team with key issues, help inform the design of fieldwork instruments and provide a baseline to help review and question the findings of this implementation assessment study.

3. LITERATURE REVIEW OUTLINE

This literature review is in two parts. First the report provides a brief synopsis of the multiple mechanisms of dispossession and sketches the variety of social contexts, historical and spatial settings which the restitution programme has had to try and address. This aims to illuminate

the deep historical, legal, methodological, social and institutional complexities embedded in the restitution programme.

Secondly the review examines what has been written about the approaches and mechanisms for actually implementing the programme which together comprise what is referred to as the 'restitution business process'. The bulk of published research sets out to:

- assess the programme at a high level in terms of legal framework, policy directions, claims settled, timeframes and costs (Hall, 2003, Hall, 2004, Hall, 2009, Brown, 1997, Christopher, 1995); (Commission on Restitution of Land Rights, 2003, Hall, 2011, Mannerback and Fransson, 2003, Pienaar, 2006)

- analyse the social, political, economic, ecological and institutional implications and effectiveness of the programme (Anseeuw and Mathebula, 2006, Camay and Gordon, 2000, Ashley, 2005, CASE, 2005, Commission on Restitution of Land Rights, 2003, Fabricius and de Wet, Parnell and Beavon, 1996, Ramutsindela, 2007, Walker, 2008, Dodson, 2006);

- assess restitution programme impacts through the lens of historical, ethnographic/ case study research (Walker et al., 2010, Barry and Mayson, 2002, de Satge et al., 2010, Robins and Waal, 2008, Sato, 2006, Westaway and Minkley, 2006, Ziqubu, 2006).

By comparison the literature on the restitution business process is quite thin. While there is a relatively large body of work on the design of settlement and implementation support (Sustainable Development Consortium, 2007) developed as part of an 18 month process funded by Belgian Technical Co-operation (BTC) this is largely beyond the scope of this evaluation framework.

Research on the 'how' of restitution (Cornell, 2008, Dodson, 2006, Du Toit, 2000, Du Toit et al., 1998) that provides an inside view of the process of the legislative and administrative routes to investigating, verifying and settling claims is difficult to obtain. The business process is largely documented in grey literature – training courses, manuals, checklists and guideline documents. It is often difficult to determine which processes are currently in use and which have been superseded. Current perspectives on the 'how' of Restitution in the DPME evaluation will largely be established through in depth qualitative research in the designated provinces.

A diagnostic evaluation of the restitution research process that is currently being conducted by the HSRC will also illuminate this and other aspects of the overall Restitution business process –in particular the management of claim files and data which has been reported to be very poorly managed. Preliminary findings indicate that while there is some standardisation and periodization in the evolution of the overall restitution business process there also appears to be some variance between the processes and instruments developed in different provinces. The HSRC report when available will be an important source of information for the DPME assessment.

4. HISTORIES AND MECHANISMS OF DISPOSSESSION

Restitution is framed by two dates – the 19th June 1913 which marks the start of the period in which dispossession is legally recognised in the Constitution and Restitution of Land Rights Act (No 22 of 1994) - and December 31st 1998 which marked the cut off for the lodgment of

claims. Although claims cannot be entertained pre 1913 the major history of dispossession is located in the broader context of colonial conquest and land alienation and the general turmoil associated with the 19th Century. In reality much of the dispossession in South Africa took place prior to 1913. In part the limitation of restitution to the date of the promulgation of the 1913 Act was partly in recognition that complexity and violence that characterised 19th century South Africa would be extremely difficult to unravel.

4.1. THE 1913 NATIVES LAND ACT

Although the political implications 1913 Natives Land Act were immediately recognised by Sol Plaatje who characterised it as "the start of deliberate and systematic framework to deny black South Africans their birth right" (Plaatje, 1916) Delius and Beinart (2013) have recently argued that while the Act had enormous symbolic significance it also had a function of staving off further dispossession. Recent scholarship also suggests that the Land Act was not that successful in preventing Africans from purchasing land outside the scheduled areas (Feinberg and Horn, 2009).

The Act purported to set aside:

- 77% land demarcated for private ownership by whites and white owned companies
- 8% reserved solely for African occupation
- 13% was reserved as Crown Land for game reserves, forests and other uses

In reality these distinctions were hard to draw. As Beinart (1994: 11) has argued " it would be a mistake to draw too hard a dividing line between types of land at the turn of the century". While the Act set out to precisely demarcate land ownership it left out extensive areas of African freehold property and unsurveyed state land. Walker and Platzky (1985) note that the Beaumont Commission which sat in 1916 ignored 1.5 million hectares which had been bought by Africans as well as unsurveyed state land on which thousands of people resided.

4.2. 1936 DEVELOPMENT TRUST AND LAND ACT

The 1936 Native Trust and Land Act finally provided the basis for formalising and extending the size of the African reserve areas as recommended by the 1916 Beaumont Commission. As has been noted earlier it was recognised in the 1913 Act that the Reserves were already overcrowded and resource stressed. The growing crisis in the Reserves was one of the factors driving the passing of the 1936 Act, but more importantly the Act was to provide the justification for subsequent evictions of sharecroppers and cash tenants farming on White-owned land.

The 1936 Act made provision for the purchase of 6.2 million hectares of 'released land' from white farmers in areas adjacent to the scheduled areas. The Act established the South African Native Trust (SANT), which purchased all reserve land not yet owned by the state, and had responsibility for administering African reserve areas. The SANT imposed systems of control over livestock, introduced the division of arable and grazing land, and enforced residential planning and villagisation (called 'betterment') under the guise of modernising African agricultural systems. Section 13(2) empowered the Minister to expropriate African people living outside the Reserves

The Act set out to limit the number of labour tenants that could reside on white farms. It required them to be registered and imposed a system of fees payable by the land owner for every tenant registered

The Act formalised the separation of White and Black rural areas laying the foundations of the apartheid homeland system. Betterment schemes also lead to substantial dispossession and loss of land rights. Areas in White South Africa where Black people owned land were declared “Black spots”, enabling the state to implement measures to remove the owners of this land to the reserves.

4.3. LEGISLATION AND DISPOSSESSION

In addition to the Land Acts successive governments passed a whole suite of legislation which undermined land rights and facilitated removals. This legislation provided the scaffolding for a whole system of urban and rural segregation which eventually developed into full blown apartheid and shaped the emergence of the ‘bantustans’ post 1948. Both pre and post 1948 state objectives remained consistent – to secure labour while denying/ severely restricting political, social and economic rights outside of the homeland system. There were numerous laws passed which regulated property rights in urban and rural areas (Sustainable Development Consortium, 2006b).

The Native (Black) Urban Areas Act (No 21 of 1923) (commenced 14 June) divided South Africa into 'prescribed' (urban) and 'non-prescribed' (rural) areas, and strictly controlled the movement of Black males between the two. Each local authority was made responsible for the Blacks in its area and 'Native Advisory Boards' were set up to regulate the inflow of Black workers and to order the removal of 'surplus' Blacks (i.e. those not in employment).

The Occupation of Land (Transvaal and Natal) Restrictions Act of 1943, better known as the Pegging Act required that all new land and property transactions between Indians and Whites required the approval of the government.

The Natives (Urban Areas) Consolidation Act (No 25 of 1945) introduced influx control - applicable to black males only (Horrell 1978: 172). People who were deemed to be leading idle or dissolute lives or who had committed certain specified offences could be removed from an urban area (Horrell 1978: 173).

The Asiatic Land Tenure and Indian Representation Act (Act No 28 of 1946) restricted Indian land ownership and residence to specific areas in Natal

The Group Areas Act, (No 41 of 1950) This Act enforced racial segregation by creating different residential areas for different races. It led to forced removals and relocation of thousands of removals of people living in "wrong" areas. [20]

Prevention of Illegal Squatting Act, (No 52 of 1951). From the 1970’s it was one of the common instruments used for forced removals. It afforded landowners, local authorities and government officials many ways of evicting people or demolishing their houses without a court order to get them off the land. Amendments in 1988 gave even more teeth to the Act.

Black Resettlement Act, (No 19 of 1954) This Act granted powers to the government to remove Africans from any area within and next to the magisterial district of Johannesburg. The Act established a Resettlement Board which could remove blacks from townships. This Act authorised the Sophiatown and other removals.

The Trespass Act (No 6 of 1959) The Act was used in both urban and rural contexts and was used to "secure the removal of people from land where their presence, has for one reason or another, become inconvenient to the owner of lawful occupier of the land or to the state… Very of often this Act was used in conjunction with others… Although the Act contained no provisions which empowered the courts to order the eviction of anyone convicted of trespass, the practical effect of arrest and conviction under the Act was often enough to drive people off the land." (Keightley, 1990)

Black (Native) Administration Act (No 38 of 1927) Section 5(1)(b) provided that "whenever he deemed it expedient in the public interest, the minister might, without prior notice to any persons concerned, order any tribe, portion thereof, or individual black person, to move from one place to another within the Republic of South Africa. This section was used extensively to authorise forced removals.

The Black (Bantu) Authorities Act (No 68 of 1951) allowed for the creation of traditional tribal, regional and territorial authorities initially run by the Native Affairs Department, but with the promise of self-government in the future.

The Blacks (Abolition of Passes and Co-ordination of Documents) Act (No 67 of 1952) repealed early laws, which differed from province to province, relating to the carrying of passes by Black male workers (e.g. the Native Labour Regulation Act of 1911) and instead required *all* black persons over the age of 16 in *all* provinces to carry a 'reference book' at *all* times.

The Promotion of Bantu Self-Government Act (No 46 of 1959) announced the existence of eight African ethnic groups based on their linguistic and cultural diversity. Each group had a Commissioner-General as an official representative of the South African government. The Commissioner-General was assigned to develop a homeland for each group. Provision was made for the transfer of powers of self-government whereby each ethnic group would govern itself independent of white intervention.

The **Bantu Homelands Citizenship Act (National States Citizenship Act) (No 26 of 1970)** required that all South African Blacks become citizens of one of the self-governing territories.

"*No Black person will eventually qualify [for South African nationality and the right to work or live in South Africa] because they will all be aliens, and as such, will only be able to occupy the houses bequeathed to them by their fathers, in the urban areas, by special permission of the Minister.*" Connie Mulder, South African Information and Interior Minister, 1970.

The Bantu Homelands Constitution Act (National States Constitutional Act) (No 21 of 1971) increased the potential governmental powers of the self-governing homelands and represented a further step towards the creation of independent Bantustans.

Black Laws Amendment Act (No 7 of 1973) was designed to speed up the planning for partial consolidation of the homelands. The Act enabled "a removal order to be served on a Bantu Community as well as on a tribe or portion thereof" and restricted right of appeal.

The Expropriation Act (No 63 of 1975) This Act which has been amended is still on the statute books. It sets out the power of Minister to expropriate property for public and certain other purposes and to take the right to use property for public purposes**.** Subject to the provisions of this Act the Minister may, subject to an obligation to pay compensation, expropriate any property for public purposes or take the right to use temporarily any property for public purposes.

4.4. PAST LAWS AND RESTITUTION AWARDS

Given that the right to restitution rests on claimants being able to show that they were dispossessed by means of a racially motivated law or practice, In order for claimants to receive an award in terms of the Act evidence has to be found to show that dispossession took place under such circumstances. This evidence may be contested by landowners who are reluctant to sell. Certain types of removal, particularly internal removals within scheduled and released areas for purposes of building a dam or removals for the purposes of establishing a conservation area can be more challenging to justify in terms of the Restitution Act.

Such cases often hinge on the practice as opposed to the character of the law utilised to effect the dispossession. They focus on the extent to which people were adequately compensated and the manner in which the removal was carried out. In addition many of the above laws overlapped with one another. As Walker and Platzky (1985) have pointed out, “The procedure for removing people is not spelt out in the legislation itself, but is set out in administrative regulations drawn up at a departmental and not a parliamentary level and not readily available to the public”.

4.5. CATEGORIES OF REMOVAL

It is not easy to come up with an all-encompassing framework that captures all the different types of removals. This is particularly the case within former reserves and homeland areas where removals and resettlement of one group of people impacted on the land rights of others creating conflicting and overlapping rights on the land.

There were many different circumstances which led to forced removals. These included:

- Evictions and displacement from white owned farms including labour tenants, sharecroppers and surplus workers
- Group areas removals, removal from mission lands and urban relocations
- Homeland consolidation and “black spot” removals
- Betterment within the reserves
- Conservation, forestry and related removals
- Removals from land which became SADF military training areas
- Internal removals in scheduled and released areas due to consolidation of homelands and construction of dams, irrigation schemes etc.

De Wet (1994: 360) cites SPP which identified 11 different categories of relocation arguing that “up to 1982, ranked by cause, the largest categories of removals were people either being evicted from or leaving white-owned farms (1,129,000 people); people being moved in terms of the Group Areas Act (No. 41 of 1950, and as amended) which prescribes the provision of separate residential and trading areas for Coloureds, Indians and Whites (834,000 people); urban relocation, whereby African townships in white South Africa were deproclaimed, and their inhabitants were settled in newly established urban settlements within the homelands (730,000 people); homeland consolidation and 'black spot' relocations (614 000 people)”.

De Wet notes that “the figure of 3.5 million relocatees does not include people resettled within the homelands in terms of the implementation of Betterment planning, which SPP (1983, Vol. II:110) estimates 'has probably removed more people in more places with greater social consequences and provoking more resistance than any other category of forced removal in South Africa'”.

While evictions from white owned farms and group areas removals are well understood other types of removal requires some explanation.

4.5.1. Betterment

Betterment involved externally imposed land use planning including controls on livestock, location of arable lands and enforced villagisation within the homeland areas. It resulted in loss of land rights and often led to negative social and economic consequences (McAllister, 1986, McAllister, 1989, Westaway and Minkley, 2006). Betterment is a complex matter to address as restoration is not possible and very often people do not seek alternative land as they have now developed new ties and social networks (Spiegel, 1988). Likewise valuation of what people lost is complex as there is no formula for valuing social capital.

4.5.2. Internal removals

Extensive removals were associated with homeland consolidation. Some removals were regarded as ‘voluntary’. The process of homeland creation and subsequent attempts at consolidation stretched out over several decades. In a vain attempt to make the homelands work communities were uprooted or found their land incorporated. Dissenting chiefs and headmen were removed and their places taken by others more compliant with the system.

In some instances people relocated ‘voluntarily’ to escape being incorporated under a particular homeland system. Perhaps the largest such case was in Herschel which in the mid 1970’s became a pawn in the ‘pre-independence’ tradeoffs between Transkei and Ciskei. The inhabitants were given the choice of joining Transkei in its new status, or moving to land in the Hewu area west and south of Queenstown, in what was to become northern Ciskei but what was then still part of South Africa, where they were promised good farming land, cattle, implements, and an infrastructure of schools and clinics. On the strength of those promises, and in distrust of the new independence of Transkei, approximately 50,000 people uprooted themselves, to find that they were allocated a tract of bare, exposed land, with nothing but tents to live in and no facilities. This was the "temporary camp" of Thornhill (Human Rights Watch, 1991). Simultaneously there was an exodus of Sotho speaking people from Herschel who left for QwaQwa.

4.5.3. Forestry

Many forestry operations have since been established on land where people were displaced in the past. South Africa has 1.5 million hectares of timber plantations, made up of pine, gum and wattle species. The plantations have been established over the last 120 years and now support large sawmilling and paper industries. Around 40% of large grower plantation land is subject to land claims. Transfer will take place in terms of the models proposed by the industry and approved by the Minister of Rural Development and Land Reform in 2009 (Clarke, 2012).

4.5.4. Conservation

Numerous removals took place related to the establishment of parks and conservation areas. Fig (2004)observes that the colonial legacy, whose model of conservation was to separate people from nature involved alienating communal land for nature conservation, removing the people, and fencing nature in. People became poachers on their own land. Restitution is these cases usually involves joint venture agreements between SANParks and the claimants where the area remains under conservation management, but the communities gain ownership and a share of the benefits (Fabricius et al., 2001).

4.6. THE LEGACY OF DISPOSSESSION AND THE CHALLENGE OF RESTITUTION

One of the consequences of forced removals was the creation of conflicting and overlapping rights in land which have led to multiple claims on the same piece of land through the restitution process. These have in many instances been exacerbated by the consolidation of claims on the same piece of land and the manufacture of artificial consensus in the claim settlement process which later unravels with major consequences. The case of Schmidtsdrift in the Northern Cape is an example of this (de Satge et al., 2010).

Overall this brief survey of the roots of Restitution highlights the legacy of removals and dispossession which has shaped the South African landscape and reveals its multiple dimensions. The array of factors and laws which led to dispossession coupled with the time lapse of several decades between forced relocation and claims for restitution have resulted in an enormously complex and often internally conflicted claim settlement process.

Cheryll Walker, a former Land Claims Commissioner and documenter of forced removals observes:

> "In contrast to the formal coherence of the generalised account of dispossession, the domain of the actual encapsulates a cascading mass of particular histories of dispossession, resistance and/or accommodation, centred on particular pieces of land and now remembered and recast for official validation by particular groups of people, communities and individuals.
>
> For them (the dispossessed) 'the land question' …is a concrete and very particular project, embedded in local histories and dynamics and directed, in the first instance, towards local rather than national needs and constructions of the public good.
>
> These specific histories cover a wide range of tenure forms and relationships to the land and include overlapping rights and claims, such as those of tenants and landowners on former black-owned ('black spot') farms and former and current residents on both state and privately owned land.
>
> There are urban stories in addition to the rural, which invoke similar motifs of community, belonging and loss but validate very different notions of community origins and the economic meaning of land...
>
> Often particular narratives of dispossession and restitution involve conflict among and within groups and competing claims for redress. Options for restitution are, furthermore, constrained by current conditions on the land in question, as well as by changes that the claimants have themselves undergone in the years since they were dispossessed.

> At this level the claim for land is finite, yet its realisation may be riddled with unintended consequences, even disappointments, for claimants."
>
> (Walker, 2004: n.p)

These sentiments are echoed by De Wet who anticipated how restoration of land would create its own problems.

> "Merely putting people back on their old land will not be adequate to ensure their economic viability… There will be no pre-existing guidelines, no historical precedent for dividing up this new land among the settlers. This presents a chance for the constitution of a new set of land relations, in a sense from scratch, as well as the potential for conflict over land. With the new land being both politically and morally new land, its de novo demarcation is likely to give rise to conflict between the older section of the community, who for the most part have held land and leadership, and the younger members, who see an opportunity for themselves in the new situation."
>
> (de Wet, 1994: 369)

5. RESTITUTION CHRONOLOGY

In outlining the evolution of the Restitution programme it is important to recognise that both the Department of Land Affairs and the Commission on Restitution of Land Rights were built from scratch following the democratic transition in 1994. Staff had to be recruited and trained and systems, procedures and institutional design developed from the ground up. While this was a challenge it was also an opportunity to create a new developmental order.

The literature suggests that this opportunity has largely failed to materialise. A recurrent theme is the haphazard nature of systems development, data management and accountability structures within the Commission and in the Department of Land Affairs and its successor the Department of Rural Development and Land Reform. These challenges have been aggravated by continual processes of restructuring and business process re-engineering which has seen claim settlement shift from a predominantly legal process to an administrative one; from restitution research being managed in house to being outsourced and then brought back in house again. There are differences in the processes and approaches to claim settlement adopted in the different regions. These processes of change combined with the turnover and redeployment of staff, poor systems of induction and inadequate on the job training and mentoring have impacted on the development of the requisite institutional capacity. An assessment of the literature indicates that many of the problems identified early in the implementation of the programme (Du Toit et al., 1998) remain unresolved today which raise serious questions about the efficacy of the Restitution programme and the extent to which it has fulfilled its constitutional mandate and realised its developmental potential.

5.1. THE EVOLUTION OF THE RESTITUTION POLICY AND THE CLAIM SETTLEMENT PROCESS

Weideman (2004) provides background on the development of the restitution policy framework noting that in 1992 and 1993 ANC land policy documents argued for the development of a court-based restitution process, which would compensate those who were forcibly removed. In 1993 a small ANC working group started to develop the Restitution Programme.

Restitution was made a constitutional imperative through Section 25(7) of the Constitution of South Africa (Act 108 0f 1996) which states that a person or community dispossessed of property after 19th June 1913 as a result of past racially discriminatory laws and practices is entitled…either to restitution of that property or to comparable redress. This is further elaborated in Section 2(1) of the Restitution of Land Rights Act (No 22 of 1994) which distinguishes between personal and community claims.

The White Paper on South African Land Policy (Department of Land Affairs, 1997) set out the overarching goals of Restitution policy which included the restoration of land and provision of other redistributing remedies to people dispossessed by racially discriminatory legislation in order to contribute to reconciliation, reconstruction and development.

The Restitution of Land Rights Act is interpreted by the Land Claims Court (LCC) which was established in 1996. The LCC is a specialist court which performs an independent adjudicatory function. It hears disputes arising from those laws which underpin South Africa's land reform initiative. The Land Claims Court enjoys the same status as the High Court of South Africa. Appeals lie to the Supreme Court of Appeal and, in appropriate cases to the Constitutional Court. Aspects of the Court's jurisdiction and proceedings are peculiar to the functions it performs, for example, it may conduct any part of its proceedings on an informal or inquisitorial basis and it may convene hearings in any part of the country to make it more accessible. The Land Claims Court has promulgated its own set of rules which set out its procedures in detail (The Land Claims Court of South Africa, 2013).

The combination of establishing the Commission on Restitution of Land Rights (CRLR) as a new institution with an uncertain relationship with the DLA and feeding into a court based claim settlement process meant that very slow progress was made in settling claims. Just 47 claims were settled in the first five years of the programme (Hall, 2011). Concerns about the causes of this slow progress prompted a Ministerial review in 1998 which led to a changed approach requiring an amendment to the Act which gave the CRLR power to negotiate settlement agreements (Ibid). The deliberations and findings of this review are discussed in more detail below.

5.2. 1994 - 2000

The Restitution of Land Rights Act was signed by President Mandela on 17 November 1994. The Commission on Restitution of Land Rights opened its doors in 1995. Five commissioners took office on 1 March 1995. Staff had to be appointed, offices found, systems established, people trained and the right of restitution had to be communicated to all those that had been dispossessed. When the CRLR began work it inherited some 3 000 claims from the defunct Advisory Commission on Land Allocation (ACLA) initiated in terms of abolition of Racially based Measures Act (No 108 of 1991) passed in the last years of the old regime.

Research into restitution claims started towards the end of 1994 when the Department of Land Affairs was formally instituted. The DLA established a Directorate of Restitution Research. The function of the Directorate was to produce research reports on all land claims referred to it and prioritised by the Commission. It prepared reports and additional information needed by the State to negotiate claims. The Land Claims Court was established in 1996.

From the 1st May 1995 eligible claimants were given three years to lodge claims. This period was extended to the cut-off date of December 31st 1998. A *Stake your claim* campaign was run to communicate the Restitution Claim process nationally. A total of 63 455 claims were

reported to have been lodged however there remained speculation that many more claims had been submitted, but not in the full and proper form, which were not formally recorded. It has been argued that "it is certain that a great many losses for which valid claims could have been lodged were not submitted – mainly because people did not know about, or did not sufficiently understand the process"(Turner and Ibsen, 2000). As some claims were split in the process of investigation so the number of claims rose to 79 693 by 2004 which has raised questions about the lawfulness of this process.

From the beginning there were concerns that the Commission was never given adequate capacity to fulfil its mandate:

> *"Warning signals that the commission was not functioning at full-steam and was having difficulties setting up its infrastructure were clearly sounded by Seremane in his first annual report. Things were clearly not happening 'chop chop'. The report refers to 'the cobwebs of bureaucratic red tape'; `the ... ponderous workings of the public service and its accounting systems'; 'the delays in providing administrative capacity'. Seremane cautioned against 'the mind-set of regarding Restitution as a Cinderella minor programme'…*
>
> *(Mesthrie, 1999: n.p)*

Between 1994 and 1998, the Department was able to research 350 rural land claims. The Restitution Research Department focused on governmental and archival material, whereas the Commission directly interacted with and obtained information from the claimants, their legal representatives and other interested parties.

Much restitution research depends on the archival records in the custody of the National Archives of South Africa. Many of the records relating to forced removals were unordered and unsorted and resulted in the process of research being unnecessarily protracted. A further problem was that many records remained scattered in government offices around the country, often in unknown locations, because of the diverse nature of the departments which administered apartheid policy.

An Archives Project was set up by the Department with donor support to overcome these problems. Phase I resulted in the sorting and indexing of 94 489 files (1,47 km of files) pertinent to the restitution process. Most of the magisterial districts in the country were visited and reports compiled on the files discovered at the magistrates, local government and district offices of the Department of Home Affairs. Phase II unearthed a further 2,99 km of files at the National Archives relevant to the restitution process which were sorted and indexed (DLA, 1998).

On the 15th October 1996 Elandskloof was the first rural land claim to be settled by order of LCC and in June 1997 the first urban claim was settled in Kingwilliamstown. However by the end of March 1998 only seven claims had been settled. The Commission came under mounting criticism for slow progress in processing and settling claims although it has been argued that criticisms which revolved around quantitative measures of success often misunderstood what was involved in the Restitution process and the scope and complexity associated with individual claim settlement.

> *"The number of claims lodged do not provide one with the magnitude of the task - one claim could involve thousands of individuals. District Six, for example, is registered as one claim but includes a total of 2 293 claimants and each of these represents several*

different households. Elandskloof represented 230 families in 1996 but this would grow over the year to involve 350 families; the Lohatlha claim in the Northern Cape was estimated to include 5 000 families."

(Mesthrie, 1999)

5.2.1. The Ministerial Review of Restitution: 1998

The slow pace of settlement prompted a Ministerial review of Restitution in 1998 (Du Toit et al., 1998). The review itself was a highly contested process characterised by "negative dynamics and "a public attack on the integrity and objectivity of the team by the CLCC" which the team interpreted as "symptomatic of the many deeper problems related to contests about power and control within the Restitution process itself" (Ibid, n.p). The review, which is cited at some length below, cautioned that "although restitution was a rights based programme it is vital that claims find developmental and sustainable resolutions" noting that "the programme will eventually be judged by what it has been able to deliver".

The review identified an overwhelming array of problems impacting on the restitution process including:

- The proliferation of claimants which stem from the way which the Act has been interpreted and framed which resulted in "a wide allocation of the right to claim" and meant that even a single dispossession can surface "scores of conflicting descendants" and made the processing of claims an "impossibly onerous task".
- The "crisis of unplannability arising out of the absence of a reliable database".
- The "absence of any coherent or nationally consistent set of management structures, policies, systems and procedures".
- The legal and procedural intricacies of the Restitution of Land Rights Act which led to "the evacuation of administrative authority" and the "disempowerment of claimants".
- The structural contradiction in the Act which created the Commission that was "apparently independent and accountable to parliament", while being located in the Department of Land Affairs with the DG as the accounting officer.
- The assumption that the state would always be represented by the DLA which allowed metropolitan government to avoid responsibility for dealing with land claims.
- A lack of guidance with regard to the meaning of the concept "just and equitable" compensation.
- The confusing framing of options which offered compensation or restoration – often conflating restoration with settlement.
- The adversarial relationship between the Commission on Restitution of Land Rights and the Department of Land Affairs.

Initially the Restitution Act did not make it clear whether the Chief Land Claims Commissioner reported to parliament or to the DG of DLA. There were concerns that lines of authority and accountability for the restitution process were not clear.

The review team identified three streams into which claimants could fall:

- large group or community claims that result in a development or settlement project
- large numbers of urban claimants who may opt for monetary compensation
- claimants who require tailored solutions such as the restoration of individual properties

The review recommended that the "central responsibility of officials is to ensure that claims…are resolved in ways that are feasible, affordable, sustainable and realistic". (ibid, n.p).

It highlighted a number of problems associated with the business process itself. They cautioned that this was "simply one component of the problem and that a resolution to the difficulties of the Restitution process cannot be imagined to be accessible through the streamlining of the business process alone".

The report emphasised the "highly complex and conflictual" nature of restitution claims which "requires a business process that combines elements of a mass production line and a specialised individualised – attention approach". It noted that:

> "A number of process manuals have been developed both in the DLA and CRLR. Each of these has remained limited to a particular regional experience and some of them…have never been revised in the light of practice".
>
> (Ibid: n.p)

The assessment distinguished between strategic and administrative process models for settling claims. Strategic models emphasised flexibility and a case by case approach while administrative models focused on batch processing of claims "through preset stages with clearly described inputs, outputs, controls and criteria for each stage".

The report examined key components of the restitution business process at the time and identified related challenges as follows:

- Initial engagement
  - Providing background information and advice to potential claimants on the claims process.
- Lodgement
  - This required submission of the claim form which the review noted did not solicit the necessary information to make informed decisions about gazetting or even acceptance of the claim.
- Registration and acknowledgement
  - Registration happened in different ways in different offices.
  - In some claims were immediately entered on the MAGIC database and a letter with a KR number sent out.
  - In others a letter was sent out with no KR number as the claim was only entered into database later.
- Dealing with queries

- The Magic database did not contain information about the status of a claim or its stage of processing.
- This meant that queries had to be directed directly to the claim researchers who reported spending a third of their time answering queries.

- Screening
  - A wide range of approaches were identified as being used by different offices.
  - Some saw acceptance as a formal stage.
  - Others argued that this decision had to be deferred until more information came to light.
  - This stage was conceptualised as validation in the Western and Northern Cape.
  - Concerns were raised about Commissioners accepting cases which "clearly were not claims".
- Gazetting
  - Claims were often gazetted despite key information not being available requiring that claims have to be regazetted later "at a huge cost in time and money".
  - Inappropriate gazetting curtails the rights of the owners and can also lead to conflict between claimant groups.
- Prioritisation
  - Different processes of claim prioritisation had been developed in different provinces.
  - Prioritisation was not used in ways that ensured co-ordination between parties for joint planning and budgeting
- Detailed investigation
  - The review highlighted a distinction between s8 and s9 staff, the latter who entered the process after the claim had been gazetted, thus creating a lack of articulation between two halves of the restitution process
  - The review highlighted problems associated with archival research and lack of a research method which would balance archival and community narratives of dispossession.
- Options
  - The review highlighted very little investment in the formulation and assessment of options
- Referral to DLA
  - This involved the Commission informing the DLA of the facts of a claim and the provision of research reports and other documents
  - The referral was to enable the DLA to negotiate cases
  - These were registered in a separate database in DLA

- Development of a negotiating position
    - Referrals to negotiation “specialists” were the “single most significant source of actual delay in Restitution processing” identified by the review
- Valuation
    - This was characterised as a time consuming and slow process
- Negotiations
- Referral to court
    - The team argued that many cases were referred to court before they were ready
- Implementation of Court Order
- Planning and settlement

The Minister of Land Affairs responded to the review findings and accepted its recommendations that the Commission be integrated into the DLA while all functions of restitution would be vested with the Commission to avoid duplication of effort. The Commission would be accountable to the Director-General through the Chief Land Claims Commissioner in order to integrate into the land reform programme as a whole.

It was also accepted that emphasis should shift to providing greater administrative capacity for mass processing of claims. The role of the Land Claims Court would be reduced such that it would only adjudicate on claims not resolved through alternative dispute resolution and would act as a review or appeal court for aggrieved parties. The process resulted in amendments to the Act in March 1999. This marked the shift in emphasis from a judicial to an administrative process and initially urban claims were prioritised for settlement.

5.2.2. Categorising claims

Pienaar (2006) examines how the categorisation of claims has been a persistent problem throughout the Restitution process. The Act alludes to individual/personal and community claims and does not use the terms ‘urban’ and ‘rural’. Personal claims are claims lodged by individuals. Community claims can in certain instances join together thousands of households in a claim that may encompass scores of land portions.

Section 10 of the Act deals with the lodging of a claim on behalf of a community and with the mechanism for resolving disputes over who represents a community. Section 35(2) empowers the Land Claims Court, where the claimant is a community, to determine the manner in which the rights in land are to be held. (This is also addressed in Section 35(3) and Section 38(b)(i). These provisions aim to ensure that Court orders or Section 42D agreements address the nature and extent of the rights of the members of a community, once the claim is settled.

Court judgments in the Land Claims Court have emphasised the need to determine the extent to which ‘***commonality’*** *and* ***‘cohesiveness’*** are present in a community claim rather than focusing on identifying and listing all the individual members of the community. However the identification of members of the community and their rights are essential for land use planning and land rights management purposes as well as determining of extent to the grants and subsidies to be allocated such as:

- Restitution Discretionary Grants of R3 000 per household;
- Settlement Planning Grants of R1 440 per household; and any additional subsidy
- Assistance in terms of Section 42C of the Act for the development or management of, or to facilitate the settlement support.

5.2.3. 1998: Quality of Life report

The DLA's 1998 Quality of Life Report noted that there has been "very little improvement in the lives of communities within land reform projects. In some cases, communities were found to be worse off in terms of access to basic services of water, electricity, sanitation, health care, and education facilities on the new land as compared with their previous settlements. And they had seen little improvement in incomes" (Camay and Gordon, 2000).

This finding alerted the Commission and the DLA to the need to engage with how best to provide post settlement support and began a debate about what the Commission's role was in this regard.

5.2.4. Introduction of the Standard Settlement Offer

The pace of the restitution claim settlement increased dramatically in 1999. The introduction of Standard Settlement Offer (SSO) in 2000 made available cash compensation for urban claims.

"The SSO offered cash compensation for urban claims usually set at R40,000 per household for former owners (R50,000 in some metropolitan areas) and R17 500 per household for former long term tenants" (Hall, 2004: 13)

5.3. 2001 - 2008

In July 2001 a campaign was launched to validate an estimated 38000 outstanding Restitution claims. Most of these claims were reported to have been validated by February 2003. President Mbeki announced in February 2002 that all claims would be settled by 2005. Minister Didiza called for rural claims to be prioritised in 2002.

The Commission and the DLA set about dealing with claims on forests and protected areas. Cabinet Memorandum No. 5 of 2002 set out an approach for settlement of valid claims on State forests, protected areas, and World Heritage Sites.

5.3.1. Provision of post settlement support

Historically there were sharp disagreements within the Commission about where their role began and ended. A Settlement Support Unit was established in the CLCC in 2002 which set out to give more substance to post settlement planning and practice. Post settlement support units (PSSU) were then established in all the RLCCs to take responsibility for development planning and facilitation in order to "promote the sustainable development of land restored to beneficiaries by individually and collectively making resources available and administering them" (Lekala, 2005).

These units had 7 key responsibility areas:

- National co-ordination

- Facilitation of development planning
- Enhancing co-operative governance
- Resource co-ordination
- Implementing a monitoring and evaluation system
- Establishing an exit strategy
- Dealing with 'legacy claims.'

These functions are further spelled out in a presentation on Restitution Development Support (Lekala, 2005) which identifies:

- Resource and stakeholder mobilization
- Interim management of restored land
- CPI support and capacity development
- Business models development
- Promotion of sustainable land use patterns
- Sustain going concerns on restored land
- Capacitation of beneficiaries' technical, business, organisational, planning and financial management skills.

However Hall (2003) noted that "there was no consensus in the Commission about its role after a claim had been settled". Much of the initial focus on post settlement support was on development facilitation and ensuring that other government departments and municipalities were in the picture. There was never a thorough assessment of the extent to which the other role-players had the capacity and budget allocated to address settlement support needs of projects.

By and large the debate about post settlement support focused more on ***who*** was responsible for service provision rather than on ***what*** services were required and how to customise these for different Restitution contexts. On the whole there has not been much focus or monitoring of the ***quality*** of the services provided to claimants.

In 2006/2007 the Sustainable Development Consortium was appointed by the Commission with the support of Belgian Technical Co-operation to develop a comprehensive strategy for the provision of post settlement. The scope of the Settlement and Implementation Support Strategy was subsequently extended to land reform as a whole given the perceived widespread failure of land reform projects across the board. The strategy aimed to dovetail with the area based planning approach intended to embed land reform within municipal IDPs and to align the support of different government departments in line with their respective mandates. The strategy conceptualised the provision of support as part of a joint programme of government which would enable:

- Functional alignment and spatial integration

- Social, institutional and capacity development
- Integrated natural resource management and sustainable human settlements
- Livelihood security, enterprise development and business support.

The strategy was launched by Minister Xingwana in 2007 but was never implemented.

5.3.2. Setting the deadline for claim settlement

By February 2005 57,000 land claims were reported to have been settled. In February 2006 Minister Didiza announced that deadline for claim settlement had been pushed forward to March 2008. The Commission pledged to use expropriation where negotiations with owners have dragged on for more than three years.

President Mbeki in his State of the Nation address in February 2006 observed that, "Land reform and land restitution are critical to the transformation of our society. Accordingly, the state will play a more central role in the land reform programme, ensuring that the restitution programme is accelerated, further contributing to the empowerment of the poor, especially in the rural areas." The Minister of Land Affairs stated in Parliament in the same year that the target for settling the remaining 7 000 odd claims had been set for 2008. She noted that full settlement of rural land claims would remove the uncertainties of farmers, banks or investors about the agricultural sector. She also announced that during 2006 the government would review the "willing-buyer willing-seller" policy, (an undertaking made at the 2005 Land Summit) land acquisition models and the possibility of price manipulation. The Minister also said government was also looking at assessing the value of farmland - including with regard to compensating farmers relinquishing ownership - based on its "productive capacity" rather than on the basis of its market value.

5.4. 2009 – 2013

The Ministry of Rural Development and Land Reform (DRDLR) was created in 2009. According the DRDLR website the rebadged department opted for a 'three legged strategy" involving:

- Sustainable land and agrarian transformation
- Rural development
- Land reform based on restitution, redistribution and land tenure reform.

This was to be supported by "deliberate and intensified post-settlement support" and one of the key priorities of the DRDLR remained to "expedite the finalisation of land claims" (DRDLR, 2013).

6. CONTESTED DISCOURSES ON RESTITUTION – RIGHTS, LEGAL PROCESS, PRACTICE AND FEASIBILITY

Reflecting on the progress of Restitution Du Toit (2000: 75) highlights that "the most important problem in the restitution programme is not the slow rate of delivery – although clearly slow delivery is a problem – but also the question of just *what* is being delivered: the vision, aim and policy that drives delivery…the purpose of the programme".

He observes that the Restitution programme has prioritised the settlement of urban compensation claims and cautions that such an approach which is driven by the need to get claims off the government's books is problematic. He notes that while urban claims make up 80% of the claim total these are primarily individual claims and account for about 0.3 million people. Rural claims on the other hand are primarily community claims which account for 20% of the claim total but could join as many as 3.5 million people.

Du Toit illustrates how the discourse of a rights based programme has deteriorated into a rights driven programme which constructs the dispossessed as victims who were ejected from a romanticised and largely undifferentiated unitary community. He highlights the inevitability of disappointment associated with the restoration of land drawing on Ziseck's concept of "the loss of the loss" which entails the recognition that "we never had what we thought we had lost", (2000: 82).

According to Du Toit once return is effected the unifying function of these narratives of dispossession which sustained the shared struggle for restitution is extinguished as people face the realities of the present and position themselves to construct the future. Du Toit presciently observed that "the task of establishing and vindicating the existence of a right to restoration to the land in question" marks the beginning of the process and "the most intractable questions relate not to the *whether* but the *how* of restitution".

The tension between the 'whether' and the 'how' – rights and feasibility of Restitution features prominently in the evolution of the claim settlement process and in current debates concerning the Draft Restitution of Land Rights Amendment Bill.

There have been a variety of pressure spikes over the life of the Restitution programme. There was considerable pressure to settle claims to meet the revised 2008 deadline. This concentrated resources to the front end of the restitution claim settlement process at the expense of making sufficient investment at the back end to ensure that land restoration contributed to sustainable development. Officials within the Commission highlighted these tensions clearly:

> *"Obviously the organisation has an overall political target which has been defined by the Minister and which has been defined by the President in their addresses to Parliament. There is target setting, which in a way are non-negotiable, and we have been saying all hands are on deck to meet that… This imposes a number of challenges in terms of qualitative aspects. Because as you have the more need for speed there's issues of human error; issues of process management, either speeding up processes and moving too fast for the pace of communities, and also moving too fast for the pace of other government departments. This is another very relevant issue. It is a bit of a pressure*

cooker. A lot of plans are fast tracked politically. There is a lot of uneven implementation or uneven roll out of the process. You get good spots and you get bad spots."

(SDC, 2007: Interview with Brendon Boyce)

Cheryll Walker reflects on the practical implications of reopening claims:

"Firstly, there are serious questions about the suitability of the restitution programme as conceived in 1993/4, 1) to carry the weight of popular expectations and aspirations around land and redress in the current conjuncture, 2) to mediate the many overlapping claims and intra- and inter-claim conflicts that the process inevitably (as we now know) generates, and 3) to manage the unexpected policy dilemmas that the commitment to land restoration as the primary and preferred form of redress produces. Examples of the latter include the numerous cases where restoring land to legitimate claimants has clashed with other public goods or government commitments, such as housing for non-claimants (e.g. Cato Manor), conservation (e.g. Kruger National Park, Isimangaliso Wetland Park) and the land demands of the SANDF (e.g. Lohatla)."

(Walker, 2013: 1 -2)

The LRC's argues for instance that amending s 33 of the Act to require consideration of the feasibility and cost of restoration and the ability of the claimant to use the land productively is "impractical, unwise, and unconstitutional" and "will inhibit the Constitution's vision of a society that aims to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" (LRC, 2013).

Hall (2013) notes that "proposed amendments to Section 33 of the Restitution Act introduce new conditionality on the restoration of land, which would likely preclude most claimants from actually getting their land back – unless they have substantial resources of their own and can prove they can use it 'productively'".

6.1. PERSPECTIVES ON THE OPERATION OF THE LAND CLAIMS COURT AND ITS RELATIONSHIP WITH THE COMMISSION

As noted above the relationship between the Court and the Commission has been somewhat strained. Du Toit et all (1998) allude to the 'headmaster' role of the court which through the mechanism of pretrial meetings would often hihglight the inadequate preparation of claims which were referred to the court.

Persons who have had experience of working with court confirm what has emerged from other reviews and highlight a number of concerns relating to the performance of the Commission and the challenges which face it and the execution of the restitution process. They emphasise that:

- Restitution is a legal process determined by the Act which involves complex property transactions requiring well trained and capacitated staff.
- The effective implementation of the Restitution programme depends on an independent and impartial institution which has the trust of claimants and landowners.

- The shortage of legally trained staff and researchers available to the Commission has compromised the preparation of cases which have come before the land claims court.
- Judgements of the LCC have been critical of the Commission and the preparation of cases which have come before the courts. These highlight the inadequacy of supporting documentation and the frequency of documents which are mislaid or incomplete.
- Inadequate data management means that often competing claims on the same property have not been identified timeously which has compromised legal proceedings.
- Concerns about no shows at meetings with claimants and land owners and frequent failures to respond to correspondence which have eroded public trust and confidence in the Commission.
- Unintended consequences of strategies adopted by the Commission to settle claims administratively without reference to the courts which include high prices being paid for land and the drafting of settlement agreements which are legally flawed, often as a result of excluding a competing claimant from the settlement.
- The practice of bundling competing claimants together to create notional communities and speed up claim settlement has been declared unlawful by the Land Claims Court which has stated that land claims are distinct and cannot be merged.
- This process of aggregating claims and joining communities has contributed to post claim settlement conflict and disputes which have nullified the benefits of restitution process.
- The need for fair and transparent processes for prioritising claim settlements and avoiding unnecessary delays.

See Appendix 3 for a detailed analysis of cases which has come before the land claims court which have explicitly criticised the Commission.

6.2. PERSPECTIVES ON PROGRESS WITH CLAIM SETTLEMENT

Pienaar (2006) argued that the high numbers presented by the Commission as being settled are based on the fact that the commission is counting the extent to which it has dealt with claims that have been lodged (in other words, claim forms). It is not assessing or reporting on the actual number of claims, be it a claim by a number of co-claimants as the direct descendants where a person was dispossessed of land (most often an erf in a urban residential area) or a claim where a community (as a single claimant) was dispossessed of land (most often rural/agricultural land).

According to Pienaar this problem was compounded because the Commission incorrectly counts its claim forms on the basis of “urban claims” and “rural claims”. The Restitution of Land Rights Act does not provide for such a distinction. The Constitution and the Act distinguishes between claims by persons (usually as co-claimants) and claims by communities (as single entities).

The problem with the counting of “claims” (as opposed to counting claim forms submitted) becomes even further compounded because the Commission incorrectly refers to members of communities in community claims as “claimants” and has undertaken to verify such “claimants” on the basis of direct descent. While ‘direct descent’ (as opposed to testatory heir) is a

requirement for the validity of a claim by a person, the validity requirement in a community claim is whether the group of people constituted a community at the time of dispossession and continued to do so up to the submission and settlement of the claim.

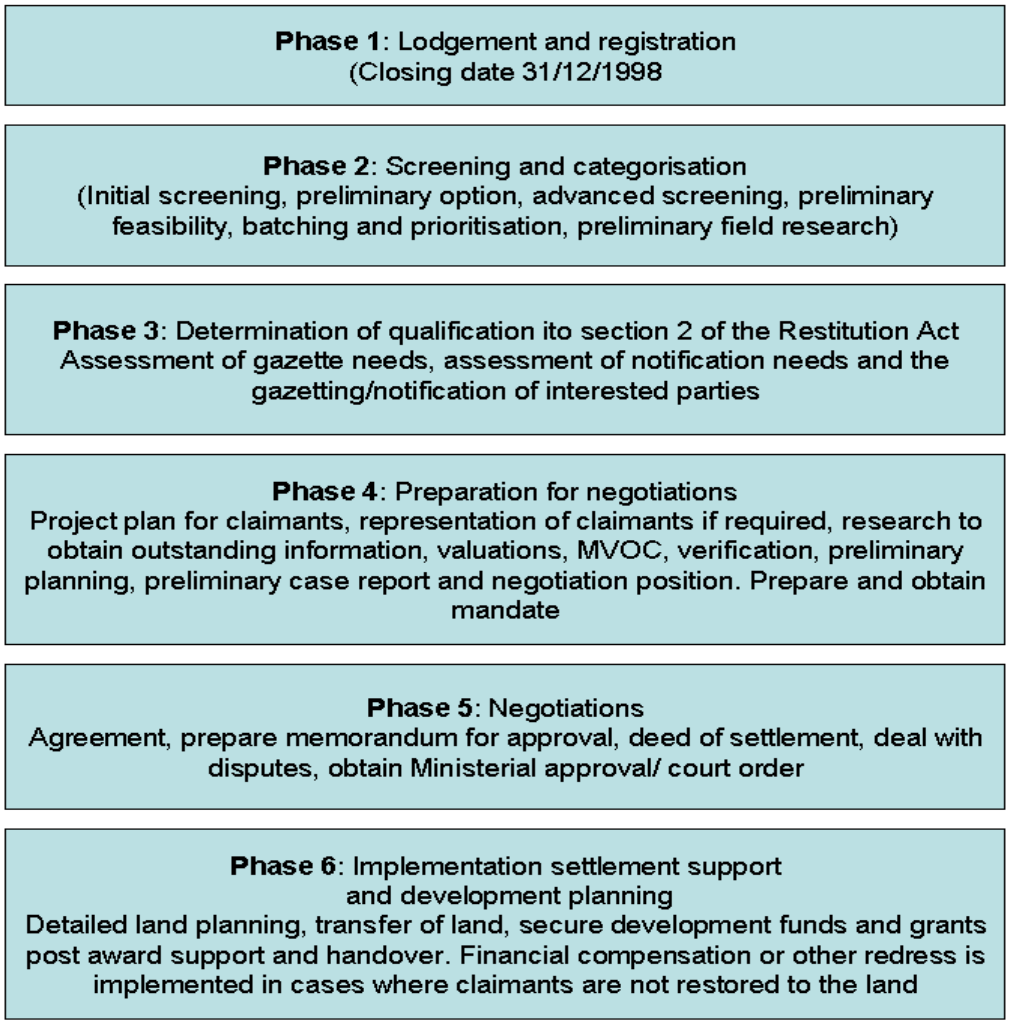
6.3. PLANNING AND BUSINESS PROCESS APPROACHES FOR CLAIM SETTLEMENT AND DEVELOPMENT

The whole notion of developmental restitution has remained fundamentally contested. The narrow perspective is that Restitution, as a rights based programme, should prioritise the restoration of property that was lost and that thereafter the responsibility of the State should fall away. However this has not made sense for claims in rural areas where large tracts of high value agricultural land are under claim which make important contributions to the local economy providing employment and making use of services up and down the value chain.

Work by the Sustainable Development Consortium in 2006 and 2007 revealed that there were at least two project cycles in use within the Commission:

- An overall cycle identifying broad phases in the claims settlement process
- An operational/implementation planning cycle for post settlement support

Figure 1: Outline of the Restitution Claims Process

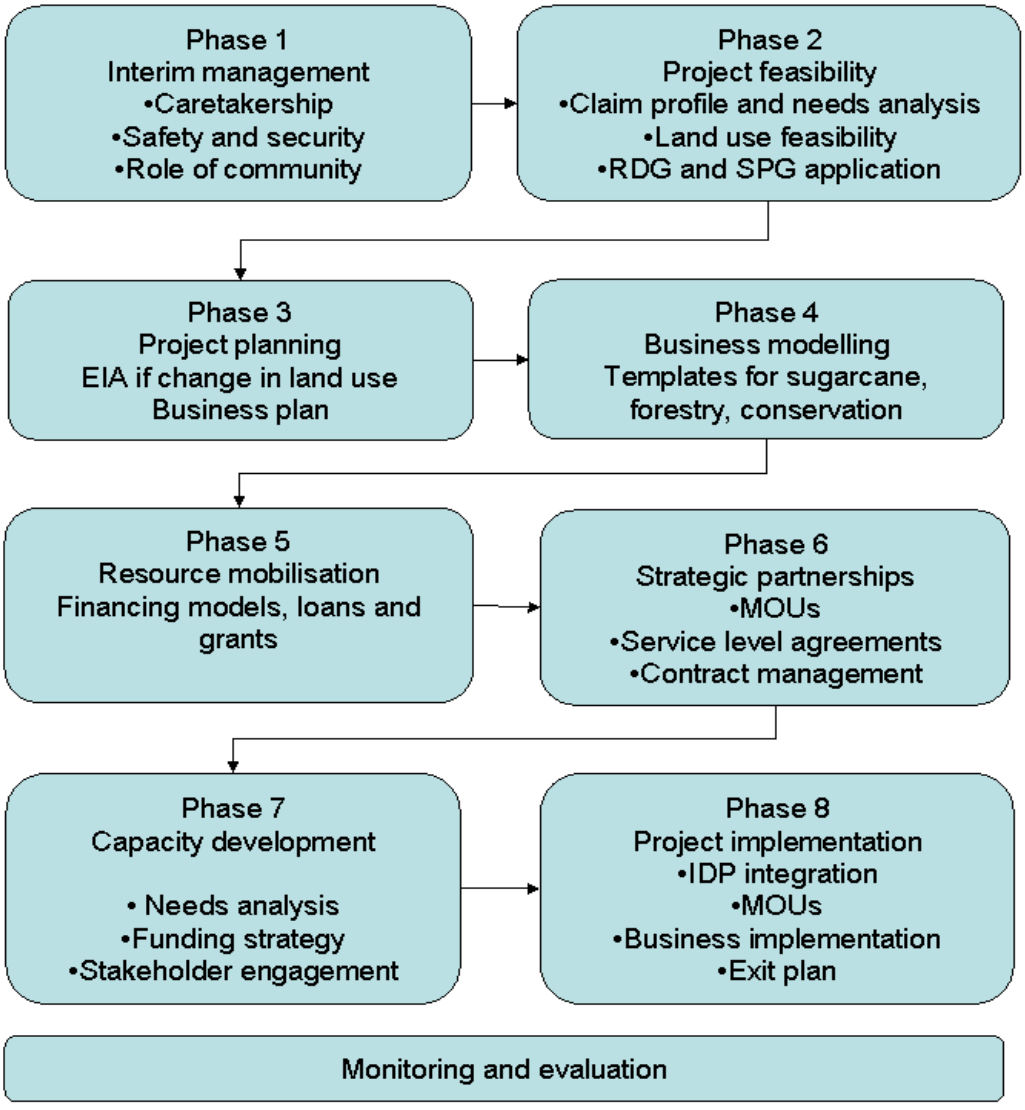


It should be noted that the phase of preparation of a referral report and referral to the Land Claims Court in circumstances where the claim is not settled, is not captured in this standard business process.

SDC observed that the claims management process was loaded towards the front end – the business of verification and negotiations leading up to the legal settlement of the claim while officials with responsibility for post settlement support argued that the focus on planning for implementation came too late in this process.

A separate business process for post settlement support was developed within the PSSUs established by the Commission. While this function is no longer deemed to be the responsibility of the Commission it is no longer clear where this responsibility has been relocated.

Figure 2: Development Planning Operational Map



The checklist which accompanies a Section 42D submission requires a wide range of supporting documentation (See below). However the emphasis appears to have been on the assembly of this documentation as the means to settle and extinguish the claim as opposed to

effectively linking the claim settlement to the potential for tangible benefits for those who were previously dispossessed. This is relevant to the design of the Restitution 'business process'.

Effective process design has to be anchored to an agreed purpose that makes it clear what the process is to achieve. A process that is geared to the legal settlement and extinguishing of claims against the State will look very different from one that sets out to maximise the developmental opportunities associated with the restoration of assets or equitable redress.

These differences are well illustrated in the Covie claim (Conway and Xipu, 2011) where the community advised by the Southern Cape Land Committee held out against the premature 'settlement' of the claim as they had learnt from the experience of the Dyssselsdorp claim where the settlement award could not be implemented due to the rushed claim settlement process which had handed over the land without any development plan being in place with secure commitments from different government actors.

6.4. THE CURRENT CLAIM SETTLEMENT PROCESS: PRACTICE IN THE WESTERN CAPE

The HSRC evaluation team in the Western Cape summarise the current claim settlement framework (Jackson et al., 2013) as implemented in the Western Cape.

The first stage involves the lodging of the claim.

- The Department accepts the claim form and acknowledges receipt.
- It also captures the claim on its land-base database.
- The Claim is then allocated to a Project Officer (PO).

The second stage involves researching the validity of the claim in terms of the Act.

- The PO checks all documents submitted and conducts research to procure documents that are needed to see whether the claim is compliant or not.
- The PO then prepares a Rule 5 Report on the claim and its compliance or non-compliance.
- The report is submitted to the Western Cape Vetting Committee, which either accepts and endorses the claim or rejects it and returns it to the PO for further research.
- If accepted, the report is sent to the Regional Land Claims Commissioner (RLCC), of which there is now only one located in Pretoria, and then to the National Vetting Committee which either accepts and endorses the report or returns it to the Provincial office.
- If accepted the RLCC signs the report and it is returned to the PO. The PO then writes a standard letter to the claimant indicating compliance or non-compliance. This is sent to Pretoria for the RLCC to sign. It is returned to the PO and posted to the claimant, who has 30 days to reply.

A Rule 5 Manual has been developed in the Western Cape to guide the Project Officers on how to compile a Rule 5 Report. The document explains the nature of and how to identify primary and secondary sources. It gives an overview of the information contained in an Erf register - the electronic printout relating to the property that one extracts from the electronic records at the deeds office and it gives

examples of archival documents and historical aerial photographs. It then outlines the information that is required in a Rule 5 report and provides a format for the report. It gives examples of all the information required. It also lists the definitions and meanings of the various words and jargon used in the Commission so that Project Officers can easily identify what they are looking for. It gives detailed examples of what is needed and how to read documents. For example, it provides a copy of a claim form and indicates how to locate the correct date on the form for use in the Rule 5 Report.

The third stage involves gazetting the claim.

- If the claim is compliant the PO compiles a gazette notice, which is verified with the Information Management Unit (IMU) to check that the claim is compliant and make sure that it is not already gazetted or settled.
- The Chief Director approves the publication of the gazette which is sent to the RLCC to be signed.
- The gazette notice is then referred to the Supply Chain Management (SCM) to place an advert in the gazette.
- The gazette is published.
- If there are objections received within the notice period these are recorded and the PO informs the relevant stakeholders whether or not objections were raised in relation to the gazette.

The fourth stage involves verification of the claimants.

- The PO interviews the claimant to determine the beneficiaries of the claim and procures supportive documents (e.g. death/ marriage/ birth certificates, affidavits, ID).
- Research is done to verify the status of the claim. This involves a deeds search and a search for other documentation regarding the individual's claims.
- The PO prepares a verification report which is submitted to the Western Cape Vetting Committee to accept it or return it to the PO.
- The Chief Director signs once accepted and the PO holds a meeting with the claimants to determine an option/ type of compensation in terms of the Act.
- The claimant signs an indication of interest clarifying their proposed compensation type.

The fifth stage involves negotiations

- If the claim involves a restoration and development option, the PO and claimant determine if the original dispossessed land is feasible to restore.
- If it is, current landowners are notified of interest in the land.
- If it is not feasible to restore alternative land is identified.
- If possible, negotiations are entered into with the land owner. If not, the option of expropriation is explored and a S42E is applied for if the decision is made to expropriate.

- If the landowner is open to negotiation, valuations are done through a service provider. The market or historical price is referred to the RLCC for approval.
- If approved, a land release agreement is drafted.
- If the claimant is a community/ group a legal entity must be established and a service provider appointed to conduct a business and development plan.

The sixth stage involves settlement.

- The PO drafts a 42D settlement submission.
- The 42D goes through an approval and signing process.
- If approved in the provincial office it is sent to the RLCC, the Deputy Chief Land Claims Commissioner (CLCC) and the CLCC to sign.
- If the settlement is recommended it is sent to the Minister for approval and finally returned to the Western Cape LCC.

The seventh stage involves implementation.

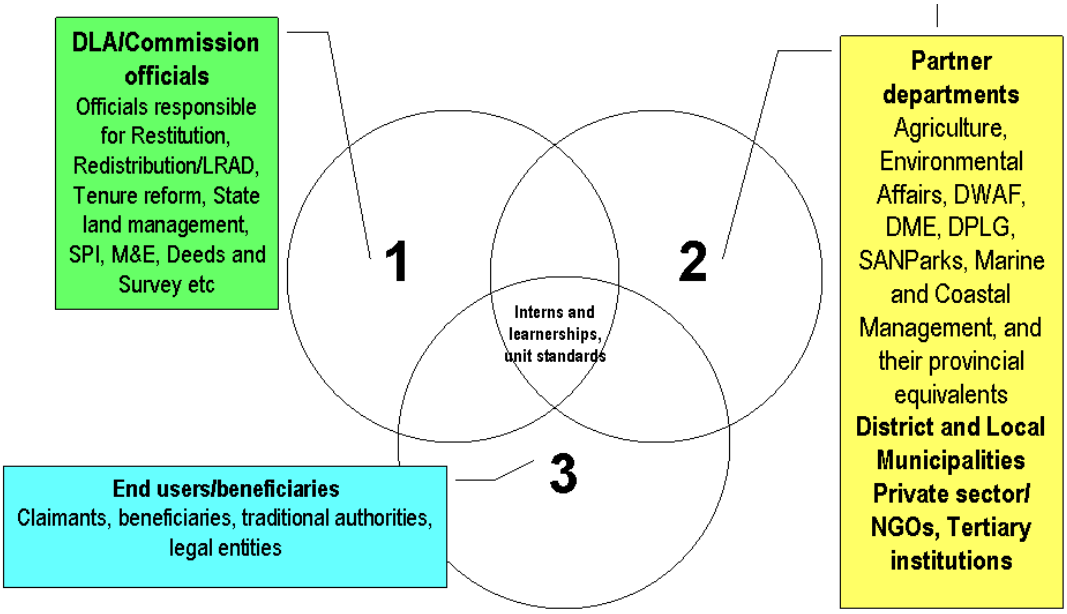
- The Chief Director sends the document to the Western Cape registry who forwards it to the PO.
- The PO drafts a clearance list which goes through internal checks.
- The sales agreement is then signed by landowner and claimant.
- This is submitted to the legal unit for compliance and sent to the RLCC for signature.
- It is sent to the Western Cape legal unit to instruct a conveyancer and is lodged at the Deeds office.
- An inspection of the property is done, a memo is given to Finance, and Finance and the CLCC pay 50% each.
- Land and the deed are handed to claimant and the claim file is then supposed to be sent to post settlement support.

As above there is no documented route which deals with referral to court as an alternative to settlement.

6.5. TRAINING AND CAPACITY DEVELOPMENT

In 2007 the SDC identified three spheres in which capacity development was required to strengthen restitution and land reform implementation.

Figure 3: Capacity Development Spheres: Land Reform



The SDC conducted extensive interviews to assess the adequacy of skills within the Commission. Several of the unit managers spoke about having young and insufficiently experienced staff who could find themselves out of their depth.

> *"Many of the young staff start from a poor foundation of skills or relevant work experience. To be quite blunt we put staff out there and I don't think we ensure that they have enough training and capacity to deal with the issues. So what actually happens is the Commission isn't taken very seriously as staff are often way out of their depth."*
>
> (Sustainable Development Consortium, 2006a: 17)

The SDC observed how resources had been largely invested at the front end of the claim settlement process. Despite the establishment of the PSSUs and the ostensible policy shift towards a greater emphasis on project sustainability there remain concerns about the seriousness with which top management in the Commission regard post settlement. They also identified concerns about the adequacy of the grants and budgets available to make post settlement support meaningful.

Overall the outline of the Restitution claims process was found to be largely silent on the issue of training and capacity development. This process is primarily focused around the settlement of the claim and seems to anticipate the settled claim being handed over to another entity for implementation.

SDC noted that the Section 42D submission checklist ignores training and capacity development issues. It is largely output focused. For example the claimant profile does not appear to require more than a claimant list with ID numbers. Information such as the skills, education, work experience, and current livelihoods of the claimants is not required.

The table below lists the key components required to support the finalisation of a Section 42D Restitution settlement agreement.

Table 1: Key components of a Section 42 D report

42D submission components	Annexures
Background to the claim	
Property description	Title deeds
	Maps
History of acquisition and dispossession	Dispossession documents, e.g. expropriation notices, proclamations, erf registers, government notices/ letters, affidavits, removal notices
Claimant profile and verification of claimants	List of verified claimants, ID numbers and linked to erf numbers where relevant
	Power of attorney
	Affidavits
	Family trees
	Locus standi of representatives of claimant/committee
	Legal entity constitution
Nature and extent of rights lost	No specific annexure but where relevant attach
Acceptance criteria	No specific annexure but where relevant and required attach
Settlement package	
Option workshop report	No specific annexure but where relevant and required attach
Restitution award: financial compensation/land restoration/other	No specific annexure but where relevant and required attach
Monetary value of the claim: Standard settlement offer/valuation/other	Documentation/ motivation with regard to calculation/determining the award: valuation certificate/municipal valuation/other
	Offer to purchase to the land owner
	Communication with regard to value/price/award
	Approval letter for disposal of state land from user department and provincial state land committee
Agreements	MOU amongst parties as to manner of settlement of claim (ito Section 14(3)
	Settlement agreement
	Sale agreement
	Distribution agreement
Consideration for compensation received at the time	No specific annexure but where relevant and required attach
Commitment to package from other stakeholders	MOU/commitment/letters of intent
Post settlement	
Phase 1: development/ land use plan (realistic picture of possible options)	Plan
Phase 2: Implementation plan	Transfer of funds agreement and basic documents

42D submission components	Annexures
	Business plans as required (project and budget planning for various projects)
	Memorandum/record of commitment/stakeholders agreement
	Lease agreement
	Share equity agreement
	Joint management plan
	Strategic partner agreement (Development/conservation authority/forestry)
	EIA
	Housing agreement/commitment
	Others
IDP process	Municipal commitment ito IDP process (e.g. CMIP for bulk services, LED for economic development initiatives)
Resource mobilisation	
	RDG: Restitution Discretionary Grant Community resolution/individual application
	RDG application
Certification	
	Section 14(3) certificate signed by RLCC

In phase 3 the submission requires the annexing of a variety of plans. There do not appear to be guidelines on what these plans must contain.

6.6. LAND RIGHTS MANAGEMENT

The SDC noted that with respect to the establishment of land holding and land rights management entities the required output in the Section 42D is the constitution. There were no guidelines for the legal entity establishment process or the development of management and support systems to develop the capability of the claimant committee to fulfil their management and statutory requirements.

Pienaar (2007) observed that once awarded, rights require ongoing support with regard to the keeping of the record of rights, maintenance of publicly accessible information, recording transactions while ensuring that procedures for the re-allocation of rights are in place and providing support in the enforcement of rights and obligations.

Pienaar argued that the state was required to ensure that the individual rights of members are respected, protected, promoted and fulfilled and found that while obligatory legislative provision was made for rights determination, provision of support is sorely lacking.

Pienaar critiqued

- the failure of the state to determine and secure the rights of individual land reform beneficiaries at the outset;
- the failure of the state to provide ongoing public rights administrative support, post determination;
- the obligations of the state to ensure the appropriate determination of individual community-based rights and public administrative support; and to take the steps to ensure that it happens.

6.7. THE DEBATES OVER RESTITUTION OUTCOMES

Early critiques of restitution from a sustainability perspective noted that:

> *"The restitution of lost land rights offers no assurance with regard to livelihoods. So far there has been no effective link between restitution and development. This creates the risk that restitution creates new rural dumping grounds, differing only from their apartheid predecessors in that their poverty stricken inhabitants own the land."*
>
> (Turner and Ibsen 2000)

Overall inadequate attention has been paid to monitoring and evaluating the impacts of land restoration. There has been a reliance on narrow quantitative indicators to infer success:

- The number of hectares transferred,
- The number of beneficiary households affected,
- The numbers of claims settled.

Qualitative questions which revolve around the sustainability of the people's livelihoods on restored land appear to be largely ignored. Research by CASE (2005) commissioned by DLA Monitoring and Evaluation Directorate reviewed 179 projects nationally (161 of which were settled claims). The CASE report found that:

- Technical assistance that was reportedly provided to the 177 assessed projects was totally inadequate.
- Officials from the RLCC and other relevant government departments do not have the skills required to provide adequate technical assistance.
- The high staff turnover rates in the RLCC offices further contributes to procedural delays and prevents consistent and applicable technical assistance.
- In 60 percent of the assessed projects, beneficiaries claimed that a lack of skills (and therefore training) contributed to the failure to attain their developmental aims (particularly in agriculture and tourism).
- Conflict within communities, within community leadership structures, or between communities and their leadership structures is reportedly undermining development in 34 percent of projects.

The CASE report identified a range of problems undermining restitution projects:

- Communal management is arguably not suitable to large or small-scale commercial enterprises.

- Steering committees that do not allow for effective claimant participation and the ability of claimants to influence decision-making hamper the attainment of developmental aims.

- The choice of legal landholding entity and the accompanying management structure is usually not informed by the developmental aims of the project, nor the level of skill within the community, but rather by the requirements of legislation pertaining to the Restitution Programme or by the advice from government officials regarding the fastest way to establish these structures.

- The lack of clarity among community members (and sometimes within the leadership structures) on the roles and responsibilities of management structures, and the rights of community members, contributes to conflict and mismanagement.

- In the vast majority of the assessed projects, community leaders/ representatives serving on management structures do not have the management (and related financial) skills required to manage large-scale and, in many cases, commercially oriented projects.

- Many of the assessed management structures were not representative in terms of gender or youth raises questions about whether the selected developmental aims really reflect the interests of the broader community.

- Predictably, conflict is prevalent in a large number of the assessed projects – within communities, within management structures, between communities and their management structures, between opposing management structures and between management structures and traditional authorities.

- In those cases where the relationships between communities and service providers were not monitored, the consequences for communities have been extremely negative. Without the financial resources to develop alternative business plans, communities are unable to attain their developmental goals.

The CASE report identified a range of systemic and management problems impacting on the effectiveness of the programme:

- Overall, the level of involvement and co-ordination of other government departments is inadequate. This limits the ability of claimants/beneficiaries to attain their developmental aims.

- The high staff turnover level in the various RLCC offices contributes to the lack of attainment of developmental goals, because no institutional knowledge is built-up or retained.

- Similarly, the lack of appropriate skills among officials from the RLCC and other government departments undermines the attainment of developmental goals.

- The skills development, training and technical assistance provided to the claimants/beneficiaries of the assessed projects was generally inadequate. A related issue is the quality or type of training that was provided to communities. Key issues included the appropriateness and relevance of the training, inadequate follow-up to training programmes.

(CASE, 2005: 100 - 101)

The report concluded that:

> *"These findings do not bode well for the sustainability of restitution projects. The general lack of attainment of developmental goals, particularly in agriculture (which includes the majority of the projects) and tourism, coupled with skills shortages (and lack of training), financial constraints, the absence of long-term planning, inadequate access to infrastructure, conflicts within communities (and the absence of conflict resolution strategies), and ineffective communication between beneficiaries and the relevant RLCC offices coupled with capacity constraints in the RLCC, suggest that sustainability is unlikely."*
>
> (CASE, 2005: 3)

It is beyond the scope of this review to comment further on Restitution outcomes but it is clear that many of the concerns raised by the CASE report remain current. The continuing disconnect between claim settlement business processes and post settlement support remains a concern for the implementation of the Restitution programme.

7. CONCLUSION

This scan of the literature has sketched out the multiple mechanisms of dispossession and highlighted the diverse range social contexts, historical and spatial settings which the restitution programme has had to try and address. It acknowledges the deep historical, legal, methodological, social and institutional complexities embedded in the restitution programme. The focus on the planning approaches and mechanisms for actually implementing the programme which together comprise the 'restitution business process' which is the focus of the DPME evaluation highlights a range of persistent systemic constraints which continue to hamper the work of the Commission and which make the effective and developmental settlement of claims so elusive.

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APPENDICES

Appendices relate to the evolution of the Act and have been compiled by Advocate Coriaan de Villiers with the support of Holly Stubbs and Nica Siegel.

- A memorandum summarizing all the amendments to the Restitution Act;
- A memorandum dealing more specifically with amendments to the Restitution Act which impact on the workings of the Commission;
- A memorandum summarizing cases which have criticized the Commission.

8.1. APPENDIX 1: RESTITUTION ACT: AMENDMENTS AND MEMOS

Original Act: No. 22 of 1994, Restitution of Land Rights Act

http://www.info.gov.za/acts/1994/a22-94.pdf

Amendments:

1) 1995 – No 84 of 1995, Restitution of Land Rights Amendment Act, 1995
   http://www.info.gov.za/view/DownloadFileAction?id=71005
   a. Memo to 1995: No Memo found
   b. Summary:
      i. Overall: Clarified the how appointment process for Land Claims Court Judges
      ii. Specifically:
         1. Designated the acting President of the Land Claims Court
         2. Provided for the appointment of additional judges
         3. Change the remuneration process for judges
      iii. Main effect of amendment on working of Commission
         1. None
2) 1996 – No 78 of 1996, The Land Restitution and Reform Laws Amendment Act, 1996
   http://www.justice.gov.za/lcc/docs/1996-078.pdf
   a. Memo to 1996: No Memo found
   b. Summary:
      i. Overall: Provided textual improvements and clarified the workings of the Land Claims Commission and Court.
      ii. Specifically:
         1. Added definitions
         2. Provided that individuals who had received equitable compensation at the time of dispossession were not entitled or restitution
         3. Allowed the commission to interdict individuals from developing or selling land that had a claim upon it, provided for certain organizations to advise the Court
         4. Allowed organizations to be appointed to assist the commission
         5. Required the notification in writing to the owner of land in which a claim has been made
         6. Changed the rules regarding the appointment of assessors
         7. Allowed for judgment of costs to be made against the State and the Commission
         8. Changed the right to appeal.

iii. Main effect of amendment on working of Commission:
    1. Commission could appoint certain organizations to advise them;
    2. Commission could facilitate meetings of interested parties and to mediate and settle disputes;
    3. Required the Commission to get the leave of the Court for the lodging of a claim in respect of land in certain circumstances;
    4. Altered the powers and duties of a regional land claims commissioner (See changes to section 11 for full list);
    5. Allowed the Commission to apply for an interdict to prohibit a person from selling, exchanging, donating, leasing, subdividing or rezoning land in respect of which a notice in terms of section 11(1) has been published without having given the regional land claims commissioner notice of his or her intention to do so;
    6. The Commission must provide, with certain claims referred to the Court, a document containing a list of the parties who have an interest in the claim;
    7. The Commission is prohibited from referring of claims to the Court in terms of section 14 until the Minister has issued certificates in terms of section 15 or has refused to do so;
    8. Empowered the Court to make an order for costs against the State or the Commission;

3) 1997 – No. 63 of 1997
http://www.info.gov.za/view/DownloadFileAction?id=70809
    a. Memo to 1997 http://www.info.gov.za/view/DownloadFileAction?id=71772
    b. Summary:
        i. Overall: The principal object was to bring the 1994 Act in line with the Constitution of 1996. The bill provided direct access to the Land Claims Court to expedite the process of the restitution program and extended the power of the Land Claims Court, the Minister of Land Affairs, and regional land claim commissioners. It also made textual improvements.
        ii. Specifically:
            1. Made changes to preamble and the definitions to conform to the Constitution
            2. Clarified that the those who were forced to sell their land are not barred on the grounds of just and equitable compensation
            3. Made provisions for settling disputes regarding who represents a community
            4. Provided for direct access to the court
            5. Clarified the process for transferring land
        iii. Main effect of amendment on working of Commission:
            1. A Regional land claims commissioner or an interested party may under certain circumstances apply for an interdict prohibiting the development of land;
            2. Provided for the election of one or more persons to represent a community for the purposes of a claim;
            3. Prohibited a person from developing land in respect of which a notice in terms of section 11(1) has been published without having given the regional land claims commissioner notice of his or her intention to do so;

4. Repealed the requirement that the Minister of Land Affairs shall issue a certificate of feasibility when a claim is referred to the Land Claims Court:
5. Clarified the provisions relating to the powers of the Commission on Restitution of Land Rights for the purposes of an investigation in terms of section 34(2);

4) 1999 – No. 18 of 1999
http://www.info.gov.za/view/DownloadFileAction?id=70584
   a. Memo to 1999 http://www.info.gov.za/view/DownloadFileAction?id=71474
   b. Summary:
      i. Overall: Focused on speeding up the restitution process by changing from a process where all claims must go through the Land Claims Court to a more administrative process and clarified the rights of descendants to lodge claims, as well as extending the power of the court.
      ii. Specifically:
         1. Changed the definition of restoration of a right of land to include a portion of land
         2. Clarified the rights of communities and individuals descended from those dispossessed to be entitled to restitution
         3. Allowed the Deputy Land Claims Commission to act in the stead of the Land Claims Commissioner
         4. Clarified the wording to ensure that only one claim can be lodge against a specific area of land
         5. Administrative changes regarding the workings of the Court (notice requirements, etc.)
         6. Allowed for more of the process to be dealt with administratively by allowing the land claims commission and the regional commissioner more discretion to settle claims and decide which cases to refer to the Court
         7. Extended the power of the Court
         8. Clarified the powers of the Minister to Land Affairs to expropriate land if a settlement is reached
      iii. Main effect of amendment on working of Commission:
         1. Authorized the Deputy Land Claims Commissioner to act in the stead of the Chief Land Claims Commissioner if the office of the Chief Land Claims Commissioner is vacant;
         2. Provided for the appointment of acting regional land claims commissioners under certain circumstances;
         3. Amended the requirements for the publication of the notice of a claim;
         4. Did away with the need for a claim to be referred to the Court where the interested parties have reached agreement as to how a claim should be finalized and to authorize the Minister to make an award of a right in land, pay compensation and grant financial aid in such a case;
         5. Authorized regional land claims commissioners to refer claims to the Court;

5) 2003 - No. 48 of 2003, Restitution of Land Rights Amendment Act, 2003
http://www.info.gov.za/view/DownloadFileAction?id=68025

a. Memo to 2003 http://www1.chr.up.ac.za/chr_old/indigenous/documents/South%20Africa/Legislation/Restitution%20of%20Land%20Rights%20Amendment%20Bill.pdf
b. Summary:
    i. Overall: The main purpose was to accelerate the settlement of rural claims by changing the provisions regarding the acquisition and expropriation of land
    ii. Specifically:
        1. Changed the power of the Minister to expropriate land in the case of unwilling sellers
        2. When land is acquired or expropriated it vests in the State which must transfer it to the claimant
    iii. Main effects of the amendment on the working of the Commission:
        1. To amend the Restitution of Land Rights Act, 1994, so as to empower the Minister of Land Affairs to purchase, acquire in any other manner or expropriate land, a portion of land or a right in land for the purpose of the restoration or award of such land, portion of land or right in land to a claimant or for any other related land reform purpose.

8.2. APPENDIX 2: AMENDMENTS TO THE RESTITUTION ACT WHICH IMPACT ON THE WORKINGS OF THE COMMISSION

The Land Restitution and Reform Laws Amendment Act 78 of 1996

- Section 9(1) was amended as suggested by the Commission to enable the Chief Land Claims Commissioner to appoint organizations such as the Independent Mediation Service of South Africa with particular knowledge or expertise to assist the Commission.

- Section 11A was inserted to make provision for withdrawal or amendment of notice of claim. The explanatory memorandum to the bill reflects that the Restitution Act created problems if a regional land claims commissioner is initially satisfied that a claim for restitution of a right in land meets the requirements of section 11(1), causes the claim to be gazetted and then, during the investigation of the claim by the Commission, has reason to believe that the criteria in the subsection have not been met.

- Section 6(3) was inserted to enable the RLCC having jurisdiction to apply for an interdict prohibiting the sale, exchange, donation etc. of land in respect of which a person or community is entitled to claim restitution.

- Section 11(6) was substituted to require written notification to the owner of the land in question and referring the owner to section 11(7) after publishing a notice in terms of section 11(1).

- Section 35(2)(g) was amended to make provision for costs orders to be made by the LCC against the state or the Commission.

Land Restitution and Reform Laws Amendment Act 63 of 1997

- Section 6(3) was amended to also empower the RLCC to interdict the development of land subject to a land claim, to also entitle an interested party to bring an application for an interdict, and in order to expedite interdict applications, the required approval of the Chief Land Claims Commissioner for such an application was removed from the section.

- Section 10(3) was amended to deal with disputes about who represents a community. The explanatory memorandum to the bill reflects that disputes had arisen in practice and caused lengthy delays. Provision was therefore made that a regional land claims commissioner may direct that an election of a community be held for the election of a person or persons to represent the community.

- The requirement of a certificate of feasibility in section 15 was repealed. The explanatory memorandum reflects that the Department of Land Affairs was required to conduct feasibility studies and that to make a feasibility certificate obligatory in every case is unnecessary and a cause of considerable delay.

- Section 34 was amended to make it clear that the Commission's powers of investigation (section 12) and mediation (section 13) can be exercised when the Commission investigates the desirability of making an order that land or any rights in it shall not be restored to any claimant or prospective claimant.

- Chapter 111A was inserted to deal with direct access to courts. The explanatory memorandum reflects that such direct access is an important measure to expedite the restitution process by allowing claimants with straightforward claims, or with access to necessary resources, to approach the court.

Land Restitution and Reform Laws Amendment Act 18 of 1999

- The memorandum on the objects of the bill states that legislative and institutional shortcomings have led to undue delays. The amendments are aimed at speeding up the restitution process. The most important amendments are those providing for a shift in emphasis from the present judicial process where virtually every claim must be dealt with by the Land Claims Court to a more administrative process which will allow for the mass processing of claims.

- Amendments included (1) repeal of section 14(1)(c) which prescribed that the Chief Land Claims Commissioner must refer a settlement agreement arising from a restitution claim to the Court (2) insertion of section 14(3) which provides that where interested parties have reached agreement as to how a claim should be finalized, the regional land claims commissioner having jurisdiction has a discretion whether to certify that he or she is satisfied with the agreement and that the agreement ought not to be referred to Court, and (3) insertion of section 14(3A) which prescribes the circumstances under which settlement agreements may be referred to Court.

8.3. APPENDIX 3: CASES WHERE THE COMMISSION HAS BEEN CRITICISED BY THE LAND CLAIMS COURT

2013

1.) **Marthienus van Biljon v Minister of Rural Development and Land Reform and Others (LCC 173/2008) [2013] ZALCC 3 (29 January 2013)**
http://www.saflii.org.za/za/cases/ZALCC/2013/3.html

- Two community claims were lodged over many portions of land affecting multiple land owners.
- The application was brought by a landowner for separation of issues in respect of the portion of land owned by the applicant. The applicant alleged that he was not served with a referral report and the applicant was not listed as an interested party.
- The Court found that the manner in which these claims had been referred to the Land Claims Court (LCC) by the relevant Regional Land Claims Commissioner (RLCC) was completely unsatisfactory.
- The claims affected hundreds of portions of land. There were three categories of landowners, firstly, those who had reached settlement agreements and land had been acquired from them, secondly those that were opposing the claim, and thirdly those like the applicants who were not opposing the claim but had not reached an agreement of settlement. The Court had no information as to the status of the claims over the portions of land which did not fall into the first two categories, except for information provided by the applicant in respect of his land.
- The Court was unable to assist the applicant because of the uncertainty as to whether the applicant's claim had been referred to the Court. The only party that could enlighten the Court as to the status of the claim was the RLCC.
- The court issued a rule nisi calling upon the RLCC to show cause why he or she should not be ordered to either refer the claim in respect of the applicant's land to the Court or, alternatively, if it was contended that the claim had been referred to the Court under case number LCC 173/2008, why a separation of trials should not be ordered.

2.) **Hoogenboezen v. Minister of Rural Development and Land Reform and Others (LCC 68/2005) [2013] ZALCC 5 (10 April 2013)**
http://www.saflii.org.za/za/cases/ZALCC/2013/5.html

- The plaintiff lodged a claim based on alleged dispossession of land which he forcibly sold for less than just and equitable compensation for purposes of creation of the Lebowa homeland. The defendants [the RLCC & Minister of Rural Development) opposed the claim on the basis that there was no forced sale i.e. that it was between a willing buyer and seller.
- The issue of whether or not there was a dispossession was heard as a preliminary issue.
- The defendants were forewarned of the evidence of a witness who was involved in the acquisition of the land on behalf of the Department of Native Affairs when the homeland was created. There was a summary of his evidence and he had given similar evidence in an earlier case.
- The plaintiff had to lead evidence. The defendants didn't lead evidence.
- After the evidence had been led and before legal argument, the Defendant conceded that there had been a dispossession. This being so, the LCC said that the defendants

continued opposition might even be considered vexatious and that the concession on the merits ought to have been made without the necessity of the plaintiff having to incur the costs occasioned by the hearing. In adopting the stance it did the State ran the risk of an adverse cost order being awarded against it.

- The court ordered costs against the Minister and the RLCC jointly and severally at the completion of the preliminary hearing in respect of whether there was a dispossession.

3.) Nephawe and Another v Regional Land Claims Commission, Limpopo and Others (LCC 93/2010) [2013] ZALCC 9 (17 May 2013)
http://www.saflii.org.za/za/cases/ZALCC/2013/8.html

- Land claims were lodged by two separate communities: the Vhangona Nation and the Nephawe tribal community.
- The Commission's letter of dismissal of claim only mentioned the Vhangona Nation claim.
- In respect of Nephawe claim, the RLCC had alluded to dismissing this claim but did not give any documentation indicating that or any reasons for such a decision.
- The applicants' queries regarding this claim were not responded to properly.
- The RLCC has had 14 years to decide whether or not this claim is valid and failed to do so.
- The Court ordered the Commission to take steps in accordance with section 11 (1) of the Restitution Act in respect of the Nephawe claim within 30 days of the court order.

4.) Phillips v The Minister of Rural Development and Land Reform and Another (LC 76/2010) [2013] ZALCC 9 (17 May 2013)
http://www.saflii.org.za/za/cases/ZALCC/2013/9.pdf

- The RLCC responded to the claim after eight years and initially accepted it as a valid claim. After protracted negotiations RLCC made an offer to the applicant in 2006, which the applicant rejected. No further progress was made until the Court granted a mandamus order in 2010 compelling the RLCC to refer the claim to the Court, which she did. The subsequent referral challenged the claim and stated that the applicant had not had a forced sale and had not been dispossessed.
- The attorney for the RLCC conceded that there were not exceptional features to distinguish this case from *Hoogenboezem.*
- The court was presented with the astounding explanation that the different approach adopted in this case was on the instruction of the Eastern Cape Regional Land Claims Commission, whilst the approach in *Hoogenboezem* was on the instruction of the Commissioner for Limpopo.
- The court expressed a concern that there exists such regional divergences which advantage a claimant in one province and disadvantage a similar claimant with an almost identical claim in another province, with little regard to legal precedent. Such an approach flies in the face of the guarantee at Section 9(1) of the Constitution of equality before the law and to equal protection and benefit thereof.
- The defendants' continued opposition on the issue of dispossession was, in the circumstances, unworthy. Their stance in persisting with the argument that the Restitution Act was not intended to give relief to White persons in total disregard of precedent to the contrary, of which they were apprised, ran the risk of a punitive cost order.

- The LCC made a punitive costs order against the Minister and the RLCC jointly and severally.

2012

1.) **Blue Horizon Investments 10 (Pty) Ltd and Another v Regional Land Claims Commissioner, Mpumalanga and Others (LCC 115/2010) [2012] ZALCC 18 (30 January 2012)**
http://www.saflii.org/za/cases/ZALCC/2012/18.html

- The Manok land claim was lodged in 1998. In a letter dated 14 June 2000 the Commission advised the community representative that its claim had been precluded in terms of the Restitution Act.
- The applicants obtained confirmation from the Commission that there was no record of a land claim against the property. On the strength thereof they proceeded to obtain various approvals for a residential and industrial development on the land.
- The community thereafter took steps to revive the claim.
- On 23 February 2007 the Commission advised the claimants and the applicants that on 19 September 2008 the Commissioner in terms of section 11(1) of the Restitution Act published a notice of the Manok land claim.
- The court held that the Commissioner was functus officio when he purported to reverse the first decision (dismissing the claim).
- It further held that the decision by the Commissioner to gazette the claim in 2008 even if it is assumed that he had the authority to do so, in any event lacks compliance of the *audi alteram partem* rule which directs the Commissioner to consult with all affected parties prior to a decision being taken that directly affects them.
- There was no information whatsoever in the investigation or the publication resuscitating the claim that explained any inaccuracies both on fact and law in the process leading up to and the decision made by the Commissioner to preclude the Claim on 14 June 2000.
- There has not been any factual or legal basis on which the claim was revisited.
- The judge was of the view that the matter did not warrant punitive costs against the Commissioner given its wide powers to receive representation in discharging his obligations and to assess the property rights of claimants. The judge also stated that it was clear that the commission mismanaged its role in administrating the claim in an open and consultative manner resulting in contradictions and expectations in the community. It therefore must be liable for the costs of the ensuing litigation. The court ordered the Commission to pay the applicants' costs.

2.) **Monyeki and Another v Regional Land Claims Commissioner, Limpopo Province and Others (LCC 18/04) [2012] ZALCC 2 (29 February 2012)**
http://www.saflii.org/za/cases/ZALCC/2012/2.html

- The RLCC had failed to give timeous notice of the referral to the LCC of the Monyeki-Makgai family claim to a competing claimant (the Mapela tribe) whose claim included the Indabushee land subject to the Monyeki-Makgai family claim.
- The court hearing had to be postponed for such referral to be made and the court order included that the RLCC had to pay the wasted costs incurred by the claimants and the second respondent (the land owner of Indabushee) resulting from the

Commissioner's failure to give timeous notice of the referral of the Monyeki-Makgai claim to the Mapela tribe.

3.) Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others (LCC 156/2009) [2012] ZALCC 7 (19 April 2012)
http://www.saflii.org/za/cases/ZALCC/2012/7.html

- Affected landowners sought a costs order against the State on the grounds of the following shortcomings in the RLCC's investigation of the claim and its conduct before and during the hearing: past failures to comply timeously or at all with orders and directions from the Court, inadequate research of the claim, alleged distortion of the facts in a supplementary report, failure to make relevant evidence available before the court and failure to properly consult with the claimant community on the various options available to it in choosing what form of restitution it will pursue, no proper minutes of meetings were kept. The files of the RLCC contained very scant details of the consultation process.
- If the manner in which the Commission investigated and presented the restitution claim to the Court is grossly inadequate or flawed, that might constitute a reason for making a cost order against the State, it was held in the *Kusile* case:

  > *"The Commission, as an organ of State, bears an obligation to ensure that the work of this court is not impeded by inadequate investigation and that time is not unnecessarily spent on claims which, in the form in which they were referred to the court by the RLCC, can manifestly not succeed."*
- The LCC held that although the investigations and presentation by the Commission leaves much to be desired, it could not find any wilful distortions, deliberate omissions or gross dereliction of duty by the RLCC or his staff and that it would be unmerited to make a cost order against the State just because the work of the Commission was not up to standard. The substandard work did not significantly impede the adjudication of the claim. In these circumstances, the LCC held that the practice of not making a cost order should prevail.

4.) Traditional Authority of Bapo ba Mogale Community v Minister of Agriculture and Land Affairs and Others (LCC18/2008) [2012] ZALCC 12 (31 July 2012)

- The applicant brought an application for an interim interdict on an urgent basis because officials of the Commission told the applicant that the land would be transferred in the near future, despite non-compliance with section 2 of the Restitution Act. The court accordingly ordered the Commission to pay the applicant's costs.

5.) Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others (590/2011) [2012] ZASCA 128; 2013 (2) SA 259 (SCA); [2013] 2 All SA 1 (SCA) (21 September 2012)

http://www.saflii.org.za/za/cases/ZASCA/2012/128.html

- Crookes Brothers Limited (a public company) sought payment of interest for the late payment of the purchase price of properties, which formed the subject of land claims, sold by it to the state.
- The claim was successful, including that the state respondents (amongst others, the relevant RLCC) were ordered jointly and severally to pay costs. The Supreme Court of Appeal expressed the view that "*the conduct of the officials in the employ of the*

respondents evoke strong feelings of disquiet. Because of their conduct the public purse is much the poorer". Interest accrued at R84 931 per day.

6.) **Naidoo v Land Claims Commission and Another (LCC112/07) [2012] ZALCC 14 (27 September 2012)**
http://www.saflii.org/za/cases/ZALCC/2012/14.html

- The Commission and its officials had a statutory duty to deal with the plaintiff's claims in accordance with the law, with reference to the Constitution and the Restitution Act. In particular, the Commission and its officials are not entitled to determine the compensation payable to the plaintiff as equitable redress in an arbitrary manner which would result in the plaintiff again receiving compensation that is not just and equitable.
- The court concluded that where a public official is aiding a member of the community in circumstances where they hold exclusive knowledge of the applicable process, such official does have a duty to disclose such information. There was a duty on the Commission's representative to disclose all information to plaintiff to enable plaintiff to make an informed decision.
- The court set aside a S42 settlement agreement on the basis that there was misrepresentation by the Minister and the Commission to the plaintiff. They had failed to advise the Plaintiff that there were various settlement options available to the plaintiff in terms of a section 42D framework agreement. The Commission's representative also told the plaintiff that the amount of R50 000.00 per claim was the maximum that plaintiff was entitled to. However, this was incorrect, resulting in substantial under compensation to the plaintiff.

2011

1.) **Baphalane ba Ramokoka Community v Mphela Family and Others In re: Mphela Family and Others v Haakdoornbult Boerdery CC and Others (CCT 75/10) [2011] ZACC 15; 2011 (9) BCLR 891 (CC) (21 April 2011)**

- The Constitutional Court ordered the Commission and the Minister for Rural Development and Land Reform to jointly and severally pay the legal costs of the first respondent because "*far from assisting the parties and the Court with an impartial exposition of the matter's history, as was its duty, the Commission in partisan manner entered the area on the Community's side. Not only did it make common cause with the Community's case but it even gave succour to the misguided imputations of unprofessional non-disclosure against the landowners' lawyers*".

2.) **Desai v Registrar of Deeds, Pietermaritzburg and Others (LCC19/09) [2011] ZALCC 7 (1 January 2011)**
http://www.saflii.org/za/cases/ZALCC/2011/7.html

- The applicant brought an application for an interim interdict in terms of section 6(3) of the Restitution Act. The third respondent had acquired the land subject to the land claim lodged by the applicant for purposes of the development of a Spar shopping centre.
- The court expressed dissatisfaction with the manner in which the applicant's claim was handled by the RLCC, KwaZulu-Natal. The claim had been investigated for more than ten (10) years without publication thereof in the gazette.

3.) **Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs and Others, Rainy Days Farms v Minster of Agriculture and Land Affairs and Others (LCC57/2009, LCC58/2009) [2011] ZALCC 22 (23 June 2011)**
http://www.saflii.org/za/cases/ZALCC/2011/22.html

- The dispute before the Court was how an amount of under compensation should be adjusted to present day value.
- The court ordered that the plaintiff was entitled to costs on the basis that attempts could have been made much sooner to settle the matter, taking into account the expert advice the state obtained from valuers.
- The court declined to order costs on a punitive scale. It found that there did not appear to be any malice on the part of the Commission in dealing with the matter even though the delay was unacceptably long. The RLCC had to grapple with difficult questions.

4.) **Majadibodu Community v Commission on Restitution of Land Rights and Others (LCC 147/2010) [2011] ZALCC 19 (5 October 2011)**

- The applicant (the Majadibodu community) sought to review the decision of the Commission and/or RLCC of Limpopo to refuse the applicant funding for legal representation.
- The applicable guidelines dealing with funding had not been followed. The court directed the Commission to pay for the legal representation of the applicant.

2010

1.) **Midlands North Research Group and Others v Kusile Land Claims committee and Another (LCC21/2007) [2010] ZALCC 19; 2010 (5) SA 57 (LCC) (30 April 2010)**
http://www.saflii.org/za/cases/ZALCC/2010/19.html

- This case dealt with a claim for legal costs against the RLCC.
- The court dealt with the role of the RLCC. It is an organ of state. It manages the restitution process on behalf of the state.
- The Court, seized with litigation under the Restitution Act, must deal with conflicting constitutional rights. A claimant who qualifies has a constitutional right to seek restitution of land rights which were taken from him. A landowner has a constitutional right to preserve his property. The RLCC should not favour any of them to the disadvantage of the other. The RLCC is a central role player, with the task of deciding whether or not a claim is *prima facie* valid.
- The RLCC as an organ of state bears an obligation to ensure that the work of the court is not impeded by inadequate investigation and that time is not spent on claims which, in the form in which the referred to the court by the RLCC can manifestly not succeed.
- Based on the submissions made to the RLCC in terms of section 11A of the Restitution Act and in response to the referral report, as well as cases which had already been decided, the RLCC should have recognized that it was individual families and not a community that was dispossessed. The RLCC should also have recognised that the individual families did not occupy the entire extent of the properties being claimed, but at best only portions thereof. The resistance to the claim for restoration by the opposing landowners was therefore fully warranted.
- The court declined to make a punitive costs order, including because it is well-known that the RLCC in KwaZulu-Natal suffered and still suffers serious capacity problems and staff shortages and that there was no willful neglect on the part of the RLCC officials. The court found the cold shoulder given to the opposing landowners during

the investigation of the claim regrettable and was distressed that the RLCC did not comply, or timeously comply, with a number of directives given at pre-trial conferences before the hearing.

2.) **Rajbunsee v Regional Land Claims Commissioner, Kwazulu-Natal and Others (LCC 168/2008) [2010] ZALCC 12 (12 May 2010)**
http://www.saflii.org/za/cases/ZALCC/2010/12.html

- The applicant sought to review the RLCC's failure to refer a land claim to the court. The parties agreed to a referral order and the only question left for determination was costs.
- The LCC found that, having regard to all of the facts placed before the court, it was apparent that there was a delay in attending to this matter and that it became apparent in April 2006 that the applicant wanted restoration of the property. There was no explanation for the delay in deciding that restoration was or not a suitable option.
- It is apparent now that the land is available but the basis on which the first respondent seeks to restore the land is not acceptable to the applicant. No explanation was tendered for the RLCC's failure to present the offer made three days before the hearing earlier or why they had not indicated that they did not oppose the relief requesting a referral to this Court until the morning of the hearing. The attorney for the RLCC for KwaZulu-Natal conceded that she could not explain the delay in this regard.
- The court ordered the RLCC to pay the costs of the application.

3.) **Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Land Reform and Others (LCC 03/2010) [2010] ZALCC 14; 2010 (4) SA 308 (LCC) ; [2010] 4 All SA 331 (LCC) (18 May 2010)**
http://www.saflii.org/za/cases/ZALCC/2010/14.html

- The applicants sought to enforce contracts entered into with the state to acquire their properties for purposes of restoring them to land claimants.
- The state's opposition included an impossibility of performance based on an alleged lack of funds.
- The court upheld the applicants' claim for a punitive costs order against the state respondents (i.e. on an attorney and client scale).
- The court held that the respondents had conducted the case in a manner deserving of censure: their disregard for their financial obligations under the contracts, their attempts to escape same by disputing the validity of the agreements and their resort to spurious and unsubstantiated allegations of lack of funds can be characterized as vexatious, reckless and reprehensible.
- The high ranking statutory approval of the agreements in terms of Section 42 D of the Act created expectations which were thwarted by unacceptable dilatoriness on the part of respondents. Conduct of this ilk on the part of state officials flies in the face of fair contractual practice and furthers the aims neither of land restitution nor the right thereto as embodied respectively in the Restitution Act and the Constitution.
- It should not be necessary to force the State through a court order to comply with its contractual obligations and an applicant who is forced to seek such an order should not be out of pocket. The court was satisfied that respondents' conduct attracted the punitive cost order sought.

4.) **Mokala Belegings (Pty) Ltd and Another v Minister of Rural Development and land Reform and Others (LCC 12/2010) [2010] ZALCC 24 (14 September 2010)**

http://www.saflii.org/za/cases/ZALCC/2010/24.html

- This case dealt with enforcement of a sale agreement.
- The fourth respondent [RLCC of Gauteng North West] issued an instruction to delay the lodging of the documents to effect transfer of the properties due to a lack of funds. This went contrary to the agreement.
- The fourth respondent's instruction that the transfer be delayed indefinitely was not discussed or negotiated with the applicants. It was a unilateral withholding of funds, albeit of funds they did not have. A number of similar matters have come before this Court with the same problem arising and no satisfactory explanation tendered, i.e. why there is a lack of funds.
- The court ordered the state respondents jointly and severally to pay the applicants' costs.

2009

1.) **Crafcor Farming (Pty) Ltd v Regional Land Claims Commissioner, Kwazulu-Natal and Others (LCC46/2007) [2009] ZALCC 10 (4 September 2009)**
http://www.saflii.org/za/cases/ZALCC/2009/10.html

- The applicant sought an order reviewing and setting aside the decision of the RLCC to publish the restitution claim as a community claim instead of publishing it as a claim by an individual claimant.
- The provisions of section 10(3) of the Act were not complied with [by the RLCC of KwaZulu-Natal]. The claim form lodged by Mr Mbatha was not accompanied by any resolution or document supporting the contention that the claim was a community claim. In fact Mr Mbatha did not even contend in the claim form that he was representing any community when he lodged the claim.
- In the court's view Mr Mbatha's claim was not properly investigated.
- There was no connection between the information placed before the first respondent and the subsequent decision taken to publish a claim as a community claim. The decision to do so was not a rational decision.
- The court held that it would serve no purpose to remit this matter to the first respondent for reconsideration as she has formed an opinion and took an irrational decision to publish the Mbatha family claim as a community claim. In the circumstances of this case, this court should take a decision which will replace the first respondent's decision.
- The court, amongst other aspects, set aside the decision to publish the claim as a community claim and ordered the RLCC to publish a fresh notice that the claim was lodged by Mr Mbatha. The court also made orders in respect of he which land was subject to the land claim.
- The court also made a costs order against the RLCC on the basis that RLCC took a decision which was highly irrational and disturbingly inappropriate in the circumstances.

2008

1.) **Bezuidenhout and Others v Commission on Restitution of Land Rights and Others (LCC120/2006) [2008] ZALCC 13 (22 April 2008)**
http://www.saflii.org/za/cases/ZALCC/2008/13.html

- The application for review was settled on the day of the hearing, including on the basis that the land claim be referred to the LCC for adjudication. The applicants sought a costs order.
- The claim on behalf of the third respondent [the Tribal Authority of Ndzundza] had been lodged ten years ago. Thereafter the mandatory publication of the claim in terms of Section 11 of the Restitution Act by second respondent [RLCC of Mpumalanga], occurred all of seven years later.
- There does not appear to be an explanation by second respondent for the long delay between lodgment and publication.
- Ever since then, the applicants, as land owners affected by the claim, have made repeated attempts to get the second respondent to do precisely what it is required to do under Section 11 of the Restitution Act, namely to complete its investigation on the claim.
- When it was clear that all attempts thus far to get second respondent to complete the investigation had come to naught, the applicant land owners resolved they had no option but to bring a review application in order to get the second respondent to complete its investigation and decide whether to refer the claim to Court.
- It took review proceedings to get the second respondent to properly perform its functions under the Restitution Act, some ten years after the claim was lodged, an obligation it should have completed many years ago. It has, to put it bluntly, required affected land owners to incur the costs of legal proceedings to get the second respondent to properly do its job as prescribed under the Restitution Act. It clearly was not intended that the first and second Respondents would be accorded ten years to decide on the status of a land claim under Sections 11 and 14, given that the Land Claims Court was initially intended to be in existence only for five years and the Commission itself has a limited life span.
- The review application was necessitated because of second respondent's failure to deal expeditiously and efficiently with third respondent's claim under the Restitution Act. Second respondent must, in fairness, under the circumstances bear the costs of the application.
- In making a costs order against the RLCC the court expressed a concern that land owners who are adversely affected by the lodging of land claims against their land, and who consequently are unable to develop or sell their land, are often forced to incur the costs of review applications such as in the present instance in order to get the relevant Regional Land Claims Commissioners to deal with their claims efficiently in terms of the Restitution Act. The court stated that this is a matter which, in the interests of justice, requires the urgent attention of the Land Claims Commission.

2.) Afriblaze Leisure (Pty) Ltd and Others v Commission on Restitution of Land Rights and Others (LCC16/2007) [2008] ZALCC 4; [2010] 3 All SA 559 (LCC) (22 May 2008)
http://www.saflii.org/za/cases/ZALCC/2008/4.html

- The applicants sought the referral of the land claim to the LCC for determination. The respondents opposed the application on the basis that the claims were at a negotiation and mediation stage and accordingly not at a stage to be referred to the LCC in terms of section 14 of the Restitution Act.
- The first and second respondents [the Commission and RLCC of Limpopo] submitted that the purpose and reason for attempting to settle the dispute through mediation under Section 13 of the Restitution Act, is that the second respondent is obliged when

referring a claim to Court to report in terms of section 14 (2) (b) on the failure of any party to accede to mediation. It is also contended that the second respondent cannot formulate an opinion under Section 14 (1) (d) if he has not triggered the mediation provision at Section 13 (1) (d).

- The court disagreed. Respondents' argument in this regard presupposes that section 13 (1) (d) places an obligation on the Land Claims Commission to mediate. It does not. It gives a discretion to the Chief Land Claims Commissioner to direct parties to go to mediation if at any stage during the investigation it becomes evident that there is any other issue which might usefully be resolved through mediation. In the court's view the second respondent had not identified an issue which might usefully be resolved as is required in terms of section 13 (1) (d).
- Applicants as landowners affected by a land claim have a constitutional right to the resolution of the legal dispute in a court of law. The third respondent (the land claimant) similarly has a right to have its claim adjudicated efficiently and expeditiously. The lack of progress towards that end by the first and second respondents ten years after the claim was lodged, two years after it was gazette and nine months after it raised the prospect of mediation, flies in the face of such constitutional rights. It could never have been the intention of the legislature that land claims could remain unresolved and unreferred to Court ten years after lodgment, given the limited life span envisaged for the Court and the Commission.
- The court ordered that the claim be referred to the LCC and that the state respondents pay the applicants' costs jointly and severally.

2007

1.) Bouvest 2173 CC and Others v Commission on Restitution of Land Rights and Others (LCC68/2006) [2007] ZALCC 7 (7 May 2007)
http://www.saflii.org/za/cases/ZALCC/2007/7.html

- The applicants sought to review a decision taken by the RLCC to publish a land claim in terms of section 11(1) of the Restitution Act in respect of twenty farms. The applicants are farmers who own some of the farms or portions thereof.
- Four claims for restitution which were submitted on the prescribed claim forms were relevant.
- Notice of three of the claims was published by the RLCC as having been lodged on behalf of the Motse community.
- The court found that there was no indication in the records of the second respondent that he applied his mind to the question whether the seventh respondent (the Motse community) was a community or not. On the contrary, the second respondent admitted that "Motse Community" is a merging name for a number of land restitution claims which were combined into a single claim. There was nothing on record at the second respondent to show that a single community as defined in the Restitution Act ever had rights in land over the applicants' farms, neither at the time of dispossession nor at any time thereafter.
- A community which was not in existence at the time when the claims were lodged and which now include members who have not lodged claims, cannot be entitled to restitution.
- The court concluded that the first respondent [the Commission) and the second respondent, on the information contained in the record which they filed did not have the right in terms of the Restitution Act to accept and publish a claim for the restitution

of land rights by the seventh respondent, insofar as the claim affects the properties of the applicants.

- The practice of "merging" different claims can have and often has the effect that persons who did not lodge timeous claims would become beneficiaries through "merger". In the present instance the effect of the "merger" is to broaden the claims brought by the third, fourth and fifth respondents in respect of specific farms to become a "communal" claim which includes communities which have not lodged timeous claims and farms which are not listed in the claim forms of those claimants.
- The court's order included setting aside the decision of the RLCC to accept a claim for restitution of land rights in the name of the Motse community in so far as it related to a number of specified properties and directing the RLCC to publish a notice in the gazette to give effect thereto.
- The obvious lack of rationality in arriving at the decision to accept and publish the claim as a claim by the second respondent (should refer to seventh respondent), enjoined the court to depart from the usual practice of this Court not to make cost orders, and to order the first respondent to pay the applicants' costs.

2006

1.) **Minaar NO v Regional Land Claims Commissioner for Mpumalanga and Others (LCC42/06) [2006] ZALCC 12 (8 December 2006)**
http://www.saflii.org/za/cases/ZALCC/2006/12.html

- The RLCC published a notice in the Gazette that a claim had been lodged by the Daisy Kopje Community for restitution of the entire farm Daisy Kopje no 643. The applicants applied for the review of the decision on the grounds that the claim was not lodged as being a community claim and that it was not lodged in respect of the whole of the farm Daisy Kopje.
- The lodged claim form described the property subject to the claim as Daisy Kopje Portion D.
- The notice that was published in the gazette was in respect of each and every subdivision of the farm Daisy Kopje and stated that the claim had been lodged by Mt Nkose Menzani Rainslee… acting in his capacity as a Chairperson of Daisy Kopje Community.
- The court found that the land claim form showed the restitution claim to be a claim lodged on behalf of the third respondent (the Nkosi family) and that it did not see how it could be "derived from the land claim form" that the second respondent is also lodging a claim on behalf of the fourth respondent (Daisy Kopje community) as the first respondent alleges.
- The court also found that it failed to understand how an investigation and verification process can "reveal" that the claimed land extends beyond portion D. There is no manifestation that the person who signed the claim form intended, at the time when he lodged the claim that the claimed land should also include other land. Even if he has had such an intention, that subjective intention alone cannot expand a claim which ex facie the claim form is limited to portion D, to also include other subdivisions of Daisy Kopje The court found that the first respondent had no power to substitute the Nkosi family by a different claimant which also includes other families.
- The court set aside the first respondent's decision and directed the RLCC to publish a fresh notice in the gazette. The RLCC was also ordered to pay the Applicant's costs.

2005

1.) **Hlaneki and Others v Commission on Restitution of Land Rights and Others (LCC43/02) [2005] ZALCC 6 (9 September 2005)**
http://www.saflii.org/za/cases/ZALCC/2005/6.html

- An application was brought to review and set aside the decision of the RLCC to dismiss the Hlaneki Tribe's land claim.
- The first reason for dismissal was that Chief Hlaneki lodged the claim on behalf of the Hlaneki tribe but did not have the mandate to do so.
- The document was submitted in substantiation of the contention that Chief Hlaneki represented the tribe applicant in submitting the claim form. None of the respondents [LCC, RLCC of Limpopo] queried the validity of the document or the chieftainship of the first applicant over the third applicant. Yet the second and third respondents decided the form did not comply with section 10(3) which specifies requirements where a claim is lodged on behalf of a community.
- A document showing that the first applicant acts on behalf of the third applicant by virtue of the powers and jurisdiction he has over the third applicant is sufficient proof of this representative capacity without necessarily necessitating a special resolution authorizing him to lodge the claim. It at least calls for further investigation, not summary dismissal. Therefore the second respondent should have been on guard, and rather have investigated the matter further.
- The proviso to section 10(3) was another procedure open to the first, second and third respondents (the RLCC may permit a resolution or document to be lodged at a later stage evidencing the basis upon which it is contended that the person submitting the form represents the community). They proffer no explanation for not following this procedure, except to say that the claim would still have failed for other reasons. That is not, and should not be, a reason for an adverse finding on this issue. If there are other reasons justifying such a finding, then the claim should have been dismissed for those reasons, not this one.
- If the first, second and third respondents were still not satisfied with all the documents referred to above, then they could have acted, and indeed ought to have acted, in terms of section 6(1)(b) which provides that the Commission or Chief Land Claims or regional land claims commissioner must "take reasonable steps to ensure that claimants are assisted in the preparation and submission of their claims".
- Failure to act in terms of any of the sections referred to above, coupled with the attitude of the respondents as evidenced in the answering affidavit, demonstrates not only a dereliction of duty, but also a high–handed approach. The court found that the applicants substantially complied with the provisions of section 10(3) of the Restitution Act and that the actions of the first, second and third respondents in determining that section 10(3) was not complied with, were in breach of section various sections of the Promotion of Administrative Justice Act.
- The claim was dismissed by the RLCC on the grounds that the applicants are claiming the same land which they currently occupy (and that they were therefore not dispossessed because they were not physically removed).
- The court held that the second respondent misinterpreted his functions under section 11(1) and (3) of the Act when he determined the merits of the applicant's claim. He

does not have the power to adjudicate the merits. This Court has rejected the view that the word "satisfied" in section 11(1) means "prove."

- The court found that the decision by the second respondent that the claim should be rejected on the basis that it is frivolous and vexatious was unreasonable and should be set aside.
- This view is persisted with in the present application. The respondents, in referring to the applicants' claim used words such as "patently bogus", "without substance", "patently devoid of any merits or prospects of success", "ill-advised", "fallacious", "despised" and refer to the review application as an "ostensible abuse" of the court process. This, was high-handed of the respondents.
- The respondents repeatedly stated that the dismissal of the claim was only "conditional", and that the applicants should have brought further "extrinsic information" to the Commission instead of bringing this application. What is meant by "Conditional dismissal" is not explained.
- The review application succeeded and the state respondents were ordered to pay the costs of the application jointly and severally.

2003

1.) **Dukuduku Community v Regional Land Claims Commissioner: Kwazulu-Natal and another (LCC30/02) [2003] ZALCC 14 (30 May 2003)**
http://www.saflii.org/za/cases/ZALCC/2003/14.html

- The Dukuduku Community brought an application reviewing the RLCC's decision to dismiss its land claim.
- The RLCC should have determined the validity or otherwise of the claim against the criteria in section 11(1) and (2) of the Restitution Act. She did not do so. The reasons she gave in the letter dismissing the claim are irrelevant to the factors to be considered under section 11.
- The RLCC attempted to argue that the dismissal of the claim was not final. The court disagreed. The letter was final in its terms and tone and did not invite further representations. Even when clarification of the letter was sought on behalf of the applicant, none was forthcoming. Moreover, the first respondent had done nothing to process the matter further. Even when it was quite clear to her that the applicant understood her letter to be final, she did not try to correct that impression. She must have become aware of the applicant's interpretation of her letter when she received the application to review. Far from behaving like someone who still expected representations, she defended the application. In this regard it is worth noting that the Restitution Act enjoins the first respondent to assist claimants in processing their claims. The RLCC did not appear to have assisted the applicant by inviting it to make representations.
- The RLCC disregarded the facts which, according to the law she was supposed to consider, while they were available to her in her research report and other documents at her disposal. Disregarding relevant facts, as the first respondent did, constitutes a serious breach of duty and borders on improper motives. The court found that the first respondent's action stands to be reviewed and set aside on the grounds that her action was unreasonable.
- The Restitution Act enjoins the first respondent to assist the applicant in processing its claim. The RLCC did not seem to have provided this assistance once she had written

the letter dismissing the claim. The fact that the first respondent found, during her investigations, that there had been a dispossession as contemplated in the Restitution Act, that there is prima facie a community and that the applicant had received no compensation, yet still dismissed the claim; tends to suggest bias or mala fides or improper motive on her part. As a result the applicant was put to the expense of an application to review her decision. In the premises, it is only fair that the applicant be compensated with an award of costs.

2002

1.) **Baphiring Community v Uys and Others (LCC64/98) [2002] ZALCC 4 (29 January 2002)**
http://www.saflii.org/za/cases/ZALCC/2002/4.pdf

- One of the issues raised in the case was whether the two claims forms relied upon by the land claimant were actually lodged with the Commission. Their receipt was never formally acknowledged by the Commission and they weren't listed on the control pages of the relevant files in the Commission's office.
- Evidence was led in respect of the lodging of the claim forms. The court noted that criticisms of the procedures of the Commission were justified but in the light of the evidence they were not sufficient to conclude that the two claims forms were not lodged.

2.) **Allie NO and Another v Department of Land Affairs and Others (LCC13/00) [2002] ZALCC 50 (1 October 2002)**
http://www.saflii.org/za/cases/ZALCC/2002/50.pdf

- This case dealt with the merits of a land claim.
- The court referred to some of the frustrations and shortcomings in the processing of the claim. 14 months after the claim form had been filled in and 11 months after it was gazetted the fourth respondent (RLCC) informed the National Housing Board (the then owner of the subject property)(represented in court by the second respondent, the provincial administration) , in writing, that a claim for the restitution of land rights had been lodged in respect of the subject property.
- Over the three years that followed Iqbal Allie, as the person pursuing the claim, endured considerable frustration, struggling to establish how the claim was progressing. His repeated enquiries with both the fourth [RLCC of Western Cape] and the second respondents came to naught. He telephoned the second respondent on numerous occasions, left messages and visited its offices, but to no avail. He even contemplated writing to the press in complaint.
- The third respondent in the meantime acquired the property from the second respondent. She had been a tenant on the property for 30 years. The transfer of the property to her was prevented when the sale was found to be in contravention of the Restitution Act because notice thereof was not given to the RLCC in terms of section 11 A of the Restitution Act.
- The fourth respondent, the Commission, sent a letter to the third respondent, dated 22 July 1999 about the land claim and drawing attention to Section 11(7) of the Restitution Act permitting the setting aside of sales in respect of properties subject to land claims. No explanation was furnished as to why the Commission only notified the

third respondent about the claim in 1999, given that the claim had been lodged four years earlier, as far back as 1995.

3.) **Ndebele-Ndzundza Community Re: Farm Kafferskraal No 181JS (LCC3/00) [2002] ZALCC 63 (23 December 2002)**
http://www.saflii.org/za/cases/ZALCC/2002/

- The claim included seventeen other farms, but the claims for those were still being processed in the Regional Land Claims Commissioner's (RLCC) office. No explanation for the separation of the claims has been proffered.
- The court had two criticisms against the Commission in respect of the requirements of section 10(1) of the Restitution Act. The first was that the claim form does not provide for all the questions raised by the sub-section. It makes provision only for a description of the land claimed, but not for the nature of the right in land of which a claimant was dispossessed and the nature of the right or equitable redress claimed. These issues must be pertinently raised in the claim form if a claimant is to comply with the Restitution Act.
- The second criticism was the failure of the Commission to act in terms of the Restitution Act, in particular Section 6(1)(b). The relevant RLCC should have assisted the claimant to complete the form to the extent possible. Some of the questions left unanswered on the form could have been easily answered, for example, questions 2 and 6. In fact at question 6, answers to the questions referred to above which are raised in section 10(1) and for which there is no provision on the form, could be furnished.

1999

1.) **Bataung Ba-Ga Selale Re: Farm Zephanjeskraal 251-JQ District of Rustenburg, North West Province (LCC85/98) [1999] ZALCC 39 (2 September 1999)**
http://www.saflii.org/za/cases/ZALCC/1999/

- A community claim was referred to the LCC. The landowners placed in issue whether the members of the group which lodged the claim in fact constituted the community which they purport to be.
- The LCC was requested to make a ruling in respect of information relevant to this aspect. In respect of some of the information requested, the he claimant indicated that the procedure for obtaining this information would be cumbersome. The Court had sympathy for the claimant's position. This information did not appear to have been elicited in the course of the investigation by the Commission on the Restitution of Land Rights. The collection of the data may involve a considerable amount of work. In the court's view, the Commission should assist the claimant in collecting this data.
- The Regional Land Claims Commissioner: Gauteng and North-West must provide reasonable assistance to the claimant to enable it to collect the data referred in this ruling.

1998

1.) **Farjas (Pty) Limited and Another v Regional Land Claims Commissioner, Kwazulu-Natal (LCC21/96) [1998] ZALCC 1 (19 January 1998)**
http://www.saflii.org/za/cases/ZALCC/1998/1.pdf

- The applicants applied for a review of the RLCC's decision to dismiss applicants' claims for restitution.
- The court dealt with the interpretation of section 11 of the Restitution Act, including the meaning of the RLCC being "satisfied" that the requirements listed in that section have been met and causing a notice of the claim to be published in the *Gazette.*
- The court held that it is sufficient if the applicants can show in relation to both the factual and legal issues that they have an arguable case, even if the arguments are relatively weak. The word "satisfied" in section 11(1) does not signify proof. Applicants are not required to prove their case before the RLCC. In broad terms, the Restitution Act attributes an investigative and facilitative role to the Commission (and not an adjudicative one which is a function assigned to the LCC).

2.) Local Trustees of Brownlee Congregational Church and Another v Goldacre and Another (LCC21/97) [1998] ZALCC 5 (24 June 1998)

http://www.saflii.org/za/cases/ZALCC/1998/5.pdf

- The claimants lodged a claim for a piece of land which they alleged that they were dispossessed of when the property was declared white in terms of Proclamation 212 of 1968 promulgated under the Group Areas Act.
- The court ultimately found that the claimants failed to prove their case.
- The copy of the aforesaid proclamation filed by the Commission, declared that the areas defined in paragraphs (a), (b) and (c) of the Schedule thereto were areas for occupation and ownership of the white group. The Commission's report alleged that the property fell under paragraph b of the Schedule. The court noted that the property was however not mentioned by erf name at such paragraph and that evidence should have been led in explanation of the allegation that the property fell within the ambit of paragraph b to the Schedule.

1996

1.) Macleantown Residents Association Re: Certain Erven and Commonage in Macleantown (LCC12/1996) [1996] ZALCC 3 (4 July 1996)
http://www.saflii.org/za/cases/ZALCC/1996/3.html

- The Chief Land Claims Commissioner, acting in terms of section 6(1)(d) of the Restitution Act reported to the Court on the terms of a settlement agreement relating to the Macleantown Local Area and requested that the settlement agreement be made an order of Court. A full report was drawn up by the Regional Land Claims Commissioner for the Eastern Cape and Free State. The Report sets out the results of the Commission's investigation and has annexed to it a deed of settlement and supporting documents.
- The Court was grateful to the Regional Land Claims Commissioner for the Eastern Cape and Free State for the investigation of and report on the claim. It was indeed a major task, particularly when it is borne in mind that this is new terrain that the Commissioner had to traverse.
- Unfortunately, all matters required by the Restitution Act and by the Rules drawn up by the Chief Land Claims Commissioner under section 16(1) of the Act are not dealt with

in the Report or the annexures. The result of some of the omissions is that the Court cannot make the settlement agreement an order of court.