

LAND RESTITUTION
IN SOUTH AFRICA

South Africa



➔ At the end of apartheid, some 60,000 white landholders - less than 1% of the country's population -- controlled about 86% of all agricultural land in South Africa. (Above) South Africa farmers pick lavender outside Franschhoek. *Photo: slack12*


By M. Mercedes Stickler

INTRODUCTION

For almost 350 years, beginning with the first European settlements in the Cape of Good Hope in the 1650s, indigenous South Africans were displaced to make way for European settlers. At the time of South Africa's transition to democracy in 1994, race-based dispossession was more widespread than in any other African country (Lahiff, 2009). This brief discusses the process and livelihood impacts of land restitution, which the democratic government of South Africa has used to return historical lands to black and other non-white owners who were dispossessed under the racially discriminatory laws and practices of the apartheid state.



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Land restitution seeks to return land or provide compensation to victims who lost land rights because of racially discriminatory laws or practices beginning with the passage of the Natives Land Act of 1913.

➔ In 1997, the South African government prescribed three mechanisms for land reform: land restitution, land redistribution, and land tenure reform. (Above) Women farming in Kwa Zulu Natal. *Photo: Mabacam*

INTRODUCTION

The Natives Land Act of 1913 aimed to limit land acquisition and ownership by non-white South Africans and, as a result, more than 13 million black people were confined to marginal “Native Reserves” that represented just 13% of the territory (Lahiff, 2009). Land rights in the Native Reserves, later called “African Homelands” or “Bantustans,” were generally insecure due to poor land administration, unclear land rights, and land conflicts. Compared to the rest of South Africans, citizens living in these areas were characterized by extremely low incomes and high rates of infant mortality, malnutrition, and illiteracy. Income and quality of life have remained strongly correlated with race, location, and gender (May, 2000).

The interim Constitution of 1993, and later the 1996 Constitution, laid the legal foundation for land reform. The 1996 Constitution recognizes the rights of existing property owners but also assigns specific rights to the victims of past dispossession. Section 25 states that “no one may be deprived of property” but also that, “[a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices

is entitled...either to restitution of that property or to equitable redress.”

Section 4.1 of the “White Paper on South African Land Policy” published in 1997 by the Department of Land Affairs (now the Department of Rural Development and Land Reform, DRDLR) prescribes three mechanisms for land reform: land restitution, land redistribution, and land tenure reform. Land restitution seeks to return land or provide compensation to victims who lost land rights because of racially discriminatory laws or practices, while land redistribution enables black South Africans to gain access to land, and land tenure reform seeks to increase tenure security and resolve tenure disputes. This brief discusses the restitution process and the challenges and opportunities it presents; a separate brief covers land redistribution.


OVERVIEW OF THE LAND RESTITUTION PROCESS

The Restitution of Land Rights Act of 1994 (“Restitution Act”) provides the legal basis for the restitution of land rights to persons or communities dispossessed without compensation by racially discriminatory laws or practices beginning with the passing of the Natives Land Act

on June 19, 1913 (Williams, 2007). By restoring land or compensating victims for their lost property, the restitution policy aims to support the process of reconciliation, reconstruction and development in South Africa (DLA, 1997).

Because the Restitution Act specifically referenced racially discriminatory practices, as well as laws, nearly any uncompensated dispossession was subject to redress (Williams, 2007). However, dispossessions perpetrated prior to the Natives Land Act were not eligible for restitution. This cut-off date faced significant criticism from communities and land activists for excluding groups dispossessed during the nineteenth century, but it was necessary to avoid dealing with multiple and overlapping claims without the apartheid State’s meticulous removal records (Lahiff, 2012). The other components of land reform - redistribution and tenure reform - were designed at least partly to assist those ineligible for restitution (Hall, 2003; du Plessis, 2004).

As defined by the Restitution Act, land rights subject to restitution can be “registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary



Less than 10% of the 3.5 to 6 million people estimated to have been evicted during apartheid have filed claims for land restitution.



Rather than acquire land through expropriation and return it to the historical owners, the government has relied on voluntary agreements with private landowners to purchase claimants' historical land. This has been criticized for delaying and increasing the costs of the land acquisition process. Photo: <http://winealign.files.wordpress.com>

under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.” Although housing and other improvements were not explicitly mentioned, in policy and practice the restitution program has incorporated the loss of these assets in calculations and considerations of claims (du Plessis, 2004).

The Restitution Act created a Commission on Restitution of Land Rights under a chief land claims commissioner and seven regional commissioners. In addition, the Act established the Land Claims Court to address land claims and other land-related (du Plessis, 2004), though later amendments enabled an administrative process of settling claims with court referrals only in cases of dispute (Hall, 2010). The DRDLR is authorized to administer the Act, including by negotiating on behalf of the State, acting as a respondent before the Court, and managing the implementation and finances of the restitution process.

Legally, all land claims are against the State and not against past or current landowners (du Plessis, 2004). Claimants file their claims with the relevant Regional Land Claims Commissioner (RLCC), whose office undertakes a

validation process to ensure the claim meets the criteria of the Restitution Act. Once a claim has been validated, the RLCC investigates the evidence presented in the claim and verifies the rights of the claimants and their relation to those dispossessed, in the case of intergenerational claims. The Commission and the Court have accepted a wide variety of evidence to establish land claims, including oral testimony, sworn affidavits, and official records of removals maintained by the apartheid State (Lahiff, 2012).

SETTLING LAND RESTITUTION CLAIMS

The Restitution Act provides for three main categories of redress for victims of dispossession: restoration of the land claimed; provision of alternative land; or compensation in cash. In contrast to urban claimants, who had typically re-established their livelihoods in other areas, many rural claimants were severely impoverished and considered restoration of their land critical to achieving self-sufficiency (Williams, 2004). Many rural communities historically held land in common and so submitted group restitution claims. As such, even though rural claims account for 20-25% of all claims, they represent

some 90% of all claimants and “are widely considered to be the ‘backbone’ of restitution” (Hall, 2003).

Settling rural claims poses a number of administrative challenges, including acquiring the land from its existing owners (Lahiff, 2009). The government is legally empowered to use expropriation to acquire claimants' historical land for settling restitution claims. The justification for using expropriation to return land to its historical owners through the ‘rights-based’ restitution program is arguably stronger than it is for the more discretionary land redistribution program (Lahiff, 2012). However, in all but a handful of restitution cases, the government has used voluntary agreements with private landowners to purchase claimants' historical land. This has arguably delayed and increased the costs of the land acquisition process (Deiningner, 2003; van den Brink et al., 2006; Lahiff, 2009; Lahiff, 2012). In addition, the government has returned large areas of State-owned land to its historical owners.

Due to the complex process of obtaining rural land for resettlement from its current owners, the Commission at first focused on settling urban land claims, where claimants were more

likely to settle for cash compensation (Williams, 2007; Atuahene, 2012; Lahiff, 2012). Cash settlements have generally used ‘standard settlement offers’ of compensation, at modest amounts, not based on the value of the property lost (Hall, 2010). Although individual claimants may freely choose cash payments over a land transfer, the overall effect of this trend has been to detract from land reform’s ultimate goal of achieving racial equity in landholding (ICG, 2004; Williams, 2007).

Prior to establishing a settlement agreement, group claimants are required to create a trust or communal property association (CPA) to hold the restored land in common (Hall, 2003; du Plessis, 2004). The Communal Property Associations Act of 1996 created the latter “[t]o enable communities to form juristic persons...to hold and manage property” (Preamble). CPAs are governed by constitutions and have an elected committee that is accountable to its members. Many require that women represent 30-50% of the committee members (Hall, 2003). However, CPAs have not in practice functioned as fully democratic institutions due to complex intra-group dynamics and limited public sector support (Hall, 2003; Lahiff et al., 2008; Lahiff, 2012).

Although between 3.5 and 6 million people were reportedly displaced by evictions during apartheid, only some 63,455 restitution claims were filed before December 31, 1998, after which no new cases were accepted (Williams, 2007; Lahiff, 2009). Between 1994 and 2011, land restitution in South Africa was used to transfer more than 2.76 million hectares (roughly 3.4% of previously white-owned farmland) to black claimants (Kleinbooi, 2011). In addition, the government paid more than R5 billion (roughly USD 596 million) to compensate claimants willing to accept cash payments in place of having their land returned (Cronje, 2012). As of March 2011, a total of 10,274 rural claims had been settled - roughly 45% in land, 45% in cash, and the rest mostly through public housing projects - and a further 4,000 were outstanding (DRDLR, 2011; Lahiff & Li, 2012).

To address concerns raised by the “perceived failure” of several high-

profile restitution settlements, from the mid-2000s the government began supporting “strategic partnerships” with commercial farmers and tourism operators to improve the outcomes of settled restitution claims, especially in high-value agriculture areas (Lahiff, 2009) and in protected areas (Kepe, 2010). The Makuleke claim in Kruger National Park illustrates some of the challenges and opportunities presented by the restitution process and the strategic partnerships that are supposed to help restitution claimants use their land productively.

THE MAKULEKE LAND CLAIM IN KRUGER NATIONAL PARK

As elsewhere around the world, many of South Africa’s national parks were created by dispossessing local people. Many of the restitution claims registered in South Africa related to conservation land (Steenkamp & Uhr, 2000; Kepe, 2010). The Makuleke claim in the northern Pafuri area of Kruger National Park (KNP) has been hailed as one of the few examples of a ‘successful’ restitution settlement in the sense that the claimants won rights to land in a protected area and entered into profitable agreements with the private sector to promote community development (Robins & van der Waal,

2008). Nonetheless, the restitution process was complex, fraught with conflict, and ultimately did not result in the Makuleke returning to their land (Robins & van der Waal, 2008; Hall, 2012).

In 1969, the Makuleke community was forcibly removed from the Pafuri Triangle area and resettled roughly 50 km (31 miles) southwest. Their land was then integrated into what

STATISTIC

Many of South Africa’s national parks were created by dispossessing local people, and many restitution claims have been related to conservation.



Land claimed by the Makuleke people occupies the northern end of Kruger National Park. It represents just 1% of the park and supports 75% of the park’s biodiversity.
Photo: Profberger @en.wikipedia



is now the northernmost corner of South Africa's flagship KNP. The Makuleke filed a restitution claim for the entire Pafuri Triangle area in August 1996 (Ramutsindela, 2002). In addition to oral testimony and official records of the removal, the evidence presented included burial sites and place names. Although the facts of the Makuleke's claim were never in doubt, the settlement was complicated mostly by the conservation authorities' unwillingness to return high-value conservation land to the claimants (Lahiff, 2012).

Although the Makuleke's land represents just 1% of the KNP, it supports 75% of the park's biodiversity and lies at the heart of the Great Limpopo Transfrontier Park, making it very valuable for conservation (Weideman, 2011). Part of the Makuleke's land—an area called the Madimbo Corridor—also had both strategic value, as it borders Zimbabwe and Mozambique, and potential mineral value (LCC, 1998). As such, the National Parks Board (now South African National Parks, SANParks) and the Minister of Defense were reluctant to transfer land ownership back to the Makuleke, and the Department of Minerals and Energy was also involved in the settlement negotiations (Steenkamp &Uhr, 2000). Meanwhile, a rival chief in the area to which the Makuleke had been relocated filed a competing claim for their land, but it was ultimately rejected because it was the Makuleke, and not the rival chief, who had been dispossessed.

Given mounting resistance to the land claim, particularly due to the area's conservation value, the Makuleke concluded that it would be "politically unfeasible" to resettle and gain unrestricted ownership of their land (Steenkamp &Uhr, 2000; Ramutsindela, 2002). Through extensive negotiations mediated by the Commission on Restitution of Land Rights, the Makuleke eventually reached a compromise in March 1998 with SANParks and the other government departments involved in the land claim (Ramutsindela, 2002). All 25,000 ha claimed by the Makuleke would be restored to the community via a Communal Property Association, which would incorporate the land into KNP as a contractual park (Ramutsindela, 2002).



The Makuleke have worked with public and private partners to maintain the area's biodiversity and use the proceeds from conservation to benefit their community. (Above) Makuleke youth. Photo: Pablo Escovado

The Makuleke agreed to use their land only for conservation in exchange for exclusive commercial rights, and a Joint Management Board with representatives from the Makuleke and SANParks was established to manage their land as part of KNP (Steenkamp &Uhr, 2000).

Despite dire predictions about the 'threat' to conservation posed by the Makuleke's claim, the Makuleke have worked with public and private partners to maintain the area's biodiversity and use the proceeds from conservation to benefit their community (Robins &van der Waal, 2008). Since 2003, the Makuleke have entered into joint venture agreements with two private operators to build, operate, and transfer eco-tourism investments on their land (Spenceley, 2008). In return, the Makuleke have benefitted from cash payments, jobs, training, and community development projects financed by concession income (Honey, 1999; Weideman, 2011).

Several factors appear to have contributed to the relative 'success' of this settlement. The Makuleke CPA received considerable technical and financial support from donors and non-governmental organizations and contracted with competent private investors who committed to explicit benefit sharing agreements (Honey, 2008; Weideman, 2011). This contrasts sharply with the experience of other joint ventures, where external support has often been missing or slow to materialize and benefit sharing agreements have been absent or ill-defined (Jacobs, 2003; Hall, 2007; Lahiff et al., 2008; Aliber et al., 2010). In fact, the majority of joint ventures between restitution claimants and the private sector have collapsed without transferring appreciable wealth to the claimants (Lahiff, 2009; Cronje, 2012; Weideman, 2011).

Still, the impact of the restitution settlement on the Makuleke's overall

FACT

South African National Parks' policy has been to oppose any settlements that transfer conservation land to claimants, and the commercial agriculture industry lobbies against the "loss" of prime agricultural land.

empowerment may be less significant than is often reported (Robins & van der Waal, 2008). The Makuleke were not able to resettle their land and derive their livelihoods directly from it. Instead, they gain indirect benefits through joint eco-tourism ventures. However, the job and income opportunities created by these ventures appear to be limited in terms of both the number and quality of jobs available (Tapela & Omara-Ojunga, 1999; Weideman, 2011). Moreover, many Makuleke people are frustrated that they are often treated as one of many “neighboring communities” and not as “landlords” of Pafuri (Robins & van der Waal, 2008). As such, the extent to which their case can be considered a ‘success’ in terms of the restitution policy objectives remains questionable.

LESSONS LEARNED

The democratic government of South Africa introduced land restitution to provide redress to those dispossessed by past racially discriminatory laws and practices. Despite an inclusive legal definition of potential claimants, less than 10% of those estimated to have been evicted during apartheid filed claims. While the government accepts a wide variety of evidence to verify land claims, the settlement of verified claims - particularly where land is to be restored to the claimants - has been particularly challenging. As a result, there are still unresolved land claims nearly 15 years after the closing date for filing new claims. The remaining unresolved claims create uncertainty

for both the claimants and existing land owners and - by ensnaring land in lengthy settlement negotiations - may actually inhibit land redistribution (Keswell and Carter, 2011).

Moreover, many of the outstanding claims are for high-value conservation or agriculture land, where land acquisition may face political and budgetary challenges. Although roughly a quarter of the KNP alone has been subject to land claims, SANParks’ policy has been to oppose any settlements that transfer conservation land to claimants (Robins and van der Waal 2008). SANParks has even argued that the Makuleke ecotourism model is not financially viable (Groenewald & Macleod, 2005). Meanwhile, the commercial agriculture industry lobbies against the “loss” of prime agricultural land (Lahiff, 2009). And without the credible threat of expropriation, it will be difficult for the government to acquire the land required to resolve pending claims where negotiations with the existing land owner fail (van den Brink et al., 2009). The process of settling the remaining unresolved land claims thus faces significant challenges, and the scope for transferring additional conservation land to restitution claimants is likely to be limited.

Among settled claims, many urban claimants have accepted cash settlements that may not adequately compensate them for their lost property, rather than face long court battles and bureaucratic delays to resettle their

historical property. Claimants whose lands have been restored are often only peripherally involved in decisions about how to manage the resettlement process and face a number of challenges in using their land productively, particularly where they are expected to collectively manage commercial enterprises (van den Brink et al., 2009). While strategic partnerships with private actors could potentially overcome some of the capital and skills shortages faced by resettled communities, these partnerships have largely failed to generate the short-term, household-level benefits that claimants typically expect. In one particularly egregious case, a community was saddled with unmanageable debts after their private partner went bankrupt (Lahiff et al., 2012). Overall, the lack of data on claimants’ income, employment, and economic development makes it difficult to fully assess the impacts of the restitution process. Given that the government has had difficulty releasing accurate, up-to-date statistics on such basic information as how much land has been restored, to whom, and at what cost, it is unsurprising that no rigorous impact evaluation of the land restitution process has been completed (Lahiff, 2009). Nonetheless, based on the information available from both official statistics and individual case studies, it appears that the program’s bias toward cash settlements for urban claims and the limited benefits resettled claimants have derived from their land risk undermining the contribution of restitution to genuine reconstruction and development in South Africa.



Legally, all land claims are against the State and not against past or current owners. Claimants have used oral testimony, sworn affidavits, official records, burial sites, and place names as evidence of their historic rights.



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