

Diagnostic Report on Land Reform in South Africa
Land Restitution

Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa

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Table of Contents

1. Introduction	1
2. Structure of the report	Error! Bookmark not defined.
3. A review of the history of the Act in the context of its relationship with section 25(7) of the Constitution	Error! Bookmark not defined.
4. The Act and its purposes, the Land Claims Court and the Commission for the Restitution of Land Rights.....	Error! Bookmark not defined.
5. A review of the restitution budget over time, and the number of claims settled and still outstanding, and the impact of settling very expensive claims affecting relatively small numbers of people, such as MalaMala	Error! Bookmark not defined.
6. A review of judgments in the Land Claims Court, emerging issues and changing trends	Error! Bookmark not defined.
7. A review of debates about Communal Property Associations, their strengths and weaknesses, and whether the Communal Property Associations Act is effectively implemented and enforced by the Department. .	Error! Bookmark not defined.
8. A summary of findings by others in relation to the cost effectiveness and equity of how funds for land restitution have been spent and a review of findings about the impact of land restitution in addressing the triple challenge of inequality, poverty and unemployment.....	Error! Bookmark not defined.
9. A review of the literature in respect of the cost effectiveness of restitution in the light of the benefits flowing directly to those who were forcibly removed, as opposed to various service providers and strategic partners	Error! Bookmark not defined.
10. A review of literature about the track record of strategic partnership arrangements on restored land	Error! Bookmark not defined.
11. A review of reasons cited in the literature for under-production and under-investment in restored farms.....	Error! Bookmark not defined.
12. A review of the impact of land restoration vs. financial compensation on the livelihoods of beneficiaries.....	Error! Bookmark not defined.
13. The Land Restitution Amendment Act and surrounding controversies	Error! Bookmark not defined.
14. Debates on the overall assessment of the effectiveness of land restitution in South Africa since 1994.....	82
15. Conclusion.....	

1. Introduction

The High Level Panel is an initiative of the Speakers' Forum of Parliament aimed at taking stock of the impact of legislation insofar as it advances or impedes progress in addressing the triple challenges of poverty, unemployment and inequality. The mandate of the panel is to investigate the impact of legislation in respect of:

- The triple challenges of poverty, unemployment and inequality.
- The creation and equitable distribution of wealth.
- Land reform, restitution, redistribution and security of tenure.
- Nation building and social cohesion

The panel will assess the possible unintended consequences, gaps and unanticipated problems in post-apartheid legislation, as well as how effectively laws have been implemented. The panel will propose appropriate remedial measures to Parliament including the amendment, or repeal of existing legislation or additional legislation where necessary.

This diagnostic report on land restitution is a component of the panel's commissioned reports on land reform, restitution, redistribution and security of tenure. It provides a review of the history of the Restitution of Land Rights Act of 1994, a summary of the findings on the implementation of the provisions of Act by the Commission on Restitution of Land Rights and the Department of Rural Development and Land Reform, and the overall assessment of land restitution in South Africa since 1994.

2. Structure of the Report

This report consists of twelve main sections (excluding the introduction and conclusion) that will assist the panel to gain insight into the impact of land restitution legislation insofar as it advances or impedes progress in addressing the triple challenges of poverty, unemployment and inequality. The first main section of the report gives the historical background to the Restitution of Land Rights Act (Restitution Act). It traces the evolution of the content of the Act from land-related legislations passed on the eve of democracy in South Africa and the debates related to Section 25(7) of the Constitution and to the 1913 cut-off date for the lodgment of land claims. Following on this, the second part of the report summarises the Act and its purposes, and the structures and instruments designed to carry out the land restitution as

provided in the Section 25(7) of the Constitution. It also summarizes current legal and institutional frameworks and the results of administrative changes on the pace of restitution.

The third part of the report gives an overview of the restitution budget over a period of 20 years (i.e. 1995 to 2015). It also analyses the number of claims settled and still outstanding to tease out the reasons for the pace of land restitutions but also to understand the impact of settling very expensive claims using MalaMala as an example. In the fourth part, attention is paid to judgements in the Land Claims Court charged with adjudicating land claims throughout the country. The purpose of reviewing judgments in the Land Claims Court is to trace emerging issues and changing trends.

Communal Property Associations (CPAs) that are established as a legal entity for purposes of registering and administering land restituted or redistributed through land reform are the subject of analysis in part five of this report. These associations are analyzed in the context of the Communal Property Associations Act. The intention is to understand the strengths and weaknesses of CPAs and their effectiveness in land reform. The sixth part of the report provides a cursory overview of a series of studies that have been conducted to assess the outcomes of South Africa's land and agrarian reforms with a particular focus on the impact of land restitution initiatives viewed against poverty reduction, job creation and equality considerations. The overview includes perspectives from both urban and rural cases and spans the restitution process since inception; involving perspectives on cases where ownership rights have translated into land occupation as well as the more recent cases where the transfer of ownership rights did not lead to the occupation of the land (for example in instances where partnerships/joint ventures have been established).

Part seven of the report reviews literature to understand the cost effectiveness of land restitution and the benefits that accrue to beneficiaries of land restitution compared to the benefits that service providers and strategic partners have. This comparison is necessary to ensure that restitution ultimately benefits the primary target of the process. Part eight takes this comparison further by reviewing the track record of strategic partnership arrangements on restored land. The question of whether these strategic partnerships results in investment and improved production in restored farms is tackled in part nine of this report. The intention is to understand reasons for under-production and under-investment as documented in literature.

Though the main goal of land restitution is to restore land to people who were dispossessed of their land on racial grounds, land restoration is not only outcome of the restitution process. Some land claims are settled through financial compensation. Part ten of this report reviews the impact if land restoration and financial compensation on the livelihoods of beneficiaries. This review is followed by recent discussion on the Land Restitution Amendment Act and the controversies surround the promulgation of this Act. Part of eleven of this report is devoted to these controversies. The last section of the report, part twelve, recounts debates on the overall assessment of the effectiveness of land restitution in the country since 1994.

3. A review of the history of the Restitution Act

While the current goals and directions of land restitution were shaped by the governing African National Congress since 1994¹, the land restitution process in South Africa should be understood as a product of competing visions for a post-apartheid South Africa that were highly contested during formal political negotiations in 1992/3. It was also influenced by external actors such the World Bank that sought to place a liberated South Africa within the ambit of a capitalist global economy and to subject land reform to neoliberalism.² Liberation movements were in agreement about the political imperative of land restitution but differed in their approaches. The apartheid state developed and pushed its version of land reform through the passage of the Abolition of Racially Based Land Measures Act, the Upgrading of Land Tenure Rights and the Less Formal Township Establishment Act.³ In particular, the Abolition of Racially Based Land Measures Act (ARBLMA) 108 was passed in 1991 as a response to political pressures against the apartheid state (including the threat of land invasion) but also as a strategy by the apartheid state to influence the path of land reform in post-apartheid South Africa.⁴ The ARBLMA sought to repeal the racial terminology without addressing the effects of apartheid.⁵ Following submissions by civil society organisations including the National Land Committee, the National Party government established the Advisory Commission on Land Allocation (ACLA) on 11 December 1991 to identify 'land belonging to the state or any state institution under, or for the purpose of promoting any law repealed by [ARBLMA]'.⁶ State land so identified was to be transferred to victims of racially-motivated removals. The ACLA did not have a complete list of all state-owned land in the country but earmarked land in possession of the departments of Public Works, Agricultural Development, Administration, and the House of Assembly. It was understood that these departments used land in their possession to promote the objectives of the Racially Based Land Measures Act.⁷

The first requests for the restoration of land rights involved the farms Roosboom (KwaZulu-Natal), Charlestown (KwaZulu-Natal), Doornkop (Mpumalanga), Klerksvlei (Free State), portions of land in Asiatic Bazaar in Pretoria (Gauteng), and Erf 295 in Potgietersrus (Limpopo).⁸ These land claims by previous title holders constitute the first test of the objectives of land restitution during negotiations for a political settlement in South Africa. They show that the apartheid state designed a land restitution process that was concerned with a privileged group of black and white property owners. It sought to entrench the status quo through a system that favours individual ownership of land and that also opens up state land to privatization while ignoring the plight of other land users. For example, the 284 mostly Sotho-speaking families who claimed Doornkop in Mpumalanga had tenants who looked after their properties when they moved to cities.⁹ The settlement of the land claim, though, resulted in land being returned to previous title holders but completely ignored the tenants who lived there.¹⁰ In 1993 the ACLA was renamed the Commission on Land Allocation (CLA) through the amendment to the ARBLMA in order to give it decision-making powers, i.e. to issue orders that bind the state.¹¹

Four important developments that were to permeate the Restitution Act occurred under the renamed Commission. These relate to land for restitution, the categories of land claimants, the idea of alternative forms of redress, and the procedures to be followed in the restitution process. Whereas the initial plan was to transfer land held by the state and its organs or a development body, by 1993 restitution included all land that may be acquired by the state for the purpose of restitution. Persons and circumstances to be considered for land restitution were grouped into eight loose categories (Box 1).¹²

Box 1 Consideration of prejudice by the CLA

‘persons who appeared to have been prejudiced’, ‘persons who had historical claims to land’, ‘persons who had a substantial need for additional land for either residential or agricultural purposes’, ‘persons who requested the Commission to allocate available land to them in order to avoid conflict between persons or communities’, ‘persons who requested the Commission to compensate them for the fact that their land was expropriated to promote the aims of the repealed racially based laws, or the Community Development Act, 1966’, ‘persons who approached the Commission in order to obtain living space for themselves and their communities’ and ‘persons who approached the Commission to allocate viable agricultural and residential units of land for their use’.

These categories meant that the CLA did not discriminate claimants on the basis of race as a matter of principle. They also reveal that land restitution and land redistribution were lumped together. Following the passage of the Restitution Act, these land reform measures were separated into two programmes that were administered differently.¹³ From the first attempts at land restitution through both the ACLA and CLA the process was guided by dispute resolution mechanisms led by a judge. The CLA investigated land claims through meetings and public hearings with affected individuals and groups of people. The procedure followed by CLA is outlined in Box 2.¹⁴

Box 2: Procedures for settling land claims before the passage of the Restitution Act

1. Applications and claims were lodged with the Commission, which determined the urgency of the matter in order to prioritize its work,
2. Following the advertisement of the claims, preliminary investigations were conducted, including *in loco* inspection,
3. Public hearings were advertised and all affected parties were afforded the opportunity to give evidence,
4. Thereafter, the Commission evaluated the evidence before it to determine the order or recommendation, and
5. The Commission notify its orders and recommendations to the Minister of Regional and Land Affairs

By the end of its term on 30 September 1994, the CLA had settled claims involving 613,000 hectares of state-owned land.¹⁵ Murray and Williams have argued that CLA resolved very few of the land claims placed before it, 'not least because many claims involved land which the state had transferred to whites'.¹⁶ There is evidence that the CLA did not give priority to the victims of forced removals in dealing with land claims. For example, in the case of Motlhwase community that had been removed from Khuis (Northern Cape) in 1969, the CLA recommended that the farms from which the community was removed could be sold to any farmer, including white farmers.¹⁷

Much of the work of the CLA and the experiences gained from its recommendations between 1991 and 1993 were incorporated into the design of the Restitution Act, and the orders made by CLA were implemented by the new Commission on Restitution of Land Rights.¹⁸

Parliamentary debates on the Restitution of Land Rights Bill in 1993 suggest that there were at least three main positions on land restitution. The first entails focusing land restitution on state

land as was the case with the commissions referred to above. It was estimated that there was some 26% of state land to be redistributed.¹⁹ This percentage represents 12% of land owned by the apartheid state and 14% in TBVC states, and shows confusion between land restitution and land redistribution in the early 1990s. It is unclear whether this calculation had any influence on the Mandela government's target to redistribute 30% of productive land in its first five years. In line with its earlier land restitution programme that was carried out by the CLA, the National Party viewed the Bill as an articulation of the gradual ending of separate development.²⁰

The second position was to use land restitution to complete the project of consolidating and expanding areas of the bantustans.²¹ This position was predominantly held by white conservative groups and some bantustan leaders, who were determined to use land ownership as a mechanism for maintaining territorial arrangements on which the apartheid state was anchored.²² A common feature between the first and second positions is their preoccupation with state land. The third position, however, sought to bring state land and private land into the ambit of land restitution while also broadening the scope of the programme as evident in Minister of Land Affairs, Derek Hanekom's remarks during the Parliamentary debate on the Bill. The Minister emphasized the need to pass the Bill in order to fulfil the obligations of the Interim Constitution, and to strike 'the right balance in dealing with both the expectations of the dispossessed and the uncertainties of land owners', to open up the agricultural economy, to secure 'a legal system where land and property rights are respected by all', and to 'bring about a fair and just land redistribution'.²³ It is from this quest for a balancing act that the Restitution Act derived its objectives that are sanctioned by Section 25(7) of the Constitution.

One of the most heated debates on restitution in South Africa relates to the cut-off date for the lodging of land claims. Notwithstanding divergent views on land restitution within the liberation movement, the ANC agreed to 19 June 1913 as a cut-off date for land claims in democratic South Africa. Five points were made to defend this cut-off date. First, it was argued that 19 June 1913 represents the date on which the Natives Land Act was promulgated. Second, it was the date on which territorial segregation and post-Union and (apartheid) land policy received the official seal. Third, it was argued that while dispossession took place prior to 1913 through wars, conquest, treachery, treaties and so forth, these injustices could not reasonably be dealt with by the LCC. Fourth, it was feared that pre-1913 historical claims on ancestral land would be impossible to unravel, and would serve to awaken and/or prolong destructive ethnic and

racial politics. The fifth point was that land restitution should be settled as soon as possible in order to achieve political and economic stability.²⁴ In other words, pre-1913 land claims would delay this stability to the detriment of the country. This is also the reason why the final deadline for submitting land claims was 31 December 1998. The government used these two dates (i.e. 19 June 1913 and 31 December 1998) to set the target for the lodgement of claims in three years, for finalizing all claims in five years, and for implementing all court orders within 10 years.²⁵

The 1913 cut-off date was discredited on the following bases. First, it was argued that, as massive land dispossession pre-dates 1913, the success of land restitution depends on the government's ability to transfer much of this land. To exclude such land from the restitution process compromises the goal of restitution.²⁶ It was also suggested that there have been waves of dispossession that cover the pre-and post-1913 timelines. Having sketched this historical background, the section that follows discusses the Act and the debates related to some of its provisions.

4. The Restitution Act, its purpose and debates around its provisions

The Restitution Act is in line with, and also supports the ideals of reconciliation and nation-building in post-apartheid South Africa. Its purpose is 'to provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith'.²⁷ It defines 'the right in land' as 'any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question'.²⁸

The purpose of the Restitution Act is realized through the Commission on Restitution of Land Rights (CRLR) that took office on 1 March 1995, with Wtsho-Otsile Joseph (Joe) Seremane as its first Chief Land Claims Commission.²⁹ The CRLR was established in terms of Sections 121 and 122 of the Interim Constitution while its functions are provided for in Sections 4 to 21 of the restitution Act.³⁰ Chapter II of the Restitution Act lists the functions of the CRLR as to 'receive and acknowledge receipt of all claims for the restitution of rights in land lodged with or transferred to it in terms of this Act; take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims; advise claimants of the progress of their

claims at regular intervals and upon reasonable request; investigate the merits of claims contemplated in paragraph; mediate and settle disputes arising from such claims; subject to the provisions of Section 14, report to the Court on the terms of settlement in respect of successfully mediated claims; and define any issues which may still be in dispute between the claimants and other interested parties with a view to expediting the hearing of claims by the Court.³¹ The founding mission statement of the CRLR is 'to promote justice in respects of all victims of dispossession of land rights as a result of racially discriminatory laws, policies and practices, by *facilitating the process of restitution of such land rights* as provided for in the Constitution and in the Restitution of Land Rights Act' (emphasis added).³²

The CRLR operates through regional structures in the form of provincial offices. In its first year the CRLR had four Regional Land Claims Commissioners who were responsible for nine provinces³³ but this structure has since been revised to allow for a commissioner per province in an attempt to enhance efficiency. Ideally, the Regional Land Claim Commission prioritizes the settling of claims on the basis of 'claims comprising large numbers of beneficiaries and/or households, claims comprising large tracts of land, rural claims, claims of the poor and the needy, claims involving other government departments, claims with strong developmental components, claims that help towards rebuilding and reintegrating towns and cities, and 'special claims' of national and international importance.³⁴

The legal requirements related to land claims are overseen by the Land Claims Court that was established in 1996 in terms of Chapter III of the Restitution Act. The Land Claims Court (LCC) deals with disputes 'that arise out of laws that underpin South Africa's land reform initiative', namely restitution, labour tenants, security of tenure.³⁵ Maureen Tong described the LCC as 'a Court of Equity', because 'it allows for the use of Alternative Dispute Resolution (ADR) mechanisms in the settlement of disputes'.³⁶ According to Chapter III of the Restitution Act, the LCC has the power to determine a right to restitution of any right in land; to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land; to determine the person entitled to title to land contemplated in the Act; to determine whether compensation or any other consideration received by any person at the time of any dispossession of a right in land was just and equitable; to determine any matter involving the interpretation or application of this Act or the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), to decide any constitutional matter in relation to this Act or the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of

1996); to determine any matter involving the validity, enforceability, interpretation or implementation of an agreement contemplated in section 14(3), and to determine all other matters which require to be determined in terms of this Act.³⁷

The work of the CRLR was reviewed in mid-1998 in light of the slow pace of land restitution. The review process focused on the legal, institutional, structural and procedural problems affecting the delivery of restitution.³⁸ The Restitution Review recommended (a) re-engineering the business process, (b) integration of the CRLR and the DLA with the CRLR retaining its separate identity as a statutory body, (c) mapping out a clear path about which claims could be completed and assisted beyond settlement, (d) shifting from a court-driven process to an administrative one using the section 42D of the Restitution Act, (e) limiting referrals to court – sending to court only those cases that are disputed, and legally complex cases, and cases involving reviews and appeals, (f) dealing with cases as a bundle and outsourcing work related to land claims, and (g) using alternative dispute resolution mechanisms to fast track land claims.³⁹ As a consequence of the Review, the CRLR embarked on a systematic registration, validation and processing of claims and batched together land claims in a geographical area so as to settle claims that could enhance development prospects.⁴⁰

In following the recommendations of the Restitution Review, the CRLC also drafted a standard settlement offer policy for urban land claims with a view to accelerating the delivery of land claims. Standard Settlement Offers (SSOs) were set initially at R40 000 for a residential property, with variations for major metropolitan centres (up to R50 000) and smaller amounts (R17 500) offered to claimants who had been long-term tenants at the time of dispossession.⁴¹ The SSOs resulted in massive cash offers throughout the country, especially in urban areas. Between 1999 and 2000, more than 8000 claims were settled compared to 41 claims that were settled in the first years of the implementation of the Restitution Act.⁴² Administratively, the CRLR decentralized its functions to provincial offices, and the Restitution Act was amended to give the CRLR delegated powers not only to investigate claims but also to negotiate and conclude settlement agreements with claimants.⁴³ While remaining rights-based, the amendments to the Restitution Act were meant to ‘do away with the need for the claimants to waive their rights in order to facilitate the administrative processing of claims’ as it was the case under Section 42D of the Restitution Act.⁴⁴

The Department of Performance Monitoring and Evaluation in the Presidency and the consequent National Evaluation Plan 2013/14 made eight recommendations to the CRLR.⁴⁵ The first recommendation was for a clear the definition of the function of the CRLC and its autonomy in the administration of the restitution process. The second recommendation was that the CRLR should provide a detailed business process and the Standard Operating Procedures (SoPs). This entails describing all steps in the restitution process, including the roles and responsibilities of staff. The third recommendation was that existing Management Information Systems (MISs) were to be rationalized into a single web-based system. This rationalization was important in light of the use of different information systems such as Umhlaba Wethu and Landbase that complicate the transfer of data from one system to another, while also compromising the security of data.⁴⁶ The national project on Electronic Data Management System tried to resolve this problem but the scanning of land claims files into electronic documents proved to be a difficult undertaking. As a fourth recommendation, managers of restitution at the provincial level were to be given responsibilities and budgets for all non-capital aspects of their programmes.

It was also recommended that the CRLR should have a dedicated and competent human resource capacity independent of the DRDLR. This fifth recommendation also included the assessment and reward of staff performance according to ‘the quality of research, adherence to agreed procedures and systems, the integrity of the claims process, [and] the quality and the rate of settled claims’.⁴⁷ The sixth recommendation was to broaden the current Management and Evaluation system in the CRLR to ‘measure intermediate outputs of the settlement process as well as qualitative aspects’.⁴⁸ In the seventh recommendation, the budget for the restitution programme was to be reconsidered in light of the reduction in the budget for the programme in the past years and the impact it had on the ability of the CRLR to settle land claims. It was noted that ‘should the second phase of restitution take place, the CRLR will require a greater operational budget than that which is currently available’.⁴⁹ The last recommendation was that the filing system should be cleaned up and systematized and that outstanding land claims should be given priority and be processed before any new claims could be attended to.

5. A review of the restitution budget, settled and outstanding claims, the impact of settling very expensive claims such as MalaMala

Restitution budgets

The Department of Land Affairs (DLA) was established in 1994 with the mandate to ‘restore land rights as provided for in the Constitution and to provide an appropriate land policy,

legislative framework and mechanism for equitable access to land and security of tenure within the context of sustainable rural development'.⁵⁰ The first budget of the DLA was that of the defunct Department of Regional and Land Affairs, which gave little attention to restitution. Though the expenditure for land restitution increased (in monetary terms) from R22.4 billion 1995/1996 to R2,997.9 billion in 2014/2015⁵¹ (Tables 1 and 2, Figures 1 and 2) the budget for land restitution has not marched the increase in land claims and the cost involved in settling them. There are also reports of underspending of land restitution budgets.⁵² Analysts have used the mismatch between the huge demand for land restitution and the budget allocation as an indication of the government's lack of commitment to land reform.⁵³ These figures should be treated with caution because they depend of how claims are bundled or unbundled. Bundled land claims give a false sense of fewer outstanding land claims.

Land claims were bundled on the basis that people claiming the same property constituted an interest group claiming the same property that was lost due racial laws.⁵⁴ It was therefore logical to treat multiple claims on the same property as one claim in order to allow researchers to focus on the same property to ensure the success of the land claim. The weaknesses of this strategy were that the interest of individual communities was subjected to often ill-defined outcomes of a collective claim. Settling bundled claims proved to be difficult as there were competing settlement options that stalled the restitution process as evident in Bahlalerwa, Mosehlana and Mokitlane communities who bundled their land claims on 30 April 2002.⁵⁵

Table 1. Audited expenditure of the Rural Development and Land Reform Programme, 1996/97-2015/16

	1996/97	1997/98	1998/99	1999/00	2000/1	2001/2	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16*
Restitution	22.4	43.7	46.9	164.1	265.1	291.0	394.3	839.1	1,182.8	1,789.4	2,338.4	3,638.5	3,122.1	2,331.6	3,766.8	2,376.3	2,865.7	2,836.7	2,997.9	2,602.7
Land Reform	106.3	195.7	431.0	275.7	252.6	443.5	416.0	453.7	453.7	644.9	854.1	1,571.1	2,805.6	2,569.6	1,937.2	3,317.8	3,326.5	2,863.2	2,482.1	2,537.1
Rural Development													9.1	72.1	357.5	786.3	1,075.6	1,700.8	1,801.0	1,984.6
Administration	65.0	76.6	93.0	103.8	127.2	112.3	151.8	191.2	223.1	266.6	331.3	420.6	456.6	579.5	689.7	934.4	1,076.7	1,238.8	1,382.2	1,314.9
National Geomatics Management																				
Services	83.0	101.2	149.5	141.3	125.2	129.3	140.2	151.8	162.4	173.8	196.8	263.0	276.3	311.0	371.7	583.0	575.1	814.6	732.5	748.1
Surveys & mapping	28.5	34.2	47.5	42.2	42.8	47.6	56.3	61.4	65.6	73.1	71.9	97.3								
Cadastral surveys	42.3	48.1	55.5	56.8	64.5	68.8	72.5	68.2	79.0	77.7	90.2	137.6								
Spatial Planning & Information	9.3	15.7	35.0	20.2	12.3	6.0	6.9	11.9	15.2	17.0	21.0	21.8								
Auxiliary & Associated Services	2.9	3.2	8.8	22.2	5.5	6.8	4.5	10.4	2.6	6.0	13.7	6.3								
Approp. Public Works			2.7																	
Stated total	276.7	417.2	720.7	684.9	770.1	976.2	1,102.3	1,635.9	2,022.0	2,874.7	3,720.5	5,893.1	6,669.8	5,863.8	7,122.9	7,997.7	8,919.6	9,454.1	9,395.8	9,187.4
National Expenditure (R billion)	175.5	189.9	201.5	214.8	233.9	262.9	278.5	299.4	347.9	416.7	470.2	541.5	636.0	747.2	806.0	889.9	965.5	1,047.8	1,132.0	1,247,317
% National Expenditure	0.16%	0.22%	0.36%	0.32%	0.33%	0.37%	0.40%	0.55%	0.58%	0.69%	0.79%	1.09%	1.05%	0.78%	0.88%	0.90%	0.92%	0.90%	0.83%	0.74%

*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016)

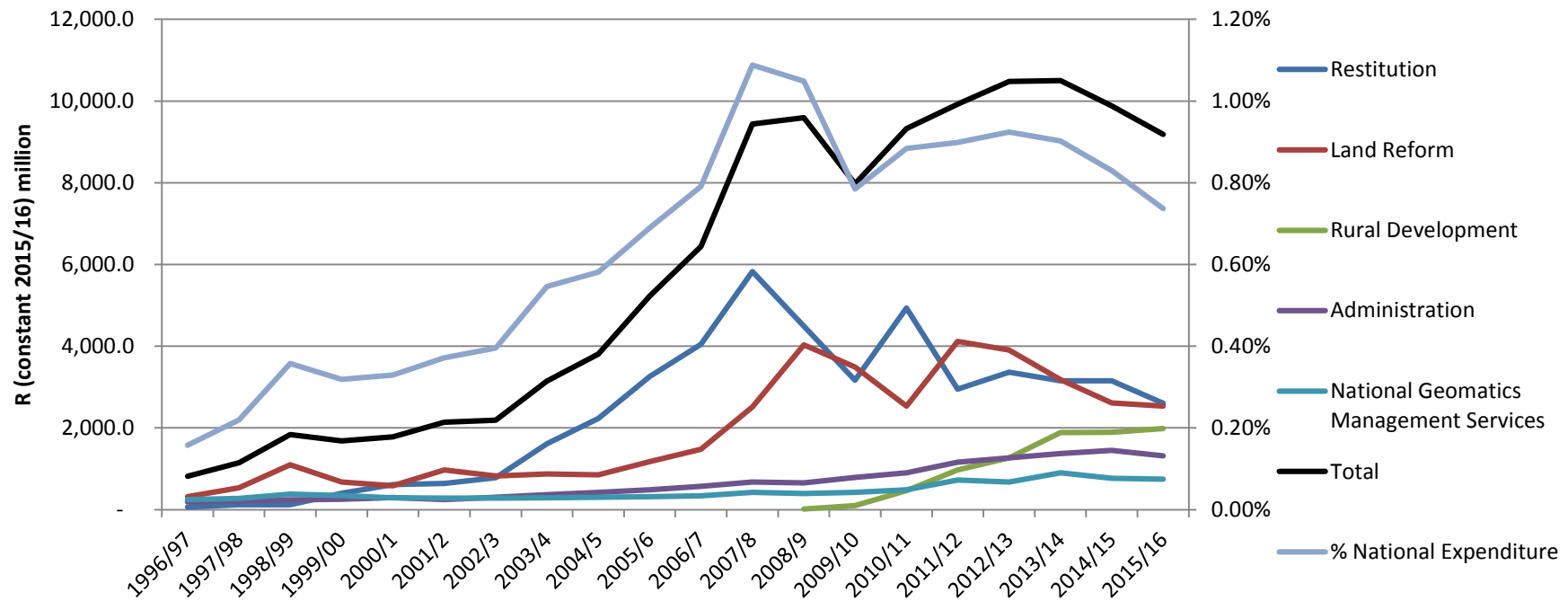
Table 2. Audited expenditure of the Rural Development and Land Reform Programme in constant R (2015/16), 1996/97-2015/16

	1996/97	1997/98	1998/99	1999/00	2000/1	2001/2	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Restitution	66.3	120.0	119.7	403.3	612.4	638.4	784.3	1,612.2	2,228.3	3,256.4	4,045.5	5,827.6	4,491.0	3,169.5	4,931.0	2,947.8	3,367.7	3,150.9	3,152.0	2,602.7
Land Reform										1,173.1	1,477.6	2,516.4	4,035.7							
Rural Development	314.5	537.5	1,100.1	677.5	583.5	973.1	827.5	871.8	854.7	6	6	4	7	3,493.1	2,535.9	4,115.7	3,909.2	3,180.3	2,609.7	2,537.1
Administration	192.3	210.4	237.4	255.1	293.8	246.4	302.0	367.4	420.3	485.2	573.1	673.7	656.8	787.8	902.9	1,159.1	1,265.3	1,376.0	1,453.3	1,314.9
National Geomatics Management Services	245.5	278.0	381.6	347.4	289.1	283.8	279.0	291.7	306.0	316.3	340.5	421.2	397.4	422.8	486.6	723.2	675.8	904.8	770.2	748.1
Surveys & mapping	84.3	93.9	121.2	103.7	98.9	104.5	112.0	118.0	123.6	133.0	124.4	155.8	-	-	-	-	-	-	-	-
Cadastral surveys	125.1	132.1	141.7	139.6	149.1	151.0	144.2	131.0	148.9	141.4	156.0	220.4	-	-	-	-	-	-	-	-
Spatial Planning & Information	27.5	43.1	89.3	49.7	28.5	13.2	13.7	22.8	28.6	30.9	36.3	34.9	-	-	-	-	-	-	-	-
Auxiliary & Associated Services	8.6	8.8	22.5	54.5	12.7	15.0	9.0	20.0	4.9	10.9	23.7	10.1	-	-	-	-	-	-	-	-
Approp. Public Works	-	-	6.9	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
								3,143.3	3,809.4	5,231.6	6,436.5	9,438.6	9,594.7							
Total	818.5	1,145.9	1,839.6	1,683.2	1,778.7	2,141.7	2,192.8	0	4	6	4	7	2	7,971.1	9,324.3	9,921.1	10,482.2	10,501.2	9,878.8	9,187.4
National Expenditure	519.1	521.7	514.4	527.8	540.3	576.8	554.0	575.3	655.3	758.3	813.4	867.3	914.8	1,015.7	1,055.1	1,103.9	1,134.6	1,163.8	1,190.2	1,247.3
% National Expenditure	0.16%	0.22%	0.36%	0.32%	0.33%	0.37%	0.40%	0.55%	0.58%	0.69%	0.79%	1.09%	1.05%	0.78%	0.88%	0.90%	0.92%	0.90%	0.83%	0.74%

*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016); StatsSA (2016)

Figure 1. Audited expenditure of the Rural Development and Land Reform Programme in constant R (2015/16), 1996/97-2015/16



*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016); Stats SA 2016

Settled and outstanding land claims

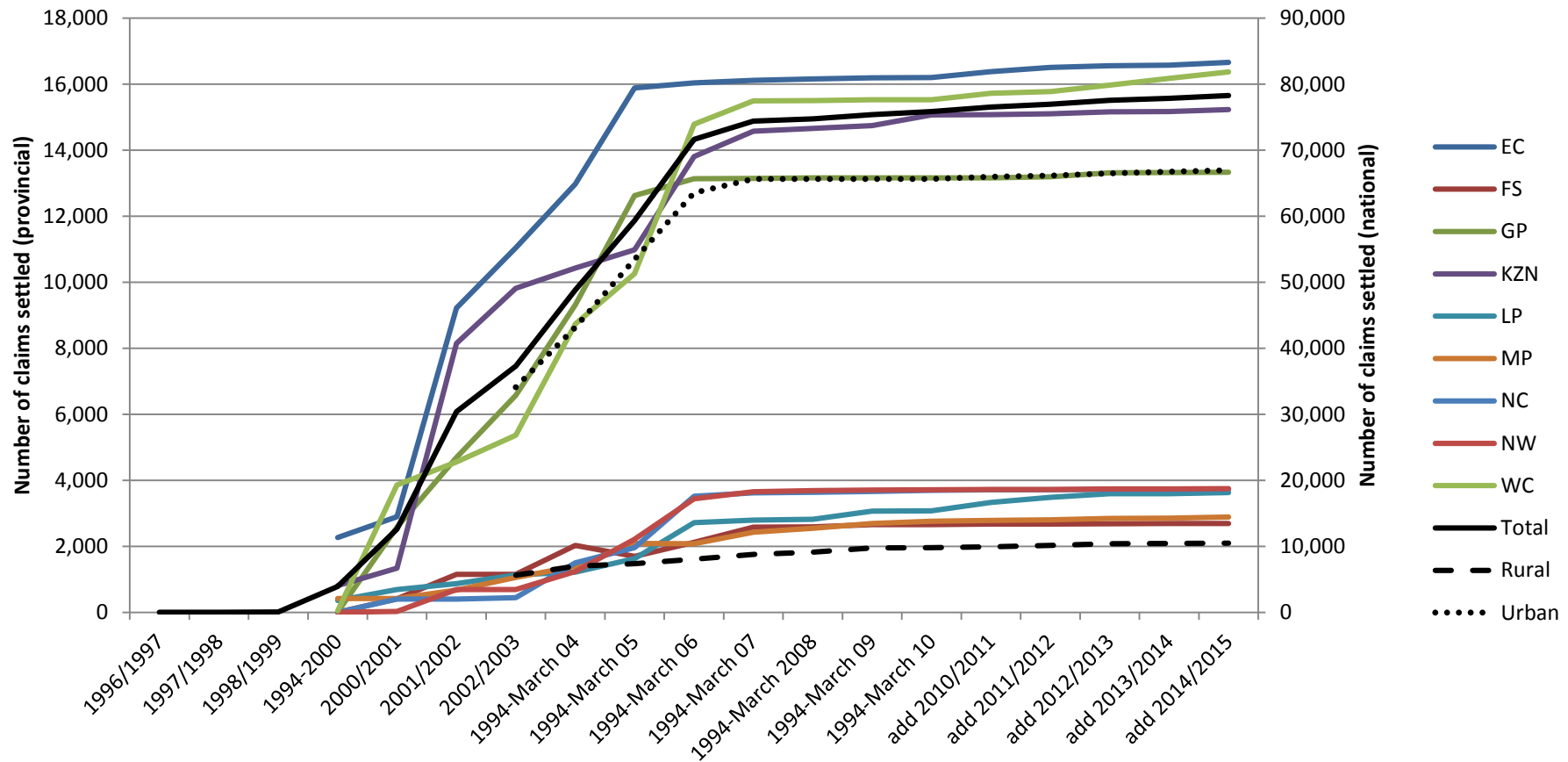
In 2013 the Department of Rural Development and Land Reform carried out a study to determine the status of land claims throughout the country. The results showed that a number of substantial land claims (7226) were not yet gazetted and the highest number of these were in Mpumalanga (Table 3). Figures 3 to 5 show settled claims, the amount of land restored, and beneficiaries per province.

Table 3: Status of land claims by provinces, August 2013

Province	Number of ungazetted claims	Number of gazetted but not yet settled claims	Number of claims partially settled (in phases)	Number of fully settled claims (but not finalised)	Number of finalised claims
Eastern Cape	844	164	213	1885	14528
Free State	0	14	8	148	2743
Gauteng	227	43	1929	1747	9907
KwaZulu-Natal	1463	665	1244	3053	11540
Limpopo	580	176	849	447	2324
Mpumalanga	2396	289	578	374	1894
North West	5	82	303	914	2730
Northern Cape	99	37	82	562	2685
Western Cape	1612	37	2802	3454	10639
TOTAL	7226	1507	8008	12584	58990

Source: Land Claims Commissioner's presentation to parliament, 2013

Figure 2. Approximate cumulative settled claims by province and settlement area. 1996/7 – 2014/15



*Data from the years 1996/7-1998/9 were retrieved from (CRLR 2003).

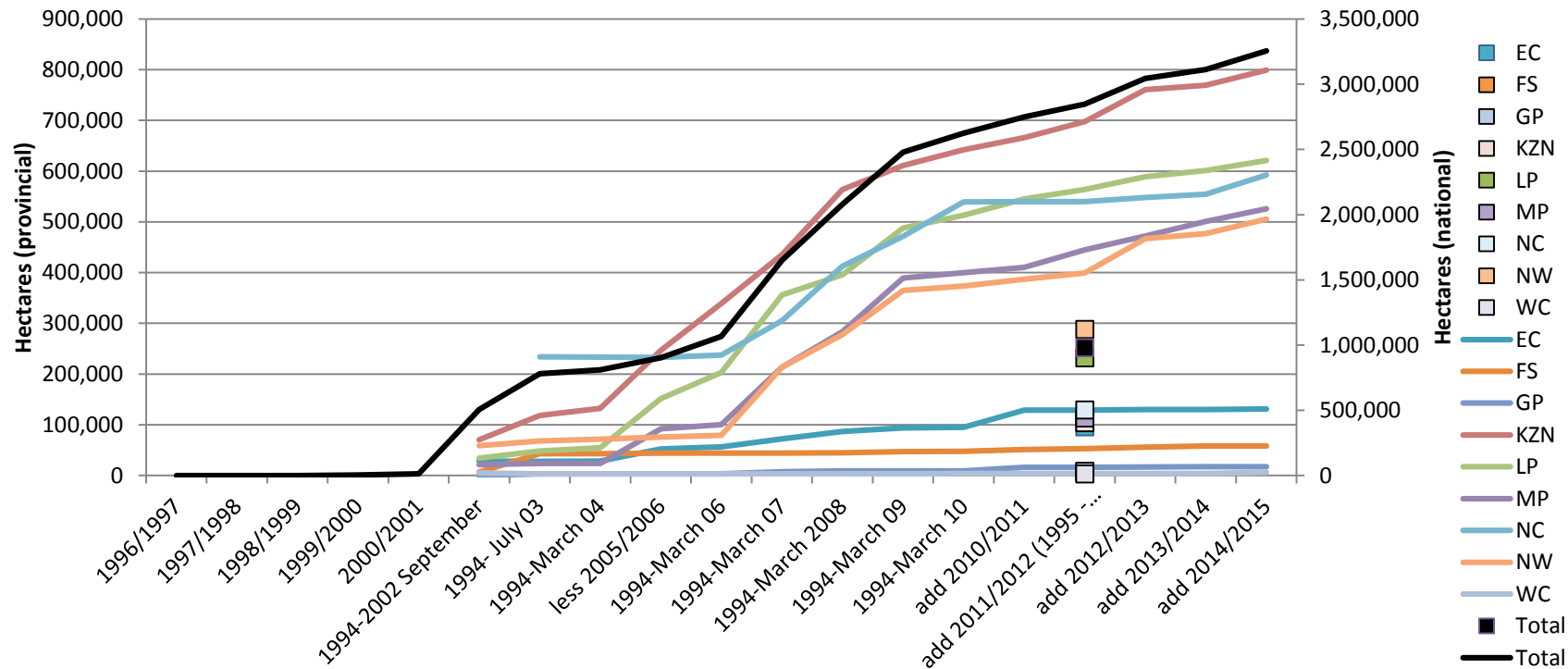
** Data from the years 1999/00 – 2002/3 were retrieved from (CRLR 2005).

*** Cumulative statistics for the years up to March 2004- March 2010 were provided from (CRLR 2004; CRLR 2005; CRLR 2006b; CRLR 2007a; CRLR2007b; CRLR 2008; CRLR 2009; CRLR 2010).

**** Data for years 2010/11-2014/15 were arrived by adding data from (CRLR 2011; CRLR 2012; CRLR 2013; CRLR 2014; CLR 2016)

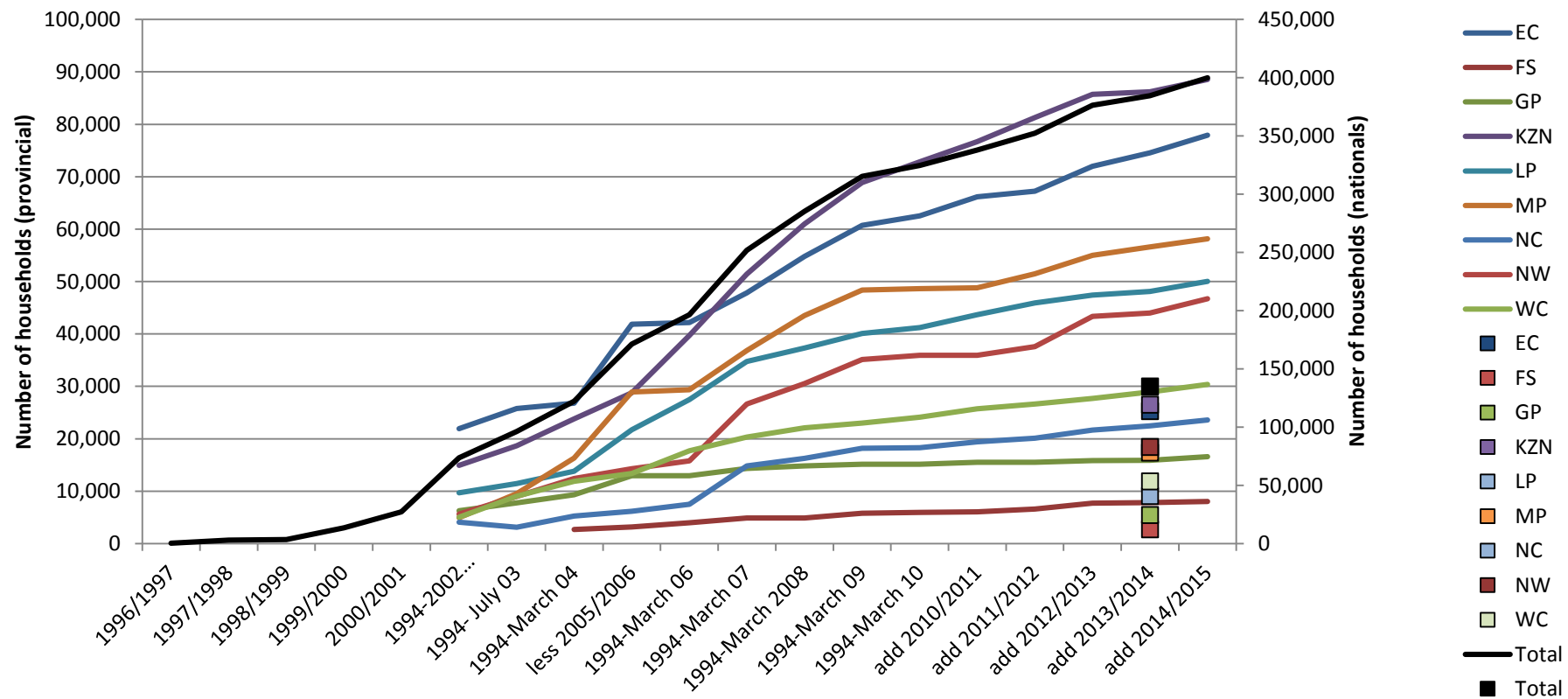
***** Data from 2002/3 – 2005/6 for urban and rural claims were derived by subtracting data from (CLR 2007b; CLR 2006a; CRLR 2005; CRLR 2003)

Figure 3. Approximate cumulative hectares approved for restoration by province, 1996/7 - 2014/15 and land actually transferred up to 2011/12



* Data from the years 1996/7-2000/01 were retrieved from (CRLR 2003).** Cumulative statistics for the years up to March 2004 and March 2006- March 2010 were provided from (CRLR 2004; CRLR2006b; CRLR 2007a; CRLR 2007b; CRLR 2008; CRLR 2009; CRLR 2010). Cumulative statistics provided by (CRLR 2002) are to September 2002, and those provided by (CLR 2003) are to July 2003.*** Data from 2010/11-2014/15 arrived at by adding data from (CRLR 2011; CRLR 2012; CRLR 2013; CRLR 2014; CLR 2016). Data for 2005 arrived at by deducting data from (CRLR 2006a) ****Data on actual land transferred taken from July 03 <http://www.pmg.org.za/docs/2003/appendices/030812land.ppt> sept 02 <http://www.pmg.org.za/docs/2002/appendices/021113restitution.ppt> Jan 2012 <http://pmg.org.za/files/docs/120207progress.ppt> *****Three data points were altered from what was published for what appeared to be obvious typos, the outcome of which was to present cumulative land approved as having decreased, an impossibility. These include: MP hectares transferred up to March 2004 was changed from 240,014 hectares to 24,014 hectares; MP hectares transferred up to July 2003 was changed from 233,979 to 23,979; and, Northern Cape hectares up to September 2002 was deleted altogether.

Figure 4. Approximate cumulative beneficiary households by province 1996/7 – 2014/15 and female-headed beneficiary households up to 2013/14



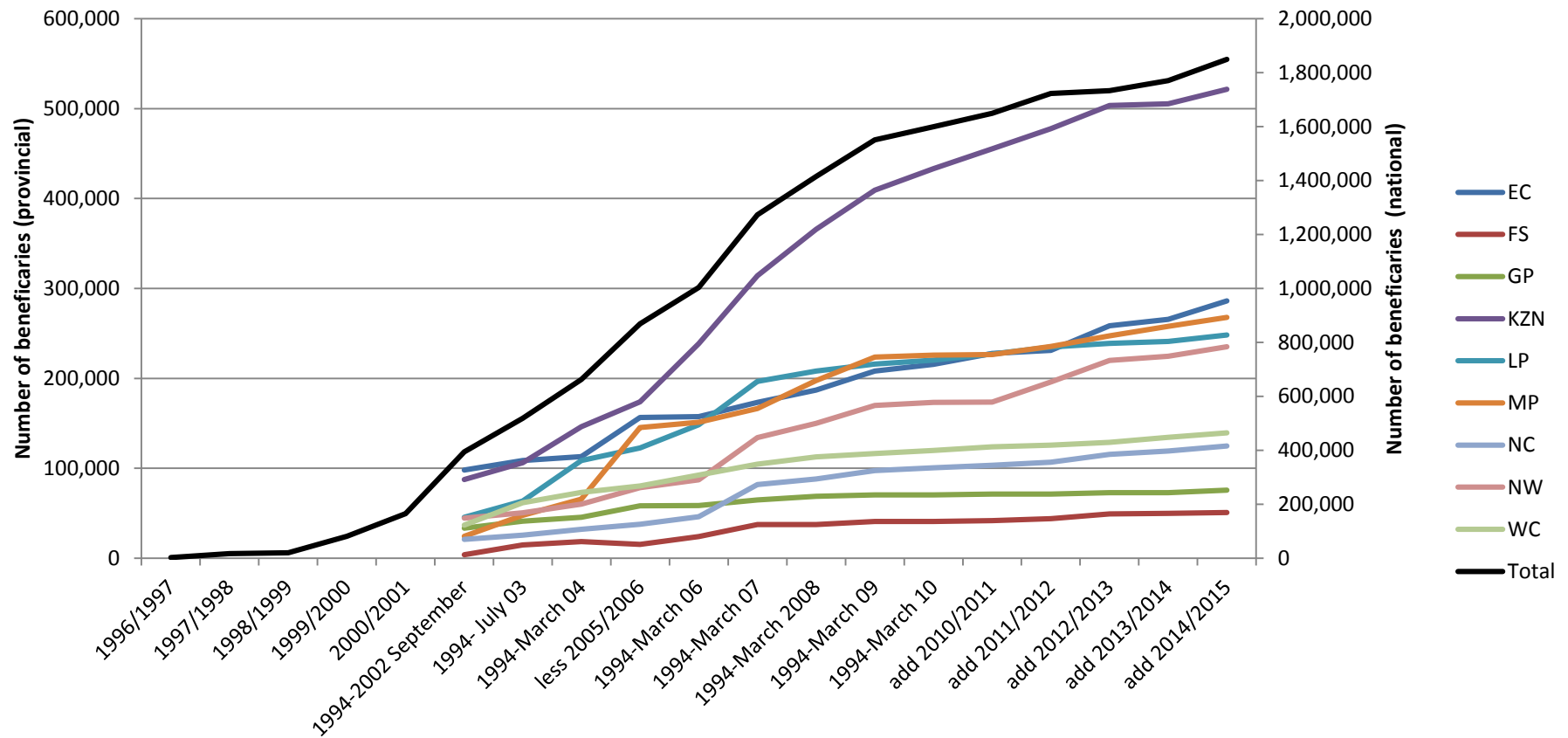
* Data from the years 1996/7-2000/01 were retrieved from (CRLR 2003).

** Cumulative statistics for the years up to March 2004 and March 2006- March 2010 were provided from (CRLR 2004; CRLR2006b; CRLR 2007a; CRLR 2007b; CRLR 2008; CRLR 2009; CRLR 2010). Cumulative statistics provided by (CRLR 2002) are up to September 2002, and those provided by (CLR 2003) are up to July 2003.

*** Data from 2010/11-2014/15 arrived at by adding data from (CRLR 2011; CRLR 2012; CRLR 2013; CRLR 2014; CLR 2016). Data for 2005 arrived at by deducting data from (CRLR 2006a)

**** Data on cumulative number of female-headed households acquired from (DRDLR 2013)

Figure 5. Approximate cumulative beneficiaries by province 1996/7 - 2014/15



* Data for the years 1996/7-2000/01 were retrieved from (CRLR 2003).** Cumulative statistics for the years up to March 2004 and March 2006- March 2010 were provided by (CRLR 2004; CRLR2006b; CRLR 2007a; CRLR 2007b; CRLR 2008; CRLR 2009; CRLR 2010). Cumulative statistics provided by (CRLR 2002) are up to September 2002, and those provided by (CLR 2003) are up to July 2003 *** Data from 2010/11-2014/15 arrived at by adding data from (CRLR 2011; CRLR 2012; CRLR 2013; CRLR 2014; CLR 2016). Data for 2005 arrived at by deducting data from (CRLR 2006a).

Most of the outstanding land claims in rural areas can be ascribed to, among other things, the initial reluctance by RLCCs to restore land rights in communal areas. This attitude changed after the Hleneki judgement noted above. The status of land claims also varied within a province. For example, a sample of various stages of land claims in Limpopo shows that the District of Sekhukhune had more outstanding land claims compared to the other four districts. The reason for this is that Sekhukhune is not only predominantly rural but has been plagued by contested chieftaincies, and this impedes the implementation of land restitution.⁵⁶

Table 4: Sample of outstanding and settled land claims in Limpopo per district, 2013

District	Outstanding	Sample of Outstanding	Settled	Sample of Settled
Capricorn	242	91	1664	250
Mopani	97	54	742	111
Sekhukhune	459	126	8	1
Vhembe	173	88	2257	339
Waterberg	180	79	327	49
Unclear	26	16	0	0
TOTAL	1177	454	4998	750

The impact of settling expensive land claims such as MalaMala

Section 25, Subsections (2) and (3) of the Constitution provide that property may be expropriated 'for a public purpose or in the public interest' subject to compensation the amount of which is determined by '(a) the current use of the property, (b) the history of the acquisition and use of the property, (c) the market value of the property, (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and (e) the purpose of the expropriation'.⁵⁷ The manner in which each of these factors is given weight in the actual settlement of the land claim has huge implications for the programme of land restitution. This is evident in Mala Mala land claim that was settled at a cost of R1.1 billion though the landowners had agreed to expropriation as provided for in the country's Constitution. Below is a brief recount of MalaMala land claim and the factors that contributed to this exorbitant price.

MalaMala land claim

The land claimants of MalaMala comprise approximately 2000 people who are collectively known as 'Mhlanganisweni community'. The name of the community does not derive from an indigenous community but is 'a name given to the claimant communities for the purposes of the land claim process'.⁵⁸ The claim involves farms and portions of farms (Table 3) that were consolidated into MalaMala Game Reserve under the ownership of MalaMala Ranch (PTY) LTD. A closer reading of the court papers submitted to the Land Claims Court reveals that though there was no dispute between the claimants and the defendants with respect to the formalities, the validity of the land claim, and the value of improvements (R66,169,420), much of the contestation centred on the cost of settling the land claim.⁵⁹ In particular, the dispute revolves around the size of the land (in hectares) used in the valuation, the land value, and the separation between property and business. While the valuations commissioned by the RLCC Mpumalanga used 12,855 hectares, the landowner argued that the land claim involved 13,184.1082 hectares and therefore the Commission's evaluation was based on the wrong area.⁶⁰ With regard to the value of the land, the RLCC calculated the price at R52,500/ha whereas the landowner had R70,000/ha. Based on these calculations, the RLCC's initial offer of purchase was R878,422,492 compared to the landowner's demand for a just and equitable compensation at R989,057,000. Expert reports estimated the total value of business at R193,115,000. This ballpark figure is made up of movables (R15 million), trademark (R38.5 million), and profitability at a five-year average of R142,315,000.⁶¹ The trademark was developed when the Lowveld was turned from agricultural land into ecotourism landscapes.⁶² Expert reports put the total value of land and business for MalaMala at R1,174 million. The Minister of Rural Development and Land Reform rejected the offer by the RLCC and the demand by the landowner on the basis that it was excessive. Instead, the Minister's proposal was that the settlement of the claim should comprise of the separation between the land claim and the operating business.

Table 5: The valuations commissioned by the Commission

Farm	Valuer	Land Value per hectar	Value of fixed Improvements	Total
Remaining Extent and Portion 1 of Eyerfield 343 KU	Dijalo Property Valuations	R 65 000/ha		R194, 000,000
Portion 7 of Toulon 383 KU	Dijalo Property Valuations	R 65 000/ha		R 27, 000, 000

Mala Mala 341 KU	Dijalo Property Valuations	R 65 000/ha	R 33, 528,850	R 153,000,000
Mala Mala 359 KU	Dijalo Property Valuations	R 65 000/ha	R 9,354,642	R 92 000,000
RE Charleston 378 and Portion 1 Charleston 375 KU	Bristow, Phenyane and Associates	R 66,627 /ha	R 1,253,000	R 241,253,000
Flockfield 414 and 361 KU	Fincon (J A van Rensburg)	R 30,000 /ha	R 22,033,000	R 105,000,000
			R 66,169,492	R 812,253,000

The implications of the MalaMala land settlement are that exorbitant prices push back land restoration as the main goal of restitution. Both the Minister and the RLCC Commissioner initially agreed on the restoration of land rights but changed their position after failed negotiations between the RLCC, claimants, and the landowner. The RLCC reasoned that a price of more than R30,000 per hectare renders land restoration unfeasible.⁶³ Thus, claimants could be given full ownership of land at a price of less than R30,000 that was even less than half of the R70,000/ha that the landowner had put on the table. Accordingly, the Minister submitted that 'it will not be feasible to restore the properties to the claimants' and that 'the claimants should be provided with equitable redress' as defined in the Restitution Act.⁶⁴

The other implication of the high price paid for settling land claims is that land claimants are failed twice: they cannot get their land rights back and the alternative redress in the form of cash payments is far below the market value of the land in question. In the recent settlement of six land claims in the KNP on 21 May 2016, Mhlanganisweni land claimants (including Sibuyi family) received R12.8 million to be shared among 116 households. President Zuma described as a settlement model that 'took into account the significance of the Kruger National Park as a home to an unparalleled diversity of wildlife and embraced an effort to save this National Monument for generations to come. It was therefore agreed that the settlement model will be one that takes the very important role of conservation into account'.⁶⁵ The basis for this figure is unclear, and this lack of clarity on the calculation of cash payments is a common feature of land restitution in the country.

6. Land claims judgements and their impact on land restitution

Established in 1996 in terms of Chapter III of the Restitution Act, the Land Claims Court (LCC) deals with disputes 'that arise out of laws that underpin South Africa's land reform initiative', namely restitution, labour tenants, security of tenure.⁶⁶ Ideally, the Regional Land Claim Commission prioritizes the settling of claims on the basis of 'claims comprising large numbers of beneficiaries and/or households, claims comprising large tracts of land, rural claims, claims of the poor and the needy, claims involving other government departments, claims with strong developmental components, claims that help towards rebuilding and reintegrating towns and cities, and 'special claims' of national and international importance.⁶⁷

The three main categories of land claim cases that appear frequently in the Land Claims Court involve the validity of land claims, just and equitable compensation, and feasibility. These categories are separated for analytical purpose as they are interlinked in the application of law. The validity of land claims is often questioned by landholders in defence of their properties, and sometimes by the Commission on Restitution of Land Rights (CRLR), whose founding mission statement is 'to promote justice in respects of all victims of dispossession of land rights as a result of racially discriminatory laws, policies and practices, by *facilitating the process of restitution of such land rights* as provided for in the Constitution and in the Restitution of Land Rights Act' (emphasis added).⁶⁸

The validity of claims

Some of the reasons used to challenge the validity of land claims relate to the motives behind land that was lost and the rights the claimants had in land as provided for in the Restitution Act. For example, in the case between government departments (DLA and Public Works) and the claimants as well as the Chief Land Claims Commissioner, the Land Claims Court found that the claimants were not dispossessed of a right in land by virtue of the sale and transfer of Erf 36307 in Cape Town to the Republic of South Africa.⁶⁹ Other land claims were invalidated on the basis that they land claimants were tenants who might have been dispossessed of cropping and grazing rights as labour tenants.⁷⁰ The Land Reform (Labour Tenant) Act of 1996 has tried to rectify this situation by recognizing the rights of tenants.⁷¹

RLCCs sometimes use ideology rather than law in determining the validity of land claims. For example, they tend to reject land claims by whites on the basis that whites received equitable

compensation upon dispossession⁷² even if they do not know the monetary value of such compensation. The ideological undercurrent is that land reform is designed to restore land rights to the victims of apartheid who are largely black. Land restoration to whites appears to go against this thinking. RLCCs also err by invalidating rural land claims on the basis of untested notions of tribal land. One of the clearest examples of this mistake is the Hlaneki land claims that had huge consequences on the processing of rural land claims. Following the lodgement of the land claim⁷³ by the Hlaneki tribe on 28 December 1998, the Regional Land Claims Commission (Limpopo) dismissed the claim as frivolous and vexatious on the grounds that Chief Hlaneki did not have the mandate to lodge the claim on behalf of his tribe, and that the tribe was never dispossessed of land as it was occupying the area. Judge Moloto found that the rejection of the claim by the RLCC and its failure to investigate the claim for purposes of gazetting it was a violation of the requirements of section 10(3) of the Restitution Act.⁷⁴

The Hlaneki case significantly challenged the position of RLCCs on researching land claims in communal areas.⁷⁵ The case more broadly reveals a common trend in Anglophone Africa where colonialism reorganized society in-line with the strategy of divide-and-rule. In the process, some chiefs were incorporated into the administrative structure of the colonial state⁷⁶, but others were not because of their resistance to colonialism. The fierce resistance by some of the chiefs led to what Thembela Kepe and Lungisile Ntsebeza consider the rural struggles that shaped South Africa in no less measure than urban struggles such as Sharpeville.⁷⁷ The Hlaneki case epitomises conditions under which colonialism determined the hierarchy of traditional leaders, and how this process interfered with customary law. Given the complexity of this colonial history, Regional Land Claim Commissions developed a tendency to dismiss or shelve land claims involving disputed chieftaincies. One such claim was that of the Mapindani Royal Family (File KPR 2209) in which chief Peninghotsa claimed land and mineral rights in the area including the entire section of the Kruger National Park (KNP) situated between Ngodzi (Nghotsa), Mopani (Mooiplaas), N'wambu, and Nkokodzi. The RLCC in Limpopo dismissed this and other land claims in communal areas on the grounds that claimants were already on the land, and should therefore be considered for the upgrading of tenure. The Hlaneki judgement meant that land claims of this nature could no longer be summarily dismissed as ill-conceived. Another impact of the judgement on restitution was that it changed the pace of rural land claims.

Just and equitable compensation

Individuals and communities have taken the CRLR and the DRLR to the LCC on grounds of inadequate compensation upon dispossession. Some of these cases relate to claims that a particular landowner was forced to sell property at lower than market value while the purpose for such sales were to support discriminatory land policies. Take Mr Mahatey who claimed that he was dispossessed of a right in land when the area of Woodstock (Cape Town) was declared “Coloured” in terms of the Group Areas Act. He argued that he was forced to sell the property (of Erf 12377) to the Community Development Board in December 1979 for a sum which did not constitute just and equitable compensation as contemplated in the Restitution Act.⁷⁸ Claims of this nature result in the DRLR paying the cost for previously inadequate compensations. The case in point is that between Msiza and the DRLR in which Judge Ngcukaitobi ordered the DRLR to pay R1,500,000 as just an equitable compensation in terms of Section 25(2)(b) of the Constitution within 60 days, and to register the property in the claimant’s name within 90 days.⁷⁹ Similarly, Acting Judge President Meer ordered the DRLR to pay R14,785,000 as just and equitable compensation to the claimant.⁸⁰ There are also instances where land claim settled by cash payouts appear unfair when members of the community constituting a land claim are said to have received different amounts.⁸¹

Feasibility

Debates on land restitution also relate to the feasibility of land restoration. The notion of feasibility is referred to in the Restitution Act but its meaning is vague. Chapter 8, Section 123 of the Interim Constitution states that ‘where a claim contemplated in section 121 (2) is lodged with a court of law and the land in question is (a) in possession of the state and the state certifies that the restoration of the right in question is feasible, the court may, subject to subsection (4), order the state to restore the relevant right to the claimant; or (b) in possession of a private owner and the state certifies that the acquisition of such land by the state is feasible, the court may, subject to subsection (4) order the state to purchase or expropriate such land and restore the relevant right to the claimant’.⁸² According to the Restitution Act (Chapter II, Section 14(3A)) the RLCC exercises the right to determine the feasibility of the implementation of the settlement agreement. In Chapter III of the Act, factors to be taken by the Land Claims Court include the feasibility of restoring land rights as a measure of equity and justice.

Section 25(7) of the final Constitution makes no reference to feasibility, but does make the right subject to the limitations contained in an Act of Parliament. When the Restitution Act was amended in 1997, Section 15(6) which dealt with feasibility was deleted and paragraph (cA) was inserted in Section 33, as the only provision referring to feasibility. In the *Slamdien* case, the Land Claims Court held that the changes brought about by the final Constitution did not seek to change the basis for restitution fundamentally and were largely the result of a different drafting style. Once the requirement for the Minister to issue a certificate of feasibility fell away, there was no longer a need to spell out in detail the nature of the discretion to be exercised in relation to feasibility. Accordingly, the LCC held the view that some guidance on the meaning of feasibility could still be derived from the repealed section 15(6), even though that provision was not re-enacted elsewhere in the Restitution Act. In *Juta's New Land Law*, Roux discusses Section 15 in details and conclude that, whenever land has been substantially transformed or developed, the Minister will have good reason to refuse a feasibility certificate. Also in relation to the now-repealed Section 15, feasibility addresses the question of whether restoration is practically achievable.

The Makahane-Marithenga land claim that was lodged in the Kruger National Park on 28 September 1996 (with 167 households) shows that different reasons are used to render the land claim unfeasible.⁸³ Though the claimants sought to use their land rights to enter into a co-management arrangement as in the much publicised settlement of Makuleke land claim, the feasibility of restoring land rights in Makahane-Marithenga land claim was considered impossible on many grounds. The Cabinet Resolution of 2008 had imposed restrictions on restoration of land rights in protected areas in the country. The South African National Parks (SANParks) and the government argued that Kruger National Park is a collective heritage as South Africans. SANParks further argued that, a public-private partnership model between KNP and the Makahane Marithenga people is not feasible as it would technically bankrupt the national parks system in the country, i.e. it would undermine the ability of SANParks to maximize the profit (from tourism) it needs to cross subsidize other seventeen national parks which are not operating at profitable margins.⁸⁴ Moreover SANParks is not financially and structurally ready to deal with multiple ownership of the KNP administratively. It was also argued that the Makuleke model prevents the national conservation agency from exercising greater and significant control on decision making regarding resource collection, allocation and use in the Makuleke region of the KNP.

7. A review of the debates about the Communal Property Associations, their strengths and weaknesses, and the effectiveness of Communal Property Associations Act

According to the White Paper of South African Land Policy of 1997, Communal Property Associations (CPAs) are landholding institutions established under the Communal Property Associations Act No. 28 of 1996. The Act sought to enable communities to form juristic persons to be known as communal property associations, in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written Constitution.⁸⁵ The formation of a legal entity (CPA) is a precondition for land ownership and administration by the community. Whilst the CPAs are governed by rules and regulations that have been written into a Constitution, the CPA Act does not prescribe the rules and procedures for land allocation and decision-making, nor the manner in which the CPA Committee should be constituted. This must be decided by the majority of the membership. The only condition is that the legal entity must conform with the requirements of the South African Constitution, in particular the Bill of Rights and democratic decision making.

Since 1994, communal property associations have been established mainly by groups benefiting from land restitution and redistribution. Unlike communal land that is administered as state land, the CPAs are legal entities that help black South Africans occupying restored and redistributed land to secure the previously insecure rights to land. CPAs take full private ownership of land, on behalf of their members, and are governed by constitutions developed by members. CPAs also help group of beneficiaries to co-own and co-manage land in order to derive livelihoods benefits. Community property association is also anticipated to improve community solidarity, social cohesion and cultural continuity of beneficiaries.⁸⁶

Although the intentions of CPAs are good, the general opinion of commentators involved in the land reform sector has continued to be that communal property association are ineffective and generally fail. Despite widespread recognition that CPAs have in general failed, there remains disagreement about whether the problems affecting them stem from the CPA model itself or from its implementation. Indications from case study research thus far are that implementation of the Act has been poor. It is generally agreed that few CPAs have received institutional support following their establishment, as required by the Act. In other words, the insufficient government support following CPAs establishment make them ineffective and dysfunctional. Members of the CPAs complained of lack of capital to undertake farming. They complained that adequate start-up costs, operating costs, equipment, fertilizer, and marketing tools were not at their disposal.⁸⁷ For instance, when Khomani San received six farms on the outskirts of the Kgalagadi National Park covering a combined surface area of 36 000 hectares, due to lack of management capacity and insufficient

government support, the existing infrastructure on the farms collapsed. This almost resulted in the loss of one of the community's farms in 2002 due to the non-payment of a huge debt. The sale of game to get funds, poaching and drought led to depletion of game stock in the farm.⁸⁸ This contributed to social fragmentation and intra-community conflict between 'traditionalists' and 'western bushmen'. These conflicts drew attention to the difficulties of creating community solidarity and viable livelihood strategies in a province characterized by massive unemployment and rural poverty.⁸⁹ Although the Act provides for DLA to monitor and support CPAs, DLA has not allocated resources to fulfil these obligations as demonstrated by this study. The CPAs are also not linked into other institutions of land administration, such as local government (e.g. local and district municipalities) or tribal authorities. As a result, they are unable to get municipal services support such as electricity and drinking water. Without these services they are unable to operate and produce leading to collapse of CPA projects.⁹⁰

Other reason that have contributed to dysfunctional and failure of CPAs relates to Constitution governing CPA matters. The CPA Act permits members to agree to a set of rules and regulations for land ownership and management which should be written into a Constitution. However, it is reported that many CPAs Constitutions have been 'cut-and-pasted' from other CPAs, and as a result they are often misunderstood by members. Furthermore, the Constitutions are poorly aligned to local land tenure practices and the rules and regulations are impossible for members to comply with. This has forced many communities to disregard their constitutions and adapted or created local institutional support for themselves. As a result of this, there is concern that multiple allocatory and adjudicatory procedures will create overlapping de facto rights that elude both official and legal resolution, creating fundamental insecurity of tenure.⁹¹ Another fundamental problem relates with the specification of rights in CPA constitutions. It is argued that land is often transferred to CPAs without agreement among beneficiaries about how rights to use the land will be allocated among members, with the result that no formal allocation takes place, and instead a free-for all develops. In other instances, lack of proper allocation of substantive rights during the establishment phase often leads to some members appropriating other members' rights and using such rights for personal gain to the detriment of the community.⁹² Related to this problem is the highly gendered character of tenure insecurity, in land reform contexts, on commercial farms and in communal areas. Women's land rights remain vulnerable and are generally still more insecure than those of men, in part because of wider social prejudice but also because the implementing agencies charged with securing rights have not confronted these inequalities sufficiently strongly.⁹³ It can therefore be said that

CPAs do not adhere to democratic principles that the CPA Act prescribes. As a result, the constitutional ideal of a more equitable dispensation of access to land, natural resources, and security of tenure is therefore jeopardised. Hence, the government is losing credibility with regard to its promises of delivery.

It was also found that there is no conceptual model for institution building in the project cycle, and officials or service providers demonstrate little understanding of tenure issues in common property systems. It is not practice to build on existing practices or institutions or in reference to them. There is little clarity or subtlety in designing an appropriate legal vehicle or mix of vehicles for the situation. Instead, the establishment of legal entities has become a milestone on the project cycle timeline that is completed as fast and cheaply as possible, with successful registration rather than well-discussed agreements as the driving force.⁹⁴

The CPA Act also allows communal property associations to elect committee members. An executive CPA committee selected by the members is expected to conduct daily tasks of administration. This committee is responsible for making decisions regarding the operation of the farm, finances, and communicating to members.⁹⁵ However, it was found that the membership and leadership of CPAs are not chosen specifically for their expertise in farming, and many simply lack the necessary skills to run a farm as a business. In addition, the committee members selected often lack the necessary training to fulfil their duties adequately. This makes CPAs committee members to lack capacity to undertake sound land management. In many instances, CPA committees also lack the facilities to fulfil their duties. As a result, the unit of production has failed to materialize in many CPAs projects.⁹⁶ Lack of expertise and proper training has led to mismanagement by CPA committees, misappropriation of CPA funds or lack of accountability, conflict between committees and members regarding land uses, abuse of power by the committee and powerful CPA members and neglect or abuse of ordinary members.⁹⁷ The breach by committee members of their duties amounts to a criminal offence. Unfortunately, the CPA Act does include a clause that can hold a committee member personally liable for mismanagement or any benefits improperly received. It is also not clear to whom CPA members can appeal when conflict or abuse occurs. In some areas where traditional authorities are present, traditional leaders have tried to undermine the functioning of CPAs as they see them as challenging their authority. In some cases, traditional leaders or authorities have contested the authority of elected trustees, and in others elites have captured the benefits of ownership.⁹⁸ Although the Department of Rural Development and Land Reform has extensive

powers to monitor and intervene in matters of the association if problems exist, in practice such measures are not resorted to. These problems create dysfunction in many CPAs.

It was also found that the instituting documents of CPAs are inaccessible to a largely unilingual membership in that most are written in English and incomprehensible jargon and are often physically unavailable on site. They say little or nothing about key issues of land rights management procedures and linkages to external land administration institutions. They are not logically set out in a meaningful manner, while including great detail on issues that should be elsewhere or which do not apply. Sometimes, they contain clauses that the community does not know about, because lawyers or officials made additions or changes in order to meet registration requirements, or because they thought they were necessary. These all cause problems in themselves, but more importantly they reflect attitudes and practices of officials and service providers and not the communities.⁹⁹

The main finding from the literature is that many communal property associations seem to be dysfunctional because of poor implementation of the CPA model. As a result, this makes it difficult to assess if the CPA model works well as some aspects of the model are untested. As documented by many scholars, implementation of the CPA Act and its regulations has been weak, and many of the problems encountered by the CPAs could be remedied within the current legal framework.

A common challenge to CPAs is intergroup dynamics that arise from the inceptions of CPAs to the implementation of a settlement plan. The Marobala land claim illustrates this trend. The land claims was championed by an individual, Molatelo Frans Mathopa, who worked together with the RLCC and Nkuzi Development Association to lodge the land claim that was gazetted on 22 March 2002.¹⁰⁰ The CPA was registered in 2004 with 1400 beneficiaries. Following the establishment of the CPA, the beneficiaries and the leadership of the CPA became embroiled in a conflict over the conduct of the leadership of the CPA, and over land use options. There were allegations of the use of poison to destroy the livestock that the Department of Agriculture (Limpopo) donated to the CPA.

It is recommended that improvements in implementation should be supported by altering the legal framework for CPAs, through amendments to the regulations.¹⁰¹ This relates particularly to ensuring that there is a more rigorous planning process that develops a Land Administration Plan (LAP) and culminates in the actual allocation of user rights. Strict monitoring is needed to identify areas where

problems are being experienced so that interventions can be initiated. It is further recommended that DLA should take a more active role in the administration of rights as this is potentially beyond the capability of CPAs.

In 2016 the Communal Property Associations Bill was introduced to parliament. The Bill seeks to amend the Communal Property Associations Act of 1996 by extending the application of the Act to labour tenants. The amendment is also meant 'to provide for the establishment of a Communal Property Associations Office and the appointment of a Registrar of Communal Property Associations; to provide for general plans for land administered by an association; to repeal the provisions relating to provisional associations; to provide improved protection of the rights of communities in respect of movable and immovable property administered by an association; to provide for name changes of associations; to improve the provisions relating to the management of an association that has been placed under administration; to provide clarity on the content of an annual report in respect of associations; to make provision for transitional arrangements; and to provide for matters connected therewith'.¹⁰² The Centre for Constitutional Rights is of the view that the Bill requires CPAs to adhere to certain procedures but lacks clarity on how the RDLR would facilitate the creation of CPAs and assist them in carrying out their duties as envisaged in the Bill. Accordingly, the CfCR submitted that 'the Bill should include mechanisms to ensure that CPAs receive adequate assistance in achieving their established aims.'¹⁰³

8. A summary of findings by others in relation to the cost effectiveness and equity of how funds for land restitution have been spent and a review of findings about the impact of land restitution in addressing the triple challenge of inequality, poverty and unemployment.

Widespread and enduring poverty is a central feature of South African life and presents the biggest challenge for the post-apartheid government. There are various positions and debates regarding the causes, nature and true extent of poverty in South Africa.¹⁰⁴ There are also considerable disagreements about the means to alleviate it. But, there is broad agreement that poverty exists on a vast scale; that it is closely correlated with race and that, by many indicators, the situation has deteriorated since the transition to democracy.¹⁰⁵ In 2010 the national poverty rate stood at 54%, while the rural poverty rate stood at 77%.¹⁰⁶ While there are higher rates of poverty in rural than in urban areas, current estimates shows that the proportion of the total poor who reside in rural areas is declining (dropping from 62% in 1996 to 56% in 2001) suggesting a rapid process of urban migration that could in the future reshape the spatial nature of poverty in South Africa.¹⁰⁷ Female-

headed households also tend to be disproportionately poor due to the fact that these households are more likely to be in the rural areas where poverty is concentrated. Research has also revealed that female headed households tend to have fewer adults of working age, a situation exacerbated by higher levels of female unemployment rates, while the wage gap between male and female earnings persists.¹⁰⁸ In a study conducted by Aliber it is reported that, in 1999, 4.2% of all African households (i.e. 2.7 million) were female-headed, and that roughly 28% of these households were 'chronically poor'.¹⁰⁹ As a result of statistics along these lines, the transformation audit report (2016) highlights the importance of efficient policy interventions in addressing concerns related to the feminization of poverty in South Africa.

One of the major objectives of South Africa's post-apartheid land reforms was to raise rural incomes and generate large-scale employment, by redistributing land to formerly disadvantaged groups¹¹⁰. For this purpose, the Reconstruction and Development Programme (RDP) assigned a distinct importance to the role of small scale farming and the massive employment opportunities it represents.¹¹¹ The National Development Plan (NDP) introduced in 2012 synchronises with this stated policy imperative and states that 'land reform is necessary to unlock the potential for a dynamic, growing employment-creating agricultural sector' and that policy should aim towards building an 'inclusive and integrated rural economy'.¹¹² The NDP sketches an ambitious set of objectives for creating up to one million rural jobs, through *inter alia* agricultural development and 'effective land reform'.¹¹³

From these stated policy visions, the contribution that land ownership could potentially make towards improving or uplifting the economic conditions of rural inhabitants has almost been perceived as a given.¹¹⁴ Especially proponents of the World Bank's vision for land reform in South Africa argued that: 'Once poor people are given good farmland they can lift themselves out of poverty permanently; even without significant government support'.¹¹⁵ This is also a view supported by a growing body of literature that strongly recommends improved access to land for the rural poor to address poverty and job creation objectives.¹¹⁶ However, despite the rather bold claims regarding the theoretical link between land ownership and improved job creation or long term poverty reduction, empirical evidence to support these projections are perceived to be rather slim.¹¹⁷ There is also seemingly disagreement about the type of farming model that should be introduced to best achieve the envisaged poverty reduction and job creation goals. Some proponents promote the virtues and efficiency of small scale farming, but the literature also reveals the continued hegemony

of the large scale commercial farming model.¹¹⁸ In particular, the South African government seems to be at odds with itself. On the one hand supporting the idea of small scale farming; but on the one hand, when it comes to the actual implementation of land reform projects, notions of viability are still enforced by state officials in terms of large scale commercial farming objectives.¹¹⁹

This section of the discussion provide a cursory overview of a series of studies that have been conducted to assess the outcomes of South Africa's land and agrarian reforms with a particular focus on the impact of land restitution initiatives viewed against poverty reduction, job creation and equality considerations. The overview includes perspectives from both urban and rural cases and spans the restitution process since inception; involving perspectives on cases where ownership rights have translated into land occupation as well as the more recent cases where the transfer of ownership rights did not lead to the occupation of the land (for example in instances where partnerships/joint ventures have been established).

Urban Claims

By the cut-off date of December 1998, a total of 63 455 land restitution claims had been lodged. Further investigations revealed that some claims needed to be split, and the official total was then revised upwards, to 79 696 by 2007.¹²⁰ Around 88% of claims were from individuals or families in urban areas; in contrast to most of the rural claims which were group-based and thus involved a great many more people than urban claims. This situation obtained even after the cut-off date of 31 December 1998 (Table 5).

Table 5. Rural and urban land claims, households represented in claims, and hectares claimed, by province, August 2013

Province	Rural claims	Urban claims	Dismissed	Households	Hectares
Eastern Cape	419	16207	291	65139	136753
Free State	41	2858	209	7614	55747
Gauteng	1717	11866	702	14320	16964
KwaZulu-Natal	2196	13641	141	85421	764358
Limpopo	2294	1326	438	48492	603641
Mpumalanga	1611	1235	202	53525	460964
Northern Cape	133	3593	255	21900	569341
North West	626	2924	319	44268	399407
Western Cape	1426	15469	633	27411	4140

Total	10483	69119	3190	368090	3011315
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Source: presentation of the Chief Land Claims Commissioner to parliament, August 2013

In 1999 the Restitution Act was amended to allow the programme to move from a cumbersome, courts-driven process into one with considerable administrative leeway. At this time, a resolution was made to resolve urban claims by means of cash settlement options. This approach was generally hailed as a great success as it allowed the process of restitution delivery to speed up¹²¹. Government reported that by 2009 the land restitution programme had resolved 75 787 claims, the great majority being urban claims resolved through cash payouts, using 'standard settlement offers' of around R40 000.

In a study conducted by Bernadette Atuahene (2011) she examined the economic impact of cash payments for the settlements of urban claims through an approach she called a "sociolegal, qualitative analysis".¹²² In this study she used 141 in-depth semi-structured interviews to explore how urban claimants spent their financial awards and to determine whether the awards had an enduring economic impact. She concludes that cash payments failed to realize long term economic gain for 30% of the respondents, but for the majority of her respondents (70%) she claims the once off payments did have an enduring impact. Thus, in her opinion, her findings dispel 'the commission's pervasive, institution-wide assumption that all claimants would use their financial awards on alcohol, revelry, or other short sighted pursuits'.¹²³ From her perspective, the fact that the money has been spent by claimants should not necessarily be seen as a negative outcome, especially in instances where the money has been used as windfall investments to improve dwellings, to buy a car or make a long term financial investment.

Her 2011 study thus conclude that these cash payments have translated into enduring economic benefits for many of these urban claimants. In direct contradiction to this finding, a very detailed study of the impact of cash compensation in Knysna and Riebeeck-Kasteel, by Anna Bohlin concludes that money became 'a relatively empty signifier, to be invested with meanings in creative and open-ended ways, often becoming about "home" and "belonging"'.¹²⁴ Bohlin explains, initially, most claimants were committed to returning to their former land (in both cases situated in what are today classified as prime residential areas), but long waiting periods and frustrating encounters with the CRLR gradually eroded their belief that their land would be restored to them. This finally drove the majority to abandon hopes of land restoration and opt for financial compensation. This is particularly in the case of Knysna where claimants who had but a marginal existence in the town have invested their money in upgrading informal homes transforming these into solid permanent

structures with improved interiors¹²⁵. Clearly in this instance investment in homes could be construed as an enduring economic outcome but not necessarily a desired outcome of a programme driven by restorative justice imperatives.

In a follow-up publication (2014) Atuehene re-contextualises her findings and this time around her assessment of the cash payments is much less flattering, especially from the restorative justice, poverty alleviation and job creation perspectives.¹²⁶ This time around, Atuahene voices the concerns expressed by other commentators who warned that cash payments would leave the inherited and racially skewed land ownership pattern mostly intact, while the amounts involved were often deemed too small to impact/improve the quality of lives of the recipients in any meaningful way¹²⁷.

These once-off cash payments have thus been criticized because the cash windfalls; were often divided among large extended families; were deemed too small to bring about lasting change in the lives of beneficiaries and were most often used to pay off debt and meet immediate expenses like school fees and consumer items. In a study of the Black River urban restitution case¹²⁸ the challenges linked to the subdivision of money into very small amounts to accommodate the ever extending number of family members in a claimant group is discussed and the author observes that the amounts paid out were eventually so small that the money ended up carrying only a temporary and relatively insignificant meaning. The author concludes the very detailed account of the complexity of settling the Black River Rondebosch claim stating, 'the money was is a sign of the failure of restitution' for some of the beneficiaries. As a result, available research also including the settlement of high profile cases such as Sophiatown¹²⁹ and District Six suggests that those whose claims are settled by means of cash payments may *not* consider that justice has been done.¹³⁰ In fact the SAHRC report concludes unequivocally that 'the Sophiatown claimants have not received just and equitable compensation'.¹³¹ The Land Claims Commission echoed concerns regarding the ambiguity linked to cash payments asserting 'although cash payments solve immediate survival problems, it ultimately widens the poverty gap in the long term' hence the Commission's preference to restore or provide land or other developmental outcomes.¹³²

Rural restitution

The progress of rural restitution has been equally ambiguous and even more challenging given the complexity of these cases. Instances of "successfully operating" settled rural land claims have been

mentioned but, these are the exception rather than the rule¹³³ and the bulk of these claims are still in the process of being settled. Although the pace of dealing with rural claims has appeared to pick up in recent years, the sustainability of these settlement approaches has come in for a great deal of scrutiny.

The first attempt by the (then) Department of Land Affairs at measuring the outcomes of land reform projects and its poverty reduction potential came in the form of a commissioned quality of life assessment report based on research conducted in 1999.¹³⁴ This initiative set out to measure the level of improved living conditions enjoyed by 131 land reform beneficiary households; of which only seven had been from the restitution programme. A combination of household and community level questionnaires; livelihood surveys and even environmental impact assessments were developed and administered for this purpose. As a first initiative, this assessment provided valuable insights. For example the basic headcount ratio of the land reform beneficiaries compared to non-beneficiaries for the incidence of poverty was 78% leading the reviewers to conclude that households who were involved in land reform initiatives were in fact poorer than the national average, implying (for the reviewers) a promising statistic that indicated that these were exactly the type of beneficiaries that should be benefitting from targeted interventions such as land reform. The second quality of life assessment deployed in 2001, included only nine restitution households and this time around no distinct findings for the restitution beneficiaries specifically were noted. For the most part however, comparative findings between the first (1999) and the second quality of life assessment reports (2001)¹³⁵ were mostly inconclusive. These reports did record some measures of benefits for the poorest and female headed households involved in land reform projects (admittedly mostly for redistribution).¹³⁶ But, methodological and conceptual questions regarding the execution and findings of these studies continue to plague its validity¹³⁷ leaving us with a continued lack of clearly conceptualised and agreed upon baseline data for effective assessments and reviews of the progress of restitution to date.

In 2003, the Programme for Land and Agrarian Studies (PLAAS) published a review of rural Restitution highlighting a number of achievements and challenges. One of the major achievements noted by the report included the rapid increase in the settling of claims following measures implemented after the 1998 Ministerial Review. The review report also mentions the adoption of a more developmental approach to the settlement of rural claims; moves to identify and address post-settlement support needs as part of pre-settlement planning; and the restoration of some large

portions of land as commendable achievements from the perspective of rural restitution outcomes. However the study also identifies a number of challenges impacting on the success and sustainability of the programme which includes concerns about the slow pace of restitution delivery, inconsistency regarding the number of outstanding claims, and the poor productivity of newly resettled restitution beneficiaries. The report concludes that 'successful restitution cases' seems the exception to the rule and in many instances restitution beneficiaries have not been able to make productive use of the land. In many respects these challenges remain both current and pertinent today.

A very substantial source of qualitative information on the outcomes of rural Restitution claims to date is the audit conducted by the Community Agency for Social Enquiry (CASE) from 2005 to 2006.¹³⁸ This study involved an analysis of provincial reports involving a total of 179 rural restitution claims that contained a development component (i.e. land restoration). At the time, 161 of these constituted the total number of settled rural claims involving land restoration; the remaining 18 claims studied were being prepared for settlement.¹³⁹ While some concerns are noted by the Sustainable Development Consortium (2007)¹⁴⁰ about the uneven quality of the reporting on individual projects and certain aspects of the analytic approach in the CASE inquiry, the value of the CASE study is its attempt at a comparative review of all the existing restitution cases at the time. Most profoundly, the CASE review concludes that most Restitution projects have not met members' expectations and that restitutions projects have done little to secure or improve people's livelihoods. The report continues to highlight how the failure to provide meaningful post-transfer support and to overcome the fragmented and silo-based delivery of services has major implications for the sustainability of land reform. It implies that the restoration of rights has realised limited social and economic returns on the investment of substantial state expenditure.¹⁴¹

The SDC observes that methodologically, the CASE report is a testimony to the difficulty of making meaningful comparative assessments where projects have no shared indicators of success.¹⁴² This required the researchers to come up with a measure by which they could reach conclusions about relative success or failure. The writers of the report therefore tried to assess participants' perspectives on the extent to which their stated 'developmental objectives' have been met. The three most prevalent 'developmental aims' identified by Restitution beneficiaries were: agricultural (72%); settlement (64%); and ecotourism (23%). Other aims included mining, forestry, brick-making and other small business ventures. On the basis of their assessment of the 179 projects, the researchers reported that the overwhelming majority of the projects were not meeting their

developmental objectives.¹⁴³ Underperforming projects included: 83% of the 128 projects where agriculture was the primary aim; 75% of projects with a settlement component; and 88% of projects with ecotourism aims.

The SDC however cautions that these findings assumes that the objectives were reasonably specific, measurable, realistic and achievable in the first place and argues that the categorisations used could potentially contain a whole continuum of possible activities under a single heading.¹⁴⁴ Commenting on the CASE report, the SDC researchers in 2007 observes that very little can be determined from the finding that 83% of projects with agricultural objectives had failed to realise them¹⁴⁵. According to the SDC, such a finding could have a host of underlying reasons – some of which might have nothing to do with the quality of post-settlement support at all.

For example the 83% of agriculture related projects could be underperforming because:

- no agricultural production had taken place;
- crops had been planted but failed or gave low yields;
- livestock had succumbed to drought or disease;
- access to agricultural resources had been appropriated by a few powerful individuals; and
- people had improved food security and gained access to environmental goods and services but had not made money as per their expectation.

Overall, the CASE report found that the technical assistance provided to the 179 assessed projects was totally inadequate. The researchers observed that very often the officials from the RLCCs and other relevant government departments did not have appropriate skills required to provide adequate technical assistance. The report warned that high staff turnover rates in the RLCC offices contributed to procedural delays to processing claims and made it difficult to provide consistent and appropriate project support. The report noted that more than a third of projects had experienced significant internal conflict, such as leadership struggles and contestation between communities and their leadership structures. Conflict was identified as a significant factor contributing to dysfunctional projects.

The CASE assessment was able to quantify patterns of success and failure based on qualitative assessments at project level and a list of key indicators that could potentially contribute to project success and failures were compiled from this analysis. Table 1.1 provides a short summary of these

key factors. The CASE audit found a strong correlation between the degree of support, from state and non-governmental institutions, and the livelihood outcomes of a project. In the instances where there has been adequate facilitation of decision-making by the community around land use and management marginally positive impacts on the livelihoods of beneficiaries could be anticipated¹⁴⁶. Furthermore the study also suggests that the establishment of steering committees or sub-structures to manage land allocation and land use should be considered as a key determinant of more positive outcomes. Diako and others observes, ‘those communities with skilled and experienced leaders... were more likely to attain their developmental goals and were also more likely to establish positive relationships with external service providers and/or partners’.¹⁴⁷

More worryingly, the study highlights consistent challenges with the reliance on CPA or trust committees consisting of representatives who might be skilled but unaccountable, or who may pursue individual rather than collective interests. The less than desirable performance of the cases in terms of poverty reduction and employment generation objectives was matched by an equally dismal performance from the equity perspective. The reviewers observe that the transfer of land and ownership has left women’s structural constraints mostly unchallenged. During the case reviews it was found that women were often unwilling to take on positions of leadership or face substantial obstacles when they did attempt to take up these positions. In many instances where communal property institutions were forced to include women on the committee structures their roles were limited to those of the secretary.

Table 7: Factors contributing to the success or failure of Restitution projects

Factors contributing to more successful projects	Factors most commonly contributing to failure
<ul style="list-style-type: none"> • Skilled and experienced leadership • Active participation of claimant structures in project steering committees established by the CRLR for planning purposes • Availability and utilisation of settlement planning and discretionary grants 	<ul style="list-style-type: none"> • Attempts to manage business enterprises under communal management • Project steering committees that close out participation of members • Inappropriately structured and supported legal entities

<ul style="list-style-type: none"> • Sustained support from government and NGOs • Strategic partnerships, special purpose vehicles, mentoring and appointment of managers, where appropriately established and monitored to enable the takeover of existing enterprises 	<ul style="list-style-type: none"> • Unclear determination of individual rights and benefits • Lack of clarity about roles and responsibilities leading to conflict • Lack of management and financial skills to run commercial enterprises • Poor quality/inadequately monitored service provision
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Source: Daiko and others, 2005; SDC, 2007.

Another factor cited as promoting positive livelihood outcomes in restitution projects is strong participation by members of claimant communities in decision-making. The creation of relevant sub-committees or institutional structures with specific areas of authority and responsibility for 'day-to-day management' was found to increase participation in and benefits from productive activities.¹⁴⁸ The study concludes that 'where land reform projects require large groups of people to form legal entities, intensive facilitation of participatory decision-making is needed'. The CASE report expressed cautious optimism about the potential for strategic partnerships and 'special purpose vehicles' to manage commercial enterprises, where land has been transferred to land reform beneficiaries who may lack the resources and management expertise to continue with existing operations.¹⁴⁹ However, it found that the projects most likely to succeed were those in which there is upfront support to beneficiaries in determining whether they wish to engage in such a partnership which would include exploring alternatives and monitoring of the partnership after its establishment. Without these conditions in place, the CASE report warns, strategic partnerships will hold little promise of livelihood improvements.

In 2007, the Sustainable Development Consortium (SDC) followed the seminal CASE report with an in-depth diagnostic study of six community Restitution claims settled by means of land restoration. This study focused on the structure of the projects, how certain key choices came to be made, and what implications these had for the livelihoods of intended beneficiaries.¹⁵⁰ The reviewers caution that most of these projects were still at an early stage of implementation during the write up, and very limited data was available on benefits, at either a community or a household level. Wherever possible, the impact on livelihoods was quantified, but this proved to be a difficult task given the lack

of data. The most striking finding from these case studies is that the majority of beneficiaries across all the Restitution projects have received no material benefits whatsoever from Restitution, in the form of cash income or access to land. The reviewers explain the poor performance of the six rural restitution projects in meticulous detail and insight. The analysis of the SDC draws attention not only to the failure of restitution projects to deliver and meet the objectives of project business plans, but also questions the very feasibility of these plans.¹⁵¹ In strong contrast to the 'cautious optimism' about the feasibility of strategic partnerships noted in the CASE report, the SDC report expresses doubt about the feasibility of improved economic conditions for restitution beneficiaries where strategic partnerships are concluded between former commercial farmers and claimants.

Aliber and his co-authors conducted an assessment of four case studies in Limpopo province. These projects are Shimange, Mavungeni, Munzhedzi and a cluster of seven claims in the Levubu valley. From their analysis, Aliber and others¹⁵² contends that despite lip service to the contrary, the South African government has come to regard the commercial farming sector as the model rural restitution projects should emulate. The authors also argue that the national debate on appropriate farming models echoes disputes at the project level. These disputes thus also play out in real world scenarios at the project level where claimants in favour of settling on the land and possibly undertaking small-scale farming comes into conflict with those who prefer the land to be given over to unified commercial production. For Aliber and others, the important question for rural restitution is how to address the real-life heterogeneity that characterizes claimants and their interests in land-based settlements.

According to the 2015 Transformation Audit conducted by the social justice network¹⁵³ the problem with South Africa's land reform policies lies in its ambiguity. The report asserts, 'On the one hand, they seek to maintain the large farms inherited from apartheid; and, on the other, they seek to redistribute land and address historical injustices in the agrarian structure'. Ultimately according to the Transformation Audit this ambiguity results in fairly unimpressive outcomes for the land reform programme.¹⁵⁴ For the most part the unimpressive nature of these outcomes is particularly evident in relation to the poverty reduction and equity goals of the South African land reform programme. The report concludes by arguing that the bi-modal agrarian structure inherited from apartheid needs to be dismantled in favour of a more democratic tri-modal structure involving a diverse group of farmers¹⁵⁵ Furthermore, the report posits 'for land reform projects to achieve their desired goal of addressing rural poverty, there is a need for the greater involvement of the beneficiaries thereof in

both policy formulation and implementation, which would engender a sense of ownership among beneficiaries that is currently lacking.’ The report concludes that South Africa’s market-based land reforms (comprising land restitution, tenure reform and land redistribution) have largely failed to restructure agrarian relations more equitably, and suggests that this failure is linked to ongoing poverty.

Even more revealing is the perspective offered by the Department of Rural Development and Land reform itself. At the November 2013 response to the South African Human Rights Commission’s hearing, the Department of Rural Development and Land Reform listed key challenges impeding their implementation and operations¹⁵⁶. From the list of key challenges particularly noteworthy is the mention of the challenge regarding the ‘ineffective use of restituted/restored land and inadequate State support’. At the hearing, the DRLR acknowledged that:

The beneficiaries of the restitution programme do not have experience in conducting farming operations on farms restored to them and there has been inadequate support from the State which tended to emphasise the number of hectares transferred as opposed to the long term sustainability of land that is awarded to the beneficiaries. Furthermore, most settlements do not result in the economic empowerment of beneficiaries.

At the interface: Land Restitution and Conservation

Land restitution and protected areas is increasingly becoming an intensely debated issue¹⁵⁷. In South Africa’s national parks the quest for justice to communities who were dispossessed of their land for purposes of creating protected areas is a compelling as the need to safeguard integrity and future of the country’s national parks, the future of conservation is equally compelling. As former President Nelson Mandela said at the centenary celebrations of the Kruger National Park:

In commemorating this historic day, we do not forget those who had to surrender their local land to make it possible, often through forcible removal, nor those who for generations were denied access to their heritage except as poorly rewarded labour. We recall these threads in our history not to decry the foresight of those who established the park, nor to diminish our enjoyment of it. We do so rather to reaffirm our commitment that the rural communities in and around our parks should also benefit from our natural heritage, and find in it an opportunity for their development.¹⁵⁸

The main opposition to land claims in protected areas are conservationists rather than landowners. They oppose land claims for fear that restitution would undermine the conservation imperatives of national parks. In their submission to the Land Claims Commissioner, the Parks Board made it clear that while it accepts 'the ethics of the land claims process. We do not want to be party to past immoral practices. However, land being claimed in national parks at present is vitally important to the integrity of those parks, which in turn are a national asset. Communities must receive adequate compensation for past losses without threatening the integrity of our world-renowned national parks system.'

At the land restitution/conservation interface a key challenge would be how to ensure that conservation and people's rights to land and natural resources are maintained. Added to this dilemma would also be the extent to which these types of arrangements could contribute to the improvement of livelihood conditions for claimant communities. The case study of co-management in Mkambati demonstrates the unresolved tensions in attempts to deal with land claims in protected areas. The issue of limited models for resolving land claims in protected areas are highlighted by Kepe .who argues that conservation interests seems to triumph the land rights of claimants.¹⁵⁹ This is also a sentiment echoed by Fay¹⁶⁰ , who in the case of the resolution of the Dwesa Cwebe claim concluded that the confirmation of ownership rights for the claimants actually translated into very limited rights for the claimants who were not granted access to forest products or grazing land. Fay bemoans the fact that the Dwesa-Cwebe claimants only received a once of cash payment, access to government grants and very limited rental income.

Aliber and others comment that assessing 'success' in restitution is made more difficult because it seeks to achieve objectives other than economic upliftment or poverty reduction. This assertion is demonstrated by the findings of a recent study conducted by Dikgang and Muchapondwa.¹⁶¹ They used a case study to test their hypothesis that land restitution could potentially increase average household income, improve income distribution, consumption levels and result in more access to natural resources; and as a result reduce poverty and inequality. Their study thus attempted to test whether there is a positive correlation between land restitution and poverty reduction among the Khomani San active beneficiaries in the Kgalagadi area of South Africa. The inquiry involved survey data collected from 200 Khomani San households and running instrumental variable probit models of "being poor" and "having access to nature" with proximity to the Kgalagadi Transfrontier Park as an instrument. Sadly, their results suggest that using restituted land by the claimants' has had no

positive effect on poverty alleviation, but their analysis did confirm a positive link between access and use of restituted land to enjoy natural surrounding *i.e.* nature. For the Khomani San a positive outcome had nothing to do with monetary or material outcomes, they were happy just gaining access to nature. Once again, even at the restitution conservation interface, limited impacts on poverty, and employment creation are observed.

Glimpses of Success

However, not all rural land restitution projects have failed. There are a relatively small number of successful land restitution projects. According to the PLAAS Diagnostic Report (2016), these projects are of three types: The first type is most visible, and these projects are often lauded in the media. They include the Makuleke community that runs a successful tourism venture in the northern part of the Kruger National Park. Steven Robins and Kees van der Waal¹⁶², reviews this well-known restitution case and illustrate how the outcome of this case appears to embody the official objectives of reconciliation, nation-building, and economic development.¹⁶³ The Makuleke's decision to maintain their land for conservation, as well as their apparent success in reconciling traditional and democratic governance institutions, positions them as a model tribe according to the authors. They argue that this claim's iconic status can be attributed to the Makuleke leadership's strategic deployment and creative assimilation of various development discourses. Some more examples of success where decisive leadership and active participation and involvement by community members has played a key role includes the Moletele claim in Hoedspruit, where the community is in strategic partnerships with private sector companies producing citrus and other plantation crops, the Ravele CPA in the Levubu valley in Limpopo, which operates export-oriented macadamia nut farms, and the Amangcolosi community in Kranskop in KwaZulu-Natal, which owns a successful company, Ithuba Agriculture, that grows sugar cane, maize, timber and other crops. Some apparent 'success stories', such as the joint ventures between TSB Sugar and communities in the Nkomati area in Mpumalanga, are problematic, especially in terms of how widely the benefits are spread.¹⁶⁴

The second type is less visible, but some are documented in case studies such as that of Munzhedzhi and Morebene in Limpopo. In the Munzhedzi case, the role of a self-proclaimed chief who allocated land to virtually anybody willing to pay a small fee is highlighted by Aliber *etal* as key determinant of positive livelihood related outcomes. Also in the case of the Covie settlement, the pro-active role played by service organisations, particularly NGOs, in facilitating community discussions and decision-making are highlighted. From the Covie case, once again, decisions made to allow direct

access to land for cultivation and grazing (for beneficiaries) alongside continued commercial production was found to be the most secure source of improved livelihoods. The case study reviews published by the SDC and findings from the case study by Aliber and others, thus underscores the central importance of strong and committed leadership, access to land for self-provisioning and committed involvement of beneficiaries as key determinants of potentially positive livelihood outcomes in restitution cases.¹⁶⁵ Where people were deriving livelihood benefits, this was often because of the initiative of people who have some resources and few alternative opportunities. Examples of the third type of successful restitution are discussed by Walker and in various case studies, and are not to be dismissed simply because the economic dimension appears unimpressive.¹⁶⁶

Lessons in terms of poverty reduction, employment creation and equality objectives

To date, the policy instruments to address structural poverty through land and agrarian reform for many observers have been too narrowly conceptualised. The focus of the land reform programme thus far, has largely been restricted to land acquisition and provision of some technical support as opposed to more wide ranging agrarian reform. Evidence ¹⁶⁷ shows that on its own, land acquisition and state investment in narrowly defined technical assistance, seldom results in economic opportunities for the poor and in certain cases may inadvertently even deepen structural poverty.

From the review of existing literature it is evident that the potential impact of restitution in terms of poverty reduction, job creation and equity considerations has been less than desirable. The following aspects are recurring themes coming up in all the assessments providing us with valuable insights:

- For many commentators a key source of concern is the level of dysfunction introduced by legal entities being imposed into the context of reconstituted 'communities' who are now expected to manage land in the interest of a rather diverse collective. In many instances the lack of adequately functioning land holding entities has prevented members from realising any form of livelihood benefits. Even where land is being used, dysfunctional legal entities may prevent members from realising these as livelihood benefits. The Sustainable Development Consortium concludes 'In no cases where CPAs or trusts had received income from leases had this been paid out to members'.¹⁶⁸ In the case of Klipgat, the CPA was not

able to say what had happened to the money allegedly paid by a mining venture in return for access to the land. Members had not been able to hold these institutions to account. No official agency has taken responsibility for capacitating the CPA committee, empowering the members to hold the committee accountable or overseeing implementation of the settlement agreement.

- Lack of post-transfer support presents an overwhelming obstacle to production and marketing. The failure of post-transfer support to materialise, even where this is specified in project plans, presents an overwhelming obstacle to production and marketing. This finding supports the observation by Lahiff and Cousins that ‘limited post-transfer support, and the failure to integrate land reform with a wider programme of rural development, has severely limited [the contribution of land reform]...to livelihoods and to the revival of the rural economy’.¹⁶⁹
- The failure to define and enforce post-settlement arrangements and the roles of different institutions has direct consequences for job creation and poverty reduction. Where claims are settled, or projects transferred, without these arrangements being in place, it leads to uncertainty, not only for beneficiaries but also on the part of those institutions which are not under any compulsion to provide support. As people’s own activities diverge further from plans, provision of planned post-transfer support becomes less likely. The absence of a clear lead agency inhibits intervention from other institutions.
- Improvements in beneficiary livelihoods depend not merely on the amount of support, but also on the degree to which this is integrated and strongly managed by a lead institution.
- The value of land and land uses for people’s livelihoods may also be evident in non-financial terms, in the form of improved nutrition through consumption of own production; reduced cash expenditure on food as a result of consumption of own production and improved tenure security, housing and access to services. Findings from the SDC (2007) review suggest that these non-financial benefits are only realisable where direct access to land is possible.¹⁷⁰

Walker¹⁷¹ highlights the following considerations that she deems important for a land reform programme aimed at significantly reducing poverty and inequality by 2030. In the first instance, she maintains that rural development is not sufficiently integrated into mainstream economic policy; land reform has to be designed to complement general economic strategies and not function in its own policy and implementation silo.¹⁷² Secondly, she contends that the state's capacity to implement land reform is weak. In this instance, she highlights the need for a political leadership to 'inject into public debates a more sober assessment of what redistributive land reform offers as a route out of poverty, along with a more pragmatic assessment of the role of commercial agriculture and its contribution to the national economy, including jobs and to national food security' (ibid.: 13).¹⁷³ Thirdly, she argues that the inability of the state to reach the national targets for land reform is a concern, but this concern should not crowd out the more important debates about what 'good enough land reform should be'.¹⁷⁴ Fourthly, she maintains that land reform and agricultural policy need to be responsive to ecological challenges facing the region.

Finally, Walker suggests that the scale of the unfinished task in the restitution programme could provide an 'opportunity to rethink how best to address the demand for social justice in these claims in relation to broader poverty reduction and rural development programmes and in this instance "communities" could be allowed a range of options that may include but should not be limited to the restoration of ancestral land'.¹⁷⁵ Walker also points out that the depth of poverty since the 1990s have declined (taking the percentage of rural poor households into account), primarily because of social grants and other transfers despite a 'failed' land reform programme. She therefore calls for a careful re-consideration of the role of land reform as a poverty alleviation strategy in the context of other (perhaps more promising and more relevant) options or forms of transfers.

9. A review of the literature in respect of the cost effectiveness of restitution in the light of the benefits flowing directly to those who were forcibly removed, as opposed to various service providers and strategic partners

By the end of 1999, the direct transfer of land back to restitution beneficiaries resulted in what many commentators perceived as 'failures'.¹⁷⁶ The failure of restitution projects was ascribed to the struggle of restitution beneficiaries to perform in the commercial agricultural environment and their lack of management and marketing skills.¹⁷⁷ At the time, private sector involvement, in the form of joint ventures, was a fairly common phenomenon in the redistribution leg of the South African land reform programme and this prompted Minister Thoko Didiza during the second half of 2004 to call

for 'creative partnerships' also between land claim beneficiaries and private sector investors in order to enhance the economic impact of the land restitution programme.¹⁷⁸

The strategic partnership model was presented as the vehicle that would foster the transformation of the South African agricultural sector into a more equitable one. These partnership initiatives are also increasingly being seen as an expression of the state's belief in the large-scale commercial farming model, especially in the context of citrus export in Limpopo.¹⁷⁹ For some observers, the establishment of strategic partnerships in restitution was the result of an important policy shift in emphasis from land *access* by claimants towards the *maintenance of agricultural productivity*.¹⁸⁰ Most of the white commercial farmers generally welcomed the introduction of these models, as it allowed them the opportunity to access government funds in one of the least subsidised agricultural environments in the world.¹⁸¹ There are also those among the white commercial farming groups who assert that these partnership initiatives were seen as a possible "bail out" for already failing white commercial farmers. The model for strategic partnerships was often presented as *the* solution that will offer justice to the landless and contribute to poverty alleviation while still maintaining high levels of production on the transferred land. The intended outcomes and assumptions of these models are however, increasingly being questioned.¹⁸²

In South Africa, strategic partnerships became prominent in the case of large restitution settlements of high value land, and in Limpopo province in particular, where most claims are rural and involve highly commercialized farms.¹⁸³ The strategic partnership model requires successful claimant communities organized as Communal Property Associations or trusts to form a joint venture with a private entrepreneur who invests working capital in an operating company that takes control of farm management decisions for ten years or more, with the option of renewal for a further period. The South African government, rather than promoting the direct return of land to claimants, has therefore opted for a joint venture model whereby farm management companies are entrusted with post-restitution responsibilities such as the enhancement of skills, competencies and institutional capacity building¹⁸⁴ whilst ensuring continuity in production and employment.

For some observers 'joint partnerships could provide land reform beneficiaries with access to land and capital, as well as the expertise of white commercial farmers and or/ companies'.¹⁸⁵ Additionally, the potential benefits to the claimant communities was supposed to include rental for use of their land, a share of profits, preferential employment, training opportunities and the promise that they

will receive profitable and functioning farms at the termination of the lease agreements.¹⁸⁶ It was also envisaged that the strategic partners would benefit through the payment of the management fee, a share in the profits of the company, as well as exclusive or near exclusive control of the upstream and downstream activities, whose potential benefits may well exceed that of the operating company.

The design of the strategic partnerships was conceptualized as a “conventional partnership”, where joint ventures were established between land reform beneficiaries and different strategic partners in the form of operating companies. It was anticipated that the state, on behalf of the community members- the majority shareholder-, would make the largest investment in the company, in the form of restitution discretionary grants. This payment was supposed to be matched by contributions from the respective strategic partners into the accounts of the operating companies. In the cases of the Moletele, Levubu, Nkumbleni partnerships however, problems emerged fairly soon when the envisaged grant payments from the state failed to materialize due to budgetary constraints; while contributions from the strategic partners to ensure production activities on the land, continued. This implied that the majority shareholders (the communities) were unable to match the contributions of its business partners. This had devastating impacts on the envisaged benefit streams to the beneficiary “communities”. In the case of the Moletele strategic partnerships it was found that land rentals that were supposed to be paid by the operating company into the MCPA account have generally not been paid, and where some payments have been made, they have been intermittent and partial. The management fees that were supposed to be paid to strategic partners also failed to materialize. For all three case studies, by the end of 2014, dividends have not been declared and therefore nothing has been paid out to the relevant community members.

Also in the case of the Moletele strategic partnerships it has been found that envisaged benefits in terms of employment opportunities for Moletele people turned out to be grossly overestimated. The lack of extensive formal employment opportunities, in tandem with the long distances that community members would need to commute if they were employed on these farms, has invariably limited the number and types of employment opportunities available to Moletele members. Added to these constraints is the fact that the farms were transferred to the Moletele as “going concerns”, i.e. the Moletele inherited non-Moletele workers already on the farms. In the case of the Nkumbleni partnership, long travel distances to the farms are also cited as a limitation for employment opportunities¹⁸⁷. In both cases, limitations on employment opportunities for the absorption of

community members are exacerbated by their own “fussiness”, with members preferring employment in the pack houses as opposed to “working on the land”. According to Moletete chairperson at that time, Mr Mashile all these facts have translated into a scenario where less than 30% of the work force in the land represented actual Moletete labourers.

Production on Moletete land is continuing, but there is increasing tension between the strategic partners and the MCPA regarding the flow of benefits and the long-term prospects of continuing the partnership. The flow of benefits from the strategic partnerships to claimants has been fairly limited to date causing a great deal of unhappiness amongst Moletete members. The ‘limited’, (and according to many respondents ‘preferential’) flow of benefits back to the community is a recurring issue in all of the MCPA AGM reports. The strategic partners also acknowledge that the community might not have benefitted to the extent originally envisaged with these arrangements. Members of the MCPA executive committee insist that the Moletete are “running out of patience” with the lack of benefits coming from the two remaining strategic partnership initiatives.¹⁸⁸

The strategic partners on the other hand, warn that the ‘profits’ they are consistently being accused of capturing are in fact quite “marginal”. In their view, benefits transmitted back to the community has been limited because restitution communities are being inserted into agricultural value chains as producers; the most profit-constrained node within the value chain. The strategic partners also blame the model for imposing such a high level of dependence on state funding while most of the risks of the farming activities on the land are being carried by them, the strategic partners. The New Dawn strategic partner in particular, has been facing great difficulty in sourcing a loan from the Development Bank Southern Africa (DBSA). Based on analysis of these models, findings to date thus suggests that the design of the strategic partnership model ultimately culminated into an overreliance on external (state) funding which has created a degree of vulnerability for both the strategic partners and the “community” The design of the model also seemingly casts the strategic partners and communities into adversarial roles where each entity apparently need to compete for access to “state” resources.¹⁸⁹

In response to the poor performance of strategic partnership arrangements, the community opted to sign two CPP agreements. The CPP arrangement is in effect a management contract between the community and an agri-business partner who would be able to shoulder all the risks and investments required for production and export on the land, thus nullifying the reliance on funding from the state. In terms of these agreements, the chairperson of the MCPA in 2011 asserted:

The challenging nature of the strategic partnership model is also evident in other cases. By June 2005, South African Farm Management (SAFM) was confirmed as the strategic partner for five of the seven claimant communities (Ravele, Tshakhuma, Masakona, Tshitwani and Tshivazwaulu communities), and Mavu was appointed as the partner for the remaining two communities at Levubu. Formal agreements were not signed until late 2007, however, and the impact of prolonged negotiations on productivity and the physical condition of the properties has been a major source of contention. The collapse of two other partnerships where SAFM was involved in Mpumalanga and in Limpopo¹⁹⁰ signaled a challenging way forward for the Levubu partnerships and finally in 2009 when South African Farm Management (SAFM) was declared insolvent, it became clear that the shift towards strategic partnerships should not be seen as the panacea for the problems experienced in South Africa's land restitution.. All of the initial partnerships established at Levubu thus collapsed within less than three years since its inception with very little benefits materialising for the beneficiaries.¹⁹¹ A strong suspicion thus emerged that strategic partners might merely have been interested in the Restitution Discretionary Grant of the beneficiaries.¹⁹² The insolvency and collapse of the strategic partnership venture at Levubu has resulted in questions being asked about the very intentions of strategic partners and the extent of benefits reaching beneficiaries.

New joint venture arrangements are mushrooming all over the South African countryside and although they might be diverse in terms of the specifics of their lease and shareholding agreements, they all entail a type of partnership arrangement. Greenberg uses the Levubu case study to launch a thought-provoking critique of these types of models.¹⁹³ He asks 'in what way are these models a success?' From his perspective, 'not only are beneficiaries prohibited from returning to their land to live, but the commercial production which the [very] model was meant to protect is also under threat'. Greenberg concludes that former owners and their management companies continue to make profits while controlling information on income and expenditure from beneficiaries (i.e. no meaningful skills transfer is taking place), while the so-called beneficiaries' lives remain much as they were: evicted from their land, with meagre income from seasonal or temporary sources.¹⁹⁴

A recurring discontent is therefore being expressed by key actors involved in these initiatives about the design of the strategic partnership model. Key informants observe that the model is too complicated and opened the community up to unnecessary risk. This risk became apparent after government failed to transfer promised grants. The community in some instances now seemingly "owes the strategic partner" in terms of partnership contributions. The liquidation of bankrupt

strategic partners has also resulted in risk for the community with some of the movable property of the Moletele's possibly attached to liquidation notices.¹⁹⁵ In the case of the Nkumbleni strategic partnership similar frustrations were noted.¹⁹⁶ Failure to transfer the Restitution Discretion Grants (R633 000) and Settlement Planning Grants (R303 840) in the instance of the Nkumbleni strategic partnership also had detrimental impacts on the strategic partnership activities.

The promise of substantial cash income, employment and training opportunities, and the prospect of claimants eventually owning and running their own successful commercial farming operation, has not been fulfilled. An assessment of 39 land reform projects in Limpopo Province shows that such projects had 'caused an 89.5 per cent decrease in production as well as many job losses'.¹⁹⁷ Furthermore, they report that 'only a few households currently benefiting from the land reform projects are able to effectively live on such income.

In instances where these types of partnership arrangements have been negotiated, as in the cases of Zebedele, Levubu and Moletele strategic partnerships, production on the land has continued. What is less apparent is the extent to which *real* benefits are being transferred to the nominal owners of the land - the restitution communities. In this regard, the role and involvement of newly restituted communities in terms of the commodity chains they are now assumed to be benefiting from thus also need to be understood. Recent studies increasingly caution against the uncritical insertion of rural producers into existing global value chains under the auspices of 'poverty reduction' goals.¹⁹⁸ Bolwig and others contend that even if people [rural producers, workers and migrant workers] are included in global value chains, this may not be on advantageous terms, and analysis should look carefully at the costs and benefits of participation in a particular chain.¹⁹⁹ Du Toit asserts; "poverty can flow not only from exclusion but also from processes of integration into broader economic and social networks".²⁰⁰ He argues that these tendencies are better captured by the notion of 'adverse incorporation' into these value chains.²⁰¹

10. A review of literature about the track record of strategic partnership arrangements on restored land

The first assumption questioned by Spierenburg and others refers to the notion that strategic partnerships are "real" partnerships in which all partners are equal and have mutual goals.²⁰² These authors caution that the unequal power relations between private sector and commercial farmers cannot be "assumed away" and poses a real threat to the long-term viability of these arrangements.²⁰³ Fraser highlights his own concern regarding unequal power relations and posits that inequality also translates into challenging power dynamics *within* "communities".²⁰⁴ James is therefore concerned

with the role of “brokers” in communities who are able to step in and dominate both the process and its outcomes when restitution projects are negotiated.²⁰⁵ Power disparities within beneficiary “communities” could thus result in local elites presenting themselves as the legitimate voice, while this might not be the case.

Secondly, Aliber and others contend that the uncritical promotion of the strategic partnership model could be construed in terms of the South African state’s assumption that commercial farmers possess the skills necessary for restitution communities to be successful in agriculture.²⁰⁶ By the same token, they find it problematic that the strategic partnership model is transmitting the idea that current commercial farming practices should be regarded as the benchmark for the kind of agriculture the restitution beneficiaries should be aspiring to.²⁰⁷

Thirdly, commentators seem to share a concern regarding the nature and extent of the assumed benefits to reach the communities involved. The stipulated or intended benefits in terms of receiving rental for their land, job opportunities, profits or dividends are often linked to business plans, which in some instances are not in place. In addition, Spierenburg and others question the ability of beneficiaries or, in fact, the Community Property Associations (CPAs) or trusts to negotiate contracts with private sector partners in the best interest of restitution communities.²⁰⁸ They question the capacity of an already beleaguered CPA as a landholding entity to ensure that training and benefits, as stipulated in terms of business plans and contracts, are in fact implemented. The ability of the CPA to put pressure on the commercial partner is thus regarded as highly questionable or assumed.²⁰⁹ The nature of job opportunities also raised suspicions and it is anticipated that these partnerships might inflate the extent of job opportunities available on commercial farms, while old relations of production would most likely result in a limited number of only low-paid jobs available for a segment of the beneficiaries.²¹⁰

In the fourth instance, the assumed benefits of the introduction of rural communities into existing value chains are also increasingly being questioned. It has also been argue that engaging in the partnership could expose restitution beneficiaries to the highest risk potential in the value chain. The strategic or commercial partners, on the other hand, are seemingly able to benefit in terms of a management fee, a share of the company’s profits and exclusive control of upstream and downstream activities with potential access to benefits that could outstrip those of the farming enterprise itself.

Finally, in line with large-scale commercial farming rhetoric, the partnership model often results in the consolidation of land parcels opening up the avenue for strategic partners to consolidate and rationalise production in a way that was previously not possible. Critics thus warn that these types of joint ventures could become ways for commercial farmers and companies to spread the risk of engaging in an increasingly complex and capital-intensive sector, while gaining political credibility. From the discussion above, it is apparent why some commentators observe that the introduction of these strategic partnership arrangements might have led to maintained production on restituted land, but there are a myriad of complexities and problems that undermine the credibility of the strategic partnership model as a long-term strategy for post-settlement land restitution (livelihoods.co.za). Lahiff concludes that strategic partnership models have been the most ambitious and, arguably, the *least unsuccessful* model in South African land reform to date.²¹¹

From a review of strategic partners to date, a common feature has been that socio-economic differences within claimant communities – in terms of ownership of livestock and access to off-farm sources of income – are seen to be reinforced. As beneficiaries are exposed to the costs of participating in a project – risk, start-up costs, transport and the opportunity cost of pursuing other activities – socio-economic differences become more apparent. This was evident in the case of the Zebediela strategic partnership, where the more educated and vocal leadership were able to get jobs in management. In the case of the Moletele claim, it appears that wealthier cattle-owning men who had transport were able to allocate themselves grazing camps with the help of the traditional leader, while others in their CPA were too poor to get access to any land because they had no transport. There was also the general perception among Moletele members that only those Moletele with business savy and the ability to ‘talk’ in a business-like manner would be able to participate at CPA meetings and benefit from the partnership initiative.

Differing priorities are evident both within and between projects. Restitution communities are not homogenous collectives and often sub-groupings within these communities were found to be differently inspired. Some members were explicitly motivated by an interest in generating profits for reinvestment in order to generate a commercial enterprise, while others are motivated by the need to have a secure place to live, to build up a stock of wealth in the form of livestock, to improve household food security, or to rebuild community.

Insights gained: Continuity of production versus claimant livelihood benefits

Strategic partnerships represent high risks for claimants whose only livelihood benefits come from a combination of rental and dividend payments – which often are not forthcoming. Strategic partnerships generally privilege continuity of production over livelihood benefits for beneficiaries. The Moletele, Bjatladi and Klipgat cases clearly demonstrate that the degree of intervention that is needed to counteract predictable power imbalances in negotiations between highly unequal partners has been severely underestimated. The promise of jobs often consists in merely maintaining existing employment (not always of the same people who are the Restitution claimants), and is also often irregular, uncertain and seasonal. It is precisely where land is to be leased out or is subject to a strategic partnership that securing a basic source of land-based livelihood is most important.

Where Restitution leads to strategic partnerships, these may involve continuity in management and use (at least in the form of use), while ownership changes. The case studies indicate that Restitution project planning is driven by an emphasis on minimising changes in the use of the land, rather than maximising the change in the livelihoods of beneficiaries. The interest of “the state” to break the reliance of strategic partnership initiatives’ dependence on state funding by providing the restitution communities with the type of commercial partner that would be able to shoulder the risks and investment required to ensure continued production on the land, has resulted in the introduction of differently configured partnership arrangements such as the community private partnership in the case of the Moletele claim. These newly configured structures have been successful in ‘breaking’ claimant communities’ reliance on state resources but the initiative has clearly converged with agribusiness interest looking for opportunities to expand, consolidate and integrate their production activities. The combination of strategic partnerships and other co-management models has therefore clearly enhanced the ability of agri-businesses to “hop” in and benefit from the most productive parcels of land in the country without the remotest concern to re-invest in the capacities of the rural community who owns the land. The transformative potential of these models is therefore highly questionable, because communities are not allowed to: (1) move on to the land, (2) use or subdivide unused or ‘open’ land for other small-scale productive purposes or (3) take full effective control of productive activities on their land.²¹² From the outcomes of the partnerships on Moletele land to date, the convergence between “state” and agribusiness interest in terms of these

models is thus very noticeable, and it does raise questions about the extent to which the models are able to accommodate the land claimants' expectations and aspirations.

11. A review of reasons cited in the literature for under-production and under-investment in restored farms

Progress with restitution has been most commonly measured by counting the number of claims that have been settled. However, the success of land reform is not only measured by the number of hectares restored but also by the use that is made of the land acquired. This section reviews literature on land reform in South Africa with particular interest in what happens after land transfer and settlement. The main aim of this section is to find out the reasons identified for under-production and under-investment in restored farm.

Various scholars have argued that the biggest challenge in South Africa for under-production and under-investment in restored farms is lack of clear and coherent strategy on post-transfer support.²¹³ Support services, or complementary development support, as specified in the White Paper of South African Land Policy of 1997 include assistance with productive and sustainable land use, infrastructure support, farm credit, agricultural inputs and access to markets for farm outputs. However, recent studies on land reform in South Africa have reported that the agricultural support programme have been poorly aligned to projects of the Department of land Affairs (DLA).²¹⁴ Inadequate resources have thus far been devoted to such support. The announcement by provincial Departments of Agriculture (DoA) to begin implementing the Comprehensive Agricultural Support Programme (CASP) has been encouraging. The CASP is designed to provide an improved package of support for land reform beneficiaries and other previously disadvantaged farmers. However, its budget allocation is still small for the needs of land reform (R200 million in the first year which is about R9 million for the entire province), and the content of the programme is still unclear.²¹⁵

Central to the problems surrounding post-settlement support are a lack of co-ordination and communication between the key Departments of Agriculture and Land Affairs, and local government structures. Although the Department of land Affairs (DLA) (responsible for land reform) is the lead agency in the implementation of land reform, it does not take responsibility for post-settlement (or post-transfer) support of beneficiaries. Services that are available to land reform beneficiaries tend to be supplied by provincial Departments of Agriculture (DoA) (responsible for state services to farmers) but the evidence suggest that these only serve a minority of projects. It is also important to note that whilst it is assumed that the provincial Department of Agriculture will provide support to

beneficiaries, there is no system yet in place to check what specific support will be required and whether the department has the resources and appropriate skills to meet the needs.²¹⁶

Whilst the primary responsibility for the establishment of state-funded land reform projects lies with the DLA and the provincial DoA, the current land policy assumes that local government (at district municipality and local municipality levels) will be the leading role player in service delivery after the transfer of land to beneficiaries.²¹⁷ However, local municipalities have shown great uncertainty in terms of establishing their role in restitution or other land reform programmes. It was also found that they do not include support to land reform in their Integrated Development Plans (IDPs) and this has negative implications on beneficiaries. Across the countries many land reform beneficiaries are unable to access municipal services after land transfer because local municipalities see land reform programme as the responsibility of the provincial DoA.²¹⁸ For instance, in a study of post-settlement challenges for land reform beneficiaries in Limpopo Province, it was found that none of the three cases (Munzhedzi, Mavungeni and Shimange Communal Property Association) under investigation had access to electricity or safe drinking water, despite numerous efforts to get the local municipality to provide such services. This has seriously affected development in restored land.²¹⁹

The absence of post-settlement strategy has resulted in the Government getting private companies and Non-governmental organisations (NGOs) to assist beneficiaries with skills, infrastructure and other services to land reform projects. However, the well-developed (private) agri-business sector that services large scale commercial agriculture has shown no interest in extending its operations to new farmers or beneficiaries, who in most cases would be incapable of paying for such services. The assumption that the private sector would somehow 'respond' to demand from land reform beneficiaries with very different needs to the established commercial farmers has not been supported by recent experience. The principal explanation for this, is that land reform beneficiaries are, on the whole, so cash-strapped that they are not in a position to exert any effective demand for the services on offer, even if these services were geared to their specific needs.²²⁰

Community members were also found to be producing at a very small scale and could not expand due to lack of access to credit and affordable inputs. It is argued that credit market has still not been reformed to enable easier access to black emerging farmers, and this has constrained them from realizing their agricultural strategies. As a result, communities or their legal entities seldom met the

conditions set by financial institutions. Where trusts applied for credit from commercial banks, they had to submit business plans, pledge collateral and have enough cash on hand for a deposit. Access to credit in 1998 was close to non-existent, and communities requested government to intervene. The common trend has been that communities were unable to raise the necessary finances, which over time, the infrastructure on their farms deteriorated thereby making it more difficult for the group to utilize its land effectively. This situation is made worse by the fact that the development support grants owed to the community by the Commission on Restitution of Land Rights have not yet been released to them. Many beneficiaries whose claims were settled even three years ago have still not received the grants that they are entitled to. These grants have become the remaining leverage to control the claimants, and tend to be used to discourage actions by the claimants that do not conform with approved plans. Furthermore, the lack of agricultural skills among beneficiaries and the difficulty of accessing technical support have contributed to under-production and under-utilisation of restored farms owned by land claimants.²²¹

Farmer training has been identified as critical for the viability and sustainability of agricultural projects in restored land. Three methods to facilitate the skills transfer to land reform beneficiaries are training through agricultural colleges, mentorship, and management programmes. Although several agricultural colleges and the Agricultural Research Council (ARC) provide training for land redistribution beneficiaries, these are oriented towards commercial farming and not small scale farming. Furthermore, course materials do not always cater for the language needs of land reform beneficiaries and attendance at formal instruction sessions requires an extended period away from people's homes. Budgets ring-fenced for training remain inadequate to cover minimal training costs of beneficiaries. Individuals who apply and are admitted for training in farming must use their own resources to pay their fees.²²²

Literature has also identified irrelevant and poor planning as the major factor contributing to failures and collapse of land reform projects. For the state to release grants to land claimants, beneficiaries are compelled to compile land use and development plans culminating in business plans. Such business plans are in most cases dictated by private consultants hired by the State to assist communities and they tend to focus narrowly on agricultural production. In addition, the business plans that are developed are often written in without consultation with the beneficiaries and are primarily to satisfy administrative rather than development objectives.²²³ Furthermore, such business plans are unrealistic in that they rely on huge loans and high levels of expertise in farm

management and marketing which beneficiaries do not have. Beneficiaries are therefore under pressure from state officials who advocate for the unitary farming system. In other words, state officials opted or preferred large scale commercial farms run by groups in the name of Communal Property Association (CPA) as opposed to small plots given to individuals who run them on own account. This approach has led to unworkable project design and/or projects that are irrelevant to the circumstances of the rural poor. This inappropriate model, and the tensions within beneficiary groups that emerge from it, are largely responsible for under-production of farms in many restored land and the high failure rate of land reform projects.²²⁴ Similarly, in conservation areas, the land restored to beneficiaries was determined that it would be used for ecotourism. In other words, the land was restored to the communities on condition that it will only be used for conservation purpose. Although the beneficiaries are co-managers of the land and retain title deeds and negotiated rights of the land, they cannot be allowed to mine, prospect, use the land for agriculture and physically occupy their land. Whilst the beneficiaries have regained their land through land restitution, the lifestyle and relationship that existed between the communities and the land before dispossession has been lost forever. This arrangement has contributed to under-production and under-investment in restored farms because they are forced to generate income through tourism.²²⁵

Research has also shown that the majority of the people have not yet returned back to their restored land because of lack of resources to make use of the land. As a result, in order to access their land, they travel long distances between their place of residence and their restored land. Such distances are a considerable constraint for poor households, many of whom do not have sufficient resources to cover the cost of transport.²²⁶ Many of the people have expressed disappointment because they expected Government to help them relocate to their new land and so far no progress has been made which is contributing to under-development and under-investment in those areas.²²⁷ This situation of travelling long distances to restored land is made more complex because the higher percentage of the land being offered for resettlement is classified as semi-arid and desert and therefore unattractive due its poor productive potential. This is because South Africa is mostly a semi-arid country that is not well-endowed agriculturally and only 13.5 per cent of the country's land is classified as arable. For instance, Northern Cape is the largest province by area and might appear on paper as a prime location for a major resettlement programme for new farmers. However, much of it is officially desert. The poor condition of restituted land coupled with poor technical agricultural support to new farmers by the government has negative implications on

farming and this contribute to under-production and under-investment in restored farms. It is anticipated that climate change will make the situation worse.²²⁸

Literature suggests that after transfer of land, land reform beneficiaries are confronted by several challenges. These includes lack of post-settlement strategy, poor infrastructure on restored farms, group tensions, lack of support from official agencies (private and government), lack of access to credit, lack of training, long distances between beneficiaries' place of residence and their restored land, poor planning, condition attached to land restoration and land offered for resettlement not adequate for agriculture. All these challenges ultimately hamper beneficiaries from making effective use of land which contribute significantly to under-production and under-investment in restored farms. It can be concluded that the provision of land alone is not enough to ensure productive use of that land and to make a positive difference to people's lives. Access to land should be complemented with the building of sound institutions at the local level with capacity to enable land reform beneficiaries to use their land and other resources efficiently and effectively; as well as the provision of support services such as extension advice, access to credit and access to affordable inputs.

12. A review of the impact of land restoration vs. financial compensation on the livelihoods of beneficiaries

Over the past two decades, the South African government has implemented a land reform programme that aims to redress the injustices in land ownership patterns and to secure the land rights of historically disadvantaged people. Restitution is provided to qualified claimants who filed a restitution claim before the deadline of December 31, 1998 and who were dispossessed of any right in land after 1913 as a result of racially discriminatory laws and practices. According to the White Paper of South African Land Policy of 1997, restitution can take the form of restoration of the land from which claimants were dispossessed, provision of alternative land, payment of compensation, alternative relief comprising a combination of the above; or priority access to government housing and land development programmes. Whereas the programme has so far managed to return some land to previously landless and marginalized individuals and communities, in other areas where the land was not restored, the state has provided financial compensation to beneficiaries. The main question that this section intends to answer is: What are the impacts of land restitution versus financial compensation on the livelihoods of beneficiaries? The study uses existing literature on land reform in South Africa in order to answer this question.

The purpose of the land reform program, as outlined in the White Paper on South African Land Policy, is to redistribute land to the landless poor, labour tenants, farm workers, and emerging farmers for residential and productive uses, to improve their livelihoods and quality of life. Effective land programmes will also contribute directly to increasing production and to poverty alleviation. In some cases, land restoration has significant impacts on the livelihoods of beneficiaries whereas in some other cases it has minimal impacts on the livelihoods of beneficiaries. As documented by many scholars, absence of clear and coherent strategy on post-settlement support in land reform projects has led to widespread under-utilisation of land.²²⁹ Although land reform in South Africa since 1994 has helped some rural poor people to gain access to land for a range of purposes, land-based livelihoods strategies and support after land transfer has been neglected by the state. Essentially, this has contributed to serious problems of the new owners of land being unable to use land as a basis for their livelihoods.²³⁰ In other words, lack of post-settlement support to beneficiaries has minimal or no impact on livelihoods for most participants and in most cases provides no effective solution to reducing poverty in rural South Africa. Another fundamental factor is that application of a large-scale commercial farming model has led to unworkable project design and/or projects that are irrelevant to the circumstances of the beneficiaries. It is argued that the large-scale commercial farming model fails to take into account social realities, not least the abilities and aspirations of rural dwellers, and results in 'land reform projects' that are intrinsically unworkable and prone to collapse. As a result, where the large-scale commercial farming model has been applied, the poverty reduction benefits were typically insignificant and in most cases did not make any impact on the livelihoods of beneficiaries.²³¹

Furthermore, a number of explanations have been offered for poor livelihoods and production outcomes including: distances between beneficiaries place of residence and their restored land or farms; lack of access to credit and funding;²³² non-payment of development support grants owed to the community by the Commission on Restitution of Land Rights have not yet been released to them;²³³ an economy that is generally hostile to small-scale entrepreneurs, whether in agriculture or otherwise;²³⁴ skewed age distribution dominated by older people who are not able to provide required labour, inadequate beneficiary skills;²³⁵ too little money spent (and thus land transferred) per beneficiary;²³⁶ and lack of interest by well-developed (private) agri-business sector in extending their operations to new farmers or beneficiaries.²³⁷ All these activities limited the ability of land reform to act as an effective poverty reduction strategy.

Although land reform had offered poor livelihoods and production outcomes, on a more positive note, there are a number of research projects that have highlighted the livelihood gains and satisfaction that individual beneficiary households have secured.²³⁸ Land reform beneficiaries who are using their restored land have been reported that their greatest satisfaction to date was regaining and deriving benefits from the land that they could call their own. Degrees of satisfaction and benefits vary from one area to another. For some beneficiaries, the highest degree of satisfaction was found when the land was returned back to people (i.e. symbolic return of the land to people) because this has allowed communities to resettled back into their ancestral land. Community members felt that justice have been done because they now had material benefits in the form of land which they could use for settlement and to improve their livelihoods.²³⁹

There are also a number of large-scale and capital-intensive commercial farming enterprises that are often praised in the media for contributing to the livelihoods of beneficiaries. This includes the Makuleke community that runs a successful tourism venture in the northern part of the Kruger National Park.²⁴⁰ Other restitution cases that contributed to the livelihoods of beneficiaries include a very large citrus estate (Zebediela) situated 50 km out of Potgietersrus in Limpopo Province and Giba banana plantation in Hazyview, Mpumalanga. All these restitution projects involve a large-scale commercial farming model, complex institutional arrangements such as CPAs and trusts, and relationships with strategic partners or mentors. In addition, other projects contributing to the livelihoods of beneficiaries include the Moletete claim in Hoedspruit where the community is in strategic partnerships with private sector companies producing citrus and other plantation crops, the Ravele CPA in the Levubu valley in Limpopo, which operates export-oriented macadamia nut farms, and the Amangcolosi community in Kranskop in KwaZulu-Natal, which owns a successful company, Ithuba Agriculture, that grows sugar cane, maize, timber and other crops.

The other category is land reform projects that are less visible or less well known, but nevertheless, have contributed to the livelihood enhancements of beneficiaries. These projects are largely developed by people themselves rather than through official support from government or private sector. Despite agriculture being identified as the major land use activity in restored farms, ironically, it is reported that most of the beneficiaries who were able to use their land as a source of livelihood have succeeded through abandoning or amending official project plans of large scale farming. Literature suggests that most beneficiaries that use their land for farming were found to be focussing on staple food crops for their own consumption. This was achieved by subdividing the

farms into smaller plots to allow individuals to produce in their own plots. This is something that features in virtually no business plan and that received little or no support from either the Department of Land Affairs or provincial Departments of Agriculture.²⁴¹ For instance, in a study of post settlement support, it was found that in Shimange land claim in Limpopo Province, land claim beneficiaries were producing at a very small scale but making a significant contribution to household well-being. Beneficiaries were able to feed their families with fresh produce but most importantly some land claimants were able to supplement their salaries by additional income from the farm produce. Furthermore, food security of some households particularly at Shimange and Munzhedzi land claims were found to have improved through access to productive land, which is of much better quality than the land which they had access in their previous places of residence. Similarly, it was also found that beneficiaries of Dikgolo trust in Limpopo Province produce maize, pumpkins, water melons and beans which are consumed largely within member's households and generate small amounts of income from the sale of surplus crops at local informal markets. These beneficiaries were able to produce and harvest without funding, training or any help from relevant government department or local municipalities.²⁴²

In a study focusing on the question of whether land transferred through the land reform programme in South Africa is making a contribution to improving the livelihoods of beneficiaries, it was found that the acquisition of land had improved, in some cases vastly, the socio-economic conditions of beneficiaries in the Chris Hani District in the Eastern Cape. In addition, the study found that land reform beneficiary households and those who acquired land on their own in commercial farm areas are far better off (on average) than their counterparts in the communal areas, who have limited access to land.²⁴³ Most land reform beneficiaries were able to improve their livelihoods with very limited or no support from the state. These examples suggest that many rural people, especially the poor and unemployed, are able and willing to farm on a small scale if they are given the opportunity. In this sense, access to land is indeed important for poverty alleviation in South Africa. Whilst it is generally acknowledged that the gains may not be significant, but members attached great importance to the friendship and sense of purpose they obtain from the project, and in most cases were hopeful of improving their returns in the future. It is therefore argued that since beneficiaries have been able to produce so far without support and with only the most rudimentary forms of irrigation, it is likely that they could expand production greatly if appropriate support could be provided.²⁴⁴

Some beneficiaries who have gained access to their land have expressed happiness of being back to their ancestral land and using it for grazing their livestock. Although many beneficiaries face challenges of travelling long distances from their place of residence to their restored land, most of the beneficiaries were found successfully using their land for grazing livestock. For instance, some beneficiaries in Mavungeni and Shimange villages in Limpopo Province were found using portions of their restored land for grazing purposes. Furthermore, a study that looked at changing livelihoods and land reform in the Northern Cape found that restoration of land to beneficiaries have made progress either in establishing or in expanding their livestock holdings over a two-year period even though the majority remain extremely small. Although it is acknowledged that the contribution of the land to farming has been minimal, per capita incomes for most households have increased which is a positive outcome to beneficiaries.²⁴⁵

Whilst restoration of the land to the dispossessed has been the most common way of redressing past injustices in land reform programme, resettlement has not always been feasible, nor has it always been the priority among those seeking restitution. For instance, land restoration and 'development' in urban areas, including city centres and upmarket suburbs, has proved challenging and prohibitively costly. As a result, the programme has made available a range of forms of redress, including 'Standard Settlement Offers' (SSOs) of financial compensation which is used as an option to settle claim by the Commission for Restitution of Land Rights (CRLR). The Standard Settlement Offers (SSOs) of cash compensation for urban claims is usually set at R40 000 per household for former owners (R50 000 in certain metropolitan areas) and R17 500 per household for former long-term tenants.²⁴⁶ Some reasons cited for choosing cash instead of land by beneficiaries is because of the inability of Commission on the Restitution of Land rights (CRLR) to offer acceptable alternative land to land claimants and due to their urgent need for financial resources given their general poverty. Waning confidence in the restitution process made claimants increasingly unwilling to pursue the comparatively unknown and uncertain option of land restoration, even though it could potentially result in an asset far greater than the financial compensation that they ultimately accepted. Other reasons include the perception among beneficiaries that financial claims would be processed more quickly and be more likely to succeed unlike the process of acquiring and transferring land and planning for its development which may take years. It is also stated that the procedures by which beneficiaries might be restored to their land seemed unclear and complicated. In addition, beneficiaries opted for cash payment which could be received by individual households rather than awards of land made in groups which in most cases results in conflicts and

mismanagement. Claimant's age also became an increasingly important factor as time passed, and beneficiaries realised that waiting for land restoration might be in vain. Furthermore, beneficiaries preferred cash because there is fear that even if they had land successfully restored to them, they would lack the necessary resources to make use of it.²⁴⁷

Once the land claim has been found legitimate, land claimants are given a once off payment which is divided among the beneficiaries. The money awarded is used by beneficiaries as they wish. For instance, poverty has forced majority of beneficiaries to channel their awards into general budget and spent on necessities within households. In some cases, at least part of the award money was used to buy furniture whereas in other cases beneficiaries used the money for building or renovating existing houses. Some of the furniture purchased by money awarded to beneficiaries are shown to guests, telling them the story about the evictions and the land claim.²⁴⁸ In other words, furniture is given meaning and history is attached to it. In the study of the impacts of cash compensation in Knysna and Riebeek, Anna Bohlin concludes that money, as relatively empty signifier, is invested with meanings in creative and open-ended ways, often becoming home and belonging.²⁴⁹ In a separate study of restitution narratives in Black River in Cape Town, Dhupelia-Mesthrie concludes that the division of money into small amounts results in the danger that the money will carry but a temporary and relatively insignificant meaning.

Unlike the transfer of land or various forms of development projects, that can be seen and utilised for years to come, the potential for financial compensation is limited mainly because the award is transitory and the disposition out of sight in the privacy of claimants' homes. In other words, the money is temporary and does not last for a long period. It is therefore unable to sustain the livelihoods of beneficiaries. Because of its very nature, monetary compensation resulted in uncertainty regarding what, precisely, the awards were compensating for, and it remains unclear how the sums given to beneficiaries are calculated. As a result, this has left restitution open to continuous reinterpretations and contestation. It is argued that the money paid to beneficiaries does not adequately compensate for the market value of the land that was lost.²⁵⁰ In other words, unlike the white land owners that are often paid vastly larger sums of compensation based on current market value for farms acquired for restitution, the awards given to beneficiaries is not determined on the basis of the property's current market value. For instance, a study that looked at cash as compensation in South African Land Restitution found that claimants in both Knysna and Riebeek-

Kasteel regarded their payments as too small compared to their suffering and economic losses they underwent from dispossession.

Rather than viewing the awards as a unique act of compensation for the loss of their land, some beneficiaries regarded the money primarily as grants to address their poverty whereas some see the awards as gifts or donations bestowed to the poor. Unlike land, cash does not reflect what was lost in any immediate or tangible manner. In relation to 'dignity restoration', it is argued that cash settlements do not confront the underlying dehumanization, infantilisation and political exclusion that enabled the dispossession. The prosperity that beneficiaries see in the land they were evicted from is a constant reminder of the high price of their land that has increased substantially and the inadequacy of the compensation provided to them. For that reason, it is argued that money given to beneficiaries is seen as failure of the restitution programme in South Africa and failure by government to treat land claimants respectfully. As a result, restitution in the form of financial compensation has made little contribution to confronting and eroding spatial apartheid particularly in the cities.²⁵¹

This section has demonstrated that land restoration is more economically advantageous than financial compensation. This is because beneficiaries receive full ownership rights to land and the land becomes their property for the rest of their life. Beneficiaries felt that justice has been done because they acquired material benefits in the form of land which they can use to improve their livelihoods. Despite the lack of government support this study has demonstrated that beneficiaries were able to sustain their livelihoods in restored land. In contrast, claimants who chose financial compensation received only paltry financial awards that are often far below the historic or current value of the property rights that were unjustly extinguished by the apartheid and colonial-era governments. The once off grant given to beneficiaries is consumed and in most cases there is no long-term effects and has failed to contribute to the nation's goal of economic transformation. Whilst financial compensation helps beneficiaries to buy necessities within household and help them out of debt, however, it does not address skewed land ownership pattern. Essentially, financial compensation undermines the purpose of the larger land reform project of restoring lost land rights or reallocating land to those who were formerly disqualified. Whereas restitution is about ensuring justice and healing the wounds of apartheid, financial compensation does not heal the wounds but instead it has been successful in opening up the half-healed wounds of the past. It can be concluded that financial compensation has not contributed towards achieving the goal of restitution.

13. The Land Restitution Amendment Act and surrounding controversies

Attempts by government to amend the Restitution Act in 2014 were brought to a halt by the Constitution Court. The aim of the Act was 'to amend the Restitution of Land Rights Act, 1994, so as to amend the cut-off date for lodging a claim for restitution; to further regulate the appointment, tenure of office, remuneration and the terms and conditions of service of judges of the Land Claims Court; to make further provision for the advertisement of claims; to create certain offences; to extend the Minister's powers of delegation; and to provide for matters connected therewith'.²⁵² In announcing the Act, the Minister of Rural Development and Land Reform, Gugile Nkwinti emphasized that: 'Given our country's history of land dispossession, the Restitution of Land Rights programme is a necessary intervention for redress, reconciliation and nation-building; which is in line with the National Development Plan (NDP)'s goal towards the elimination of poverty and the reduction of inequality by 2030. It is my conviction that the issue of access to land is one of the fundamental elements to the transformation of the rural economy of our country, where the burden of land dispossession was mostly acute'.²⁵³ The Restitution of Land Rights Amendment Bill was timely in that it was published on 23 May 2013; the year of the commemoration of the centenary of the notorious Natives Land Act of 1913.

A number of steps were taken in preparation of the Restitution of Land Rights Amend Act. These include the meetings between Minister Gugile Nkwinti and land claimants in 2011 and the release of the Land Restitution Amendment Bill for public comments in May 2013. As required by law, a Regulatory Impact Assessment (RIA) evaluated the feasibility of reopening the lodgement of land claims and the administrative and financial implications of such a process. Recommendations from RIA were that the lodgement of land claims should be re-opened, that the administration and implementation of land restitution should be made effective and efficient, and that post-settlement support should be improved. The expected number of new claims varied mainly because of estimates and categories of people who were excluded from the first phase of the restitution process that closed on 31 December 1998. According to the RIA a 'minimum of 4.886 million people', comprising 86 000 unable to lodge claims by 1998; 1.3 – 2.5 million who were victims of betterment planning; the 'majority of 4.5 million Africans living in South Africa in 1910' as victims of pre-1913 dispossession; and between 1 and 7 million farm dwellers and labour tenants.²⁵⁴ Many submissions to parliament called for a ring fencing of existing claims, to protect them from competition from new claims and ensure that they could be dealt with first, before any new claims

are addressed. This recommendation was not adopted, and instead existing unresolved claims will be able to be 'prioritised', as provided for in section 6(1)(g) of the Amendment Act.²⁵⁵ The Amendment Bill was tabled in parliament in October 2013, public hearings took place in November 2013 and January 2014, and the President signed the Act into law on 30th June 2014.

While there is no question about the necessity for land restitution, there were doubts about the government's move towards re-opening land claims. Questions were raised about how this move would impact on outstanding land claims and on the administrative capacity of the Commission to carry out an additional load. The official explanation for reopening the land claims was that it was morally wrong to exclude potential land claimants who missed the 1998 deadline, and those whose land claims were unfairly dismissed by the RLCC on the grounds that they referred to betterment planning rather than racially motivated forced removals as required by the Restitution Act.²⁵⁶

Minister Nkwinti elaborated on reasons for reopening the lodgement of land claims when he said that 'the government was conscious of the fact that the law as it stood did not accommodate the country's Khoi and San communities, who suffered dispossession long before the passing of the 1913 Land Act. Their plight is not forgotten. I want to assure them that a policy on the exceptions to the 1913 Natives Land Act cut-off date is being developed that seeks to address their concerns'. Thus, the Khoi and the San communities were considered by government as the biggest beneficiaries of the change in the cut-off date.²⁵⁷ Commenting on the re-opening of the lodgement of land claims, the Chairman of the National Khoisan Council, Cecil le Fleur is reported to have said: 'the Khoisan community has always fought for the cut-off date to be extended beyond 1913. It is a difficult process ahead but at least we are on the right path. We will have to get through those challenges and get justice for the Khoisan people. There should be a lot of redress in this'.²⁵⁸

This move to reopen the lodgement of land claims was surprising as the ANC government had expressed the desire to finalize land restitution cases in order to ensure political and economic stability in the country. The Bill was criticised for stressing that land should be returned to claimants who show that they can use it 'productively'.²⁵⁹ It has been argued that the Bill, in its current context, was unlikely to meet the needs of rural people, and that it should be read in conjunction with other laws in order to make a meaningful contribution to the wellbeing of people in the former bantustans.²⁶⁰

These criticisms were ignored by government and the Restitution of Land Rights Amendment Act was signed into law by President Jacob Zuma in June 2014. Applicants – consisting of various organisations²⁶¹ with interests in land rights and agrarian reform, and communal property associations – challenged the Amendment Act on procedural grounds. They argued that the National Council of Provinces (NCOP) and Provincial Legislatures failed to facilitate public participation as required by the Constitution. They also challenged the notion that the LCC will ensure that priority is given to claims lodged not later than 31 December 1998 that had not been finalised at the date of the commencement of the Amendment Act.²⁶² They further argued that the meaning of ‘priority’ is vague. A unanimous judgment by the concourt struck down the Amendment Act on 28 July 2016 on procedural grounds, i.e. the government did not conduct adequate public participation before the Act was passed.²⁶³ Until such time as it is re-enacted, the Commission is interdicted from processing any new claims, but must proceed with processing and finalizing older claims lodged by 1998.

14. Debates on the overall assessment of the effectiveness of land restitution in South Africa since 1994

Since the passage of the Restitution of Land Rights Act, Act 22 of 1994, the effectiveness of the land restitution process has been under scrutiny by interest groups such as white farmers and the public as well as by researchers. The effectiveness of land restitution is often analyzed within the broad remit of land reform. This is understandable since restitution is one of the three programmes of South Africa’s land reform. Both the conception and implementation of land restitution has generated a number of debates. This section attempts to summarize some of the main debates in the literature.

The property clause

The property rights clause was one of the last issues to be resolved in the political negotiations for a new a constitution for South Africa. At these negotiations the National Party government placed the protection of land as private property high on its agenda. Despite the political rhetoric of ‘land to the tiller’, the ANC recognized property rights in article 12 of its proposed Bill of Rights²⁶⁴, ‘partly as a result of particular conceptions of development in South Africa in which the role of industrialization and the creation of a working class are the major priority’.²⁶⁵ The ANC however argued that it would not guarantee corporate property once it becomes a governing party.²⁶⁶ The Pan Africanist Congress (PAC) and the Azanian People’s Organization (AZAPO), and a significant section of the African community across political divides, opposed the property clause. They argued that the property

clause turns land into a marketable property in line with free market principles that will not deliver the expected land transfer from white landowners to the black majority. Van Zyl defends a market-related land reform by arguing that such a land reform 'can assist in the financial crisis of the commercial farm sector by creating a market for land ... will increase employment, equity and efficiency of the farm sector ... and will cost less than blanket debt relief and subsidies'.²⁶⁷ This argument is biased towards using land reform to assist bankrupt white farmers who feared losing subsidies and sympathy under the ANC government.

One of the debates that have not been closed since the passage of the Restitution Act is on how the property clause in the Constitution constrains land restitution, and land reform more broadly. Most analysts have argued that the Bill of Rights make it difficult for the state to acquire land. As the state is the only buyer of land for restitution, property owners tend to ask for exorbitant prices as we discussed in the case of MalaMala in this report. The Bill of Rights is seen as foundation for the Willing Buyer-Willing Seller principle but this principle is regarded as a conservative approach to the interpretation of the Constitution. It has been argued that the Willing Buyer-Willing Seller principle of land reform was absent from the ANC's Ready to Govern policy statement and from the Reconstruction and Development Programme but was entrenched into the South African Land Policy in 1997. It is seen as part of the 1996 neoliberal macro-economic strategy of the ANC government.²⁶⁸

The ANC government is currently trying to change this principle. In his State of the Nation Address in 2015, President Jacob Zuma remarked that the net effect of establishing the Office of the Valuer-General is to 'stop the reliance on the willing buyer-willing seller method in respect of land acquisition by the state'.²⁶⁹ This move by government is in line with the resolution of the 53rd National Conference of the ANC, in which the party affirmed the proposals to 'replace willing buyer willing seller with "just and equitable" principle in the Constitution immediately where the state is acquiring land for land reform purposes', to expropriate without compensation, and to pass a new Expropriation Act.²⁷⁰ There is a view though that the market has been effective in transferring land to blacks faster than when the government is involved.²⁷¹

Settlement options

Land claims are not easy to settle mainly because they are legally complex and also affect people holding different and often competing interests. Two settlement options have been used in land claims in

South Africa as provided for in the Restitution Act. The first settlement option relates to land restoration which is the primary of land restitution. It was the point of departure of the ANC's land reform policy in 1992. A move away from this option has raised questions about whether the ANC government has less committed to land restoration. This debate is linked to the second option of settling land claims through cash compensation. Most urban land claims have been settled through cash payouts, which explains the fast pace of urban land restitution. Compensation by means of cash is not land reform as it does not change the skewed pattern of landownership in the country. While these two settlement options are valid in terms of the law cash payouts appear discriminatory as when white farmers received large amounts of money for their land compared to victims of forced removals, who are the primary target of land restitution.

There is also policy uncertainty in land claims involving protected areas. When the Makulele land claim was settlement by restoration land rights with the provision that their land should be used for conservation to protect the integrity of the Kruger National Park, this arrangement was perfect model for South Africa.²⁷² It was hailed as a win-win solution and as a demonstration of the South African government's ability to manage the volatile land question while resolving the country's problems of poverty and unemployment.²⁷³ This model has now been abandoned as unviable and is considered incapable of serving the interest of the country as a whole. The promise that the model held in terms of opening up business ventures for successful land claimants in protected areas has been lost. Instead, these ventures are made available to the private sector. For example, SANParks launched its commercialization strategy in 2000 in an effort to increase and improve economic activities in the country's national parks and to acquire new five-star market facilities built by the private investors on a Built Operate and Transfer (BOT) system.²⁷⁴ This system means that property built on leased land in national parks would be transferred to the national parks at the expiry of the lease agreement.

The overall goal of land restitution

The options for settling land claims noted above raise deep questions about the goal of land restitution and how the achievement of that goal is measured. As part of land reform, restitution is expected to yield tangible and intangible results. Tangible results are land that, once restored, can be used as a stepping stone toward rural development. Beyond political rhetoric, details of the strategic link between land restitution and rural development are still lacking. The intangible

outcomes of land restitution relates to social cohesion and reconciliation. These outcomes appear marginal to assessments of land restitution.

15. Conclusion

Land restitution in South Africa set out to right injustices and violations associated with historic processes of land dispossession. While restitution is an idea with an almost intuitive moral appeal, carrying it out inevitably forced lofty principles of justice and restoration to confront the messy practicalities of determining ownership, defining legitimate claimants, establishing evidence for claims and overcoming opposition by current land owners.²⁷⁵ Add into this mix the complexity of reconfigured 'community' dynamics, problematic communal land holding institutions and capacity constraints within the leading implementation structures; and it is almost unsurprising that progress in the Restitution programme to date has been painstakingly slow and mostly unsatisfactory.²⁷⁶ Pervasive discontent with restitution often finds expression in a litany of academic and popular media reports where case studies are used to illustrate variations of disappointing outcomes from both equity and efficiency perspectives. But, there have also been some exciting glimpses of success and innovation. Instances where beneficiaries have shown autonomy and business skills in deciding their own way forward with the help of committed stakeholders.²⁷⁷ These successes might be few in numbers and not as spectacular or configured in a manner we initially envisaged, but they do exist. For the purpose of a review of this nature, it is therefore important that both accounts of successes and failures are interrogated as they offer opportunity for critical reflection and re-assessment. It is equally important to acknowledge that articulations of 'success' and 'failure' within restitution is particularly slippery conceptualizations depending on the selected vantage point.

The Restitution Act is a product of a negotiated political settlement that sought to address the injustices of the past while at the same time paying attention to the prospects for the future of the country. The Restitution Act is also a culmination of ideas and perspectives from many interested parties and constituencies. Some of the common threads in the literature relate to the constitutional constraints on the Restitution Act, the government's commitment to land restitution (and to land reform in general), and the purpose of land restitution.²⁷⁸ Case studies show that land restoration is increasingly losing its status as the primary goal of land restitution.²⁷⁹ Alternative measures of redress that emerged in the last years of the Commission on Land Allocation have not only found expression in the Restitution Act, but are becoming a preferred method of settling land claims. The challenge ahead is to be explicit about the purpose of land restitution in light of different

and shifting positions on land reform, and also due to socio-political, economic, and environmental dynamics nationally, regionally and globally.

As shown in this report, the complexity of adjudicating land claims through the Land Claims Court slowed down the process immensely, causing much frustration and anxiety among all stakeholders. Such a slow pace, coupled with threats of, and actual, land invasions by impatient communities led to attempts to speed up the settlement of land claims. These include the implementation of an administrative approach, as opposed to a judicial approach (i.e. through the Land Claims Court) and the launching of the validation campaign on 18 August 2001.²⁸⁰ The campaign aimed to tackle the validation of all outstanding land claims (estimated to be around 38 000) between July 2001 and June 2002. Nevertheless, there has been a steady increase in the number of settled land claims.

The importance of interrogating the impact of Restitution and land reform more generally on the livelihoods of those intended to benefit cannot be overstated. These major programmes can achieve their goals of transferring land, spending budgets, and noting the thousands of ‘beneficiaries’ but, unless all of this results in improved livelihoods, land reform will not succeed. Restoring land rights must lead to development, or the injustice of dispossession will not have been undone. This will lay the basis for making the economic argument for land reform, and to do so by demonstrating that scaling up land reform and changing the ways in which rural land is used constitute an effective investment by the State, and by South African society as a whole, in pro-poor development and transformation.

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