

# Restitution of land rights: the requirement of feasibility of restoration

by

RENAY NAIDOO

submitted in partial fulfilment of the requirements

for the degree of

MASTER OF LAWS WITH SPECIALISATION IN PROPERTY LAW

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROFESSOR JEANNIE VAN WYK

2015

## **DECLARATION**

I declare that the 'Restitution of land rights: the requirement of feasibility of restoration' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

---

Signed: R Naidoo

## **ABSTRACT**

The purpose of the Restitution of Land Rights Act 22 of 1994 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. The restitution of a right in land can include the restoration of a right in land. The aim of this dissertation is to investigate the requirement of feasibility in restoring land rights and in particular the role of feasibility studies and the courts' interpretation of the feasibility requirement in restoring such rights.

The methodology used includes a review of literature, legislation and policies on land restitution and an analysis of case law.

The outcome of the research indicates that while actual restoration ought to take preference in all instances, it may only be granted once all the relevant circumstances and factors have been considered. In certain circumstances it may not be feasible to restore land rights.

Key phrases: land restitution, feasibility, feasibility study, feasibility requirement, actual restoration, non-restoration, Restitution of Land Rights Act, equitable redress, development plans, resettlement.

## **ACKNOWLEDGEMENTS**

I would not have been able to complete my dissertation without the guidance of my supervisor and the encouragement of my husband, family and friends.

I wish to express my gratitude to my supervisor, Professor Jeannie van Wyk, for her guidance, patience and motivation.

I wish to thank my husband for his constant encouragement and support.

I wish to thank my associates, family and friends for their words of encouragement

# TABLE OF CONTENTS

	Page
Title Page	i
Declaration	ii
Abstract	iii
Acknowledgments	iv
Table of Contents	v - viii
LIST OF SYMBOLS AND ABBREVIATIONS	ix
 <b>CHAPTER ONE</b>	 <b>1 - 5</b>
<b>1. Problem statement</b>	<b>1 - 3</b>
<b>1.1 Background</b>	<b>1 - 3</b>
<b>1.2 Research question</b>	<b>4</b>
<b>1.3 Purpose of study</b>	<b>4</b>
<b>1.4 Hypotheses and point of departure</b>	<b>4</b>
1.4.1. Hypothesis	4 - 5
1.4.2 Point of departure	5
 <b>CHAPTER TWO</b>	 <b>6 - 18</b>
 <b>2. Land restitution</b>	 <b>6</b>
<b>2.1 Introduction</b>	<b>6 - 7</b>
<b>2.2 Constitutional foundation</b>	<b>7 - 9</b>
<b>2.3 The Restitution of Land Rights Act 22 of 1994</b>	<b>9 - 10</b>
<b>2.4 An overview of the restitution process</b>	<b>10 - 13</b>
2.4.1 Lodgement of claims	11
2.4.2 Screening and categorisation	11
2.4.3 Acceptance of claim	11
2.4.4 Preparation for negotiations and settlement	11
2.4.5 Negotiations	12
2.4.6 Implementation	12
2.4.7 Concluding remarks	12 - 13

<b>2.5. The requirement of feasibility</b>	<b>13 - 18</b>
<b>2.6 Conclusion</b>	<b>18</b>

## **CHAPTER THREE 19 - 26**

<b>3. Feasibility studies</b>	<b>19</b>
<b>3.1 Introduction</b>	<b>19</b>
<b>3.2 Definition of a feasibility study</b>	<b>19 - 20</b>
<b>3.3. The basis for a feasibility study</b>	<b>20 - 21</b>
<b>3.4 Legal framework</b>	<b>21 - 22</b>
<b>3.5 An overview of a feasibility study</b>	<b>22 - 25</b>
3.5.1 Section 1: Introduction, vision and principles	23
3.5.2 Section 2: Contextual analysis	24
3.5.3 Section 3: Design informants and concept	24
3.5.4 Section 4: Strategies	24
3.5.5 Section 5: Planning procedures and implementation	25
3.5.6 Section 6: Conclusions and recommendations	25
<b>3.6 Concluding remarks</b>	<b>25 - 26</b>

## **CHAPTER FOUR: SPECIFIC PROJECTS WITH FEASIBILITY STUDIES 27 - 48**

<b>4.1 Introduction</b>	<b>27</b>
<b>4.2 The Cato Manor development project</b>	<b>27 - 33</b>
4.2.1 Historical background	27 - 29
4.2.2 Restitution and the issue of public interest	29 - 31
4.2.3 The settlement agreement	31 - 32
4.2.4 Cato Manor development	32
4.2.5 The section 34 application	32 - 33
4.2.6 Conclusion	33
<b>4.3 Dukuduku Community claim</b>	<b>33 - 43</b>
4.3.1 Historical background	33 - 34
4.3.2. Restitution and the issue of feasibility	34 - 36
4.3.3 The Dukuduku <i>Research Report</i>	36 - 40

4.3.4 Options and recommendations	40 - 42
4.3.4.1 <i>Option 1</i>	40
4.3.4.2 <i>Option 2</i>	40 - 41
4.3.4.3 <i>Option 3</i>	41 - 42
4.3.5 Dukuduku on-site resettlement	42
4.3.6 Conclusion	43
<b>4.4. The AbeKunene Community claim</b>	<b>43 - 48</b>
4.4.1 Historical background	43 - 44
4.4.2 Restitution and the requirement of feasibility	44
4.4.2.1 <i>The Community</i>	44 - 45
4.4.2.2. <i>The South African National Defence Force (SANDF)</i>	45 - 47
4.4.3 Conclusion	47
<b>4.5 Concluding remarks</b>	<b>47 - 48</b>
 <b>CHAPTER FIVE</b>	 <b>49 - 71</b>
 <b>5. THE COURTS AND FEASIBILITY</b>	 49
<b>5.1 Introduction</b>	49
<b>5.2 <i>In re Kranspoort</i></b>	<b>49 - 57</b>
5.2.1 The issue of feasibility	51 - 56
5.2.2 Conclusion	56 - 57
<b>5.3 The Mhlanganisweni Community</b>	<b>57 - 63</b>
5.3.1 The issue of feasibility	59 - 62
5.3.2 Conclusion	62 - 63
<b>5.4 Baphiring Community claim</b>	<b>64 - 71</b>
5.4.1 The issue of feasibility	65 - 66
5.4.2 The appeal	67 - 69
5.4.3 Conclusion	69
5.4.4 The Property Valuation Act	70
<b>5.5. Concluding remarks</b>	<b>70 - 71</b>

<b>CHAPTER SIX</b>	<b>72 - 76</b>
<b>6. CONCLUSIONS AND RECOMMENDATIONS</b>	<b>72</b>
<b>6.1 Conclusions</b>	<b>72 - 75</b>
6.1.1 Review of the feasibility studies	72 - 74
6.1.2. Review of case law	74 - 75
<b>6.2 Recommendations</b>	<b>75 - 76</b>
6.2.1 Planning	75
6.2.2 Amendment to RLRA	76
<b>6.3 Concluding remarks</b>	<b>76</b>
<b>TABLE OF LEGISLATION</b>	<b>77</b>
<b>TABLE OF CASES</b>	<b>77 - 78</b>
<b>BIBLIOGRAPHY</b>	<b>78 - 80</b>



## **LIST OF ABBREVIATIONS**

ABP	Area-Based Plans
AFRA	Association for Rural Advancement
CMDA	Cato Manor Development Association
CMDP	Cato Manor Development Project
CRLR	Commission on Restitution of Land Rights
DLA	Department of Land Affairs
DWAF	Department of Water Affairs and Forestry
IDP	Integrated Development Plan
LCC	Land Claims Court
LRRLAA	Land Restitution and Reform Laws Amendment Act 63 of 1997
RLCC	Regional Land Claims Commissioner
RLRA	Restitution of Land Rights Act 22 of 1994
SANDF	South African National Defence Force
SCA	Supreme Court of Appeal
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013

# CHAPTER ONE

## 1. PROBLEM STATEMENT

### 1.1 Background

The deprivation and denial of rights in land on a discriminatory basis is both a central feature of South African history and the main reason for land reform.<sup>1</sup> The Constitution of the Republic of South Africa, 1996<sup>2</sup> identifies 3 categories of land reform, namely land restitution, land redistribution and land tenure reform.<sup>3</sup> Restitution is seen as an integral part of the broader land reform programme and is closely linked to the need for the redistribution of land and tenure reform with the aim of correcting the racially disproportionate land ownership<sup>4</sup> in South Africa. The Restitution of Land Rights Act<sup>5</sup> (RLRA) provides the legal framework for the resolution of land claims and a successful claimant is entitled either to restitution of that property or to equitable redress.<sup>6</sup>

In terms of the 1997 *White Paper on Land Reform* the goal of the restitution policy is to restore land and provide other restitutionary remedies to people dispossessed by racially discriminatory legislation and practices in such a way as to provide support to the vital process of reconciliation, reconstruction and development.<sup>7</sup>

Where the redress is one of restoration of land, the issue of feasibility of the restoration is pertinent. Initially section 15 of the RLRA required the (then) Minister of Land Affairs to issue a certificate of feasibility if he was satisfied that the restoration of a right in land in a particular instance was feasible. In determining the feasibility of restoration the minister had to consider the factors set out in section 15(6) of the Act.

---

<sup>1</sup> Carey Miller DL *Land title in South Africa* Juta (2000) 1.

<sup>2</sup> Hereafter 'the 1996 Constitution'.

<sup>3</sup> Sections 25(5)-(7) of the 1996 Constitution.

<sup>4</sup> The Natives Land Act 27 of 1913 became law on the 19th of June 1913 and had the effect of limiting black land ownership to 7%. Later the 1936 Development Trust and Land Act 18 of 1936 increased black land ownership to 13%. The Act restricted black people from buying or occupying land except as employees of a white master and ensured that white people had ownership of 87% of the land, leaving black people to compete for a mere 13%.

<sup>5</sup> Act 22 of 1994.

<sup>6</sup> Section 25(7) of the Constitution.

<sup>7</sup> The *White Paper on South African Land Policy* para 4.13.

Despite being repealed by the 1997 Land Restitution and Reform Laws Amendment Act (LRRLAA)<sup>8</sup> section 15 appeared as section 33(cA) in the same Amendment Act.<sup>9</sup>

‘Feasibility’ is not defined in the RLRA, but the concept can cover the suitability of the land for agricultural purposes or the availability of sufficient water or development possibilities.<sup>10</sup> Feasibility does not influence the validity of the claim, in other words the issue of feasibility cannot deny a claimant’s right to restitution if the claim meets the criteria laid down by the RLRA. Feasibility goes to the resolution of the claim and to the process to be followed in cases where restoration is the outcome. It is the responsibility of the Commission on the Restitution of Land Rights (CRLR)<sup>11</sup> to raise issues around feasibility; however other parties can and should raise issues of feasibility,<sup>12</sup> especially other government institutions that must assist in post-settlement development and support. Matters such as the delivery of bulk services are important for sustainability of the project if restoration occurs.

While not always referred to as ‘feasibility’, the concept has been dealt with by the courts on a number of occasions. In the *Khosis Community* case,<sup>13</sup> the Land Claims Court (LCC) pointed out that in considering the feasibility or otherwise of physical restoration, a court must be guided by the provisions of section 33(a) to (f) of the RLRA.<sup>14</sup>

The *Kranspoort Community*<sup>15</sup> case provides guidelines as to how to approach the issue of feasibility. Dodson J was of the view that some guidance can still be derived from the repealed section 15 even though it is no longer contained in the RLRA.<sup>16</sup>

---

<sup>8</sup> Act 63 of 1997.

<sup>9</sup> Section 23.

<sup>10</sup> Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan 2000* (June 2000) para 2.2.3.  
[http://www.ruraldevelopment.gov.za/phocadownload/spatial\\_Planning\\_Information/April\\_June2013/ceimp\\_1st\\_ed\\_2000150413.pdf](http://www.ruraldevelopment.gov.za/phocadownload/spatial_Planning_Information/April_June2013/ceimp_1st_ed_2000150413.pdf), (date accessed 3/03/2015).

<sup>11</sup> Established in terms of section 4 of the RLRA. See further *The Baphiring Community v Tshwaranani Projects CC and Others* (806/12)[2013] ZASCA 99 (6 September 2013) para 16 and discussed at para 3.3 below.

<sup>12</sup> Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan* para 2.2.3.

<sup>13</sup> *Khosis Community, Lohatla Battle School v Minister of Defence and Others* 2004 (5) SA 494 (SCA). This case dealt with a section 34 application. Discussed further at para 2.5 below.

<sup>14</sup> *Khosis Community, Lohatla v Minister of Defence* para 30.

<sup>15</sup> *Kranspoort Community Concerning the Farm Kranspoort 48 LS LCC 26/1998* (10 December 1999). Discussed further at para 5.2 below.

In the *Baphiring Community* case<sup>17</sup> it was acknowledged that the restoration of agricultural land in the past had generally been unsuccessful due to the inadequate financial support of the community and its inadequate knowledge of and skills in commercial farming.

In the *Dhlomo-Dhlomo Community* case<sup>18</sup> the physical restoration of land was opposed. The court stated that the primary object of the Act is restitution of land. The court agreed with the defendants that resources of the state must be taken into consideration when considering redress to the affected claimants and that a balance needs to be struck.<sup>19</sup>

In light of the 1997 amendments to the RLRA, decided cases and a changing restitution policy the following questions arise with regard to the issue of feasibility of restoration:

- What would be in the *best interest of all role players* involved: the claimants, the present owners and the public?
- How are these interests determined and weighed?
- How is the final analysis made?
- How are the conflicting discourses of redress or restitution on the one hand and economic development and/ or sustainability on the other, approached?<sup>20</sup>

Van Wyk<sup>21</sup> concludes that both the *Kranspoort* and *Baphiring* decisions are cardinal decisions on the feasibility issue. She points out that:

...Ideally the courts will have to take all factors in both decisions into account to provide a balanced, objective view on whether restoration is feasible or not, without losing sight of the promise of restorative justice that underpin land restitution.<sup>22</sup>

---

<sup>16</sup> *Kranspoort Community Concerning the Farm Kranspoort* paras 88 – 92.

<sup>17</sup> *Baphiring Community v Uys and Others* (LCC64/1998) [2010] ZALCC 1; 2010 (3) SA 130 (LCC); [2010] 3 All SA 353 (LCC) (19 January 2010). See also *The Baphiring Community v Tshwaranani Projects CC*. Discussed further at para 5.4 below.

<sup>18</sup> *The Dhlomo-Dhlomo Community v Minister of Agriculture and Land Affairs and Others* (LCC175/10) [2012] ZALCC 15 (19 October 2012). See further paras 5.3.1 and 5.3.2 below.

<sup>19</sup> *Dhlomo-Dhlomo Community v Minister of Agriculture and Land Affairs* paras 34, 36.

<sup>20</sup> Pienaar JM “Restitutionary road: Reflecting on good governance and the Role of the Land Claims Court” 2011 14(3) *PER* 43.

<sup>21</sup> Van Wyk J, “‘Feasibility of restoration’ as a factor in land restitution claims” (2010) 25 *SAPL* 590 601.

## **1.2 Research question**

The research question is under what circumstances is it feasible for a court to make an order to restore land rights to land claim beneficiaries? The main issue for consideration in answering the research question will be the factors considered in determining the feasibility of restoring land rights and the analysis or lack of analysis of these factors by the courts in making a decision of restoration.

## **1.3 Purpose of study**

The purpose of this study is to investigate the requirement of feasibility in restoring land rights and in particular the courts' interpretation and application of the feasibility requirement in restoring such rights. The feasibility requirement plays an important role in the restitution programme and the broader land reform programme.

This purpose is of great importance especially in light of the Restitution of Land Rights Amendment Act 15 of 2014 which extends the period within which claims may be lodged and the increased likelihood of competing claims to the same piece of land, as well as claims in respect of land that has been developed to such an extent that what will be returned will be far removed from what has been lost.

In light of the limited state resources available and the untenable burden on the fiscus to deal with specific restoration and in particular post transfer support required to ensure success this research is relevant to land restitution and the broader land reform programme.

## **1.4 Hypotheses and point of departure**

### **1.4.1 Hypothesis**

In certain circumstances it may not be feasible to restore land rights to land claim beneficiaries. To this end the following factors are taken into account:-

---

<sup>22</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] 3 All SA 563 (LCC) para 24; See also Van Wyk "'Feasibility of restoration' as a factor in land restitution claims" 601.

- the claimants do not have the necessary skills and finances to maintain the land in its current state;
- limited state resources play a role in determining whether the courts will grant an order for specific restoration;
- land that has been developed to such an extent that what will be given back will be far removed from what has been lost resulting in overcompensation;
- an order for the specific restoration of land rights will not serve the greater public interest, including national security, economic security and food security.

#### 1.4.2 Point of departure

The hypothesis formulated above will be investigated through a critical analysis of the relevant legislation, journal articles, literature and case law focusing on the LCC's approach to granting restoration of land rights to land claim beneficiaries.

Chapter 2 provides a review of the relevant theory of land restitution. This chapter follows the development of land restitution and in particular the requirement of feasibility through the changing legislation.

Chapter 3 of the research discusses the concept of feasibility and in particular a feasibility study.

Chapter 4 considers three projects in which feasibility studies were conducted. This chapter looks at the impact of a feasibility study on the claim for restoration of land.

Chapter 5 is an analysis of case law to determine the court's interpretation and application of the feasibility requirement.

Chapter 6 sets out the findings of the research and concludes with recommendations.

# CHAPTER TWO

## 2. LAND RESTITUTION

### 2.1 Introduction

To redress the suffering caused by the policy of forced removals, the democratic government must, through the mechanism of a land claims court, restore land to South Africans dispossessed by discriminatory legislation since 1913.<sup>23</sup>

One of the first issues to be addressed by the newly elected government in 1994 was land reform, divided into the three categories of land redistribution, land tenure reform and land restitution. In particular, South Africa adopted a rights-based approach to restitution in that the right to restitution is constitutionally mandated. Although the restitution programme is aimed at righting the wrongs of the past and thereby bringing the past into the present, claims are not lodged against private individuals or corporations but against the state.<sup>24</sup> In terms of the 1997 *White Paper on South African Land Policy* the principles of fairness and justice also require a restitution policy that considers the broader development interests of the country and ensures that limited state resources are used in a responsible manner. Initially it was felt that, to be successful, restitution needs to support, and be supported by, the reconstruction and development process.<sup>25</sup>

The restitution process does not prescribe the outcome of each claim, but provides a framework and various options which can be used to arrive at an appropriate solution through negotiation by the parties or adjudication by the LCC.<sup>26</sup> When deciding on a particular form of restitution the RLRA provides that a court can make one of the following orders:-

- restoration of land, a portion of land or any right in land;<sup>27</sup>
- grant of an appropriate right in alternative state-owned land;<sup>28</sup>

---

<sup>23</sup> *Reconstruction and Development Programme* (1994) 2.4.13.

<sup>24</sup> The *White Paper on South African Land Policy* para 4.13; Pienaar "Restitutionary road: Reflecting good governance and the role of the Land Claims Court" 35.

<sup>25</sup> The *White Paper on South African Land Policy* para 4.14.1.

<sup>26</sup> The *White Paper on South African Land Policy* para 4.14.4.

<sup>27</sup> Section 35(1)(a).

- payment of compensation;<sup>29</sup>
- order the State to include the claimant as a beneficiary of a state support programme for housing or the allocation and development of rural land;<sup>30</sup> or
- grant of alternative relief.<sup>31</sup>

The scope of this dissertation is limited to restitution and in particular the feasibility of restoring land or land rights. This chapter looks at the theoretical basis for restitution and more closely at the requirement of feasibility in restoring land or land rights. The premise of this dissertation is that the claimant qualifies for restitution of land or a right in land provided that both the formal and legal requirements for restitution as set out in the RLRA have been met.

## 2.2 Constitutional foundation

The history of restitution begins with the 1993 interim Constitution. Sections 121 to 123 read together with section 8(3)(b) of the interim Constitution made provision for restitution of land rights. The interim Constitution provided that:-

8 (3) (a) ...

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with section (2) had that subsection been in operation at the time of dispossession shall be entitled to claim restitution of such rights subject to and in accordance to section 121, 122, 123.

121 (1) An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section and in sections 122 and 123.

(2) A person or a community shall be entitled to claim restitution of a right in land from the state if:

(a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in sub-s (1); and

(b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in s 8(2), had that section been in operation at the time of such dispossession.

---

<sup>28</sup> Section 35(1)(b).

<sup>29</sup> Section 35(1)(c).

<sup>30</sup> Section 35(1)(d).

<sup>31</sup> Section 35(1)(e).



- 122 (1) The Act contemplated in section 121(1) shall establish a Commission on Restitution of Land Rights, which shall be competent to—
- (a) investigate the merits of any claims;
  - (b) mediate and settle disputes arising from such claims;
  - (c) draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court; and
  - (d) exercise and perform any such other powers and functions as may be provided for in the said Act.
- (2) The procedures to be followed for dealing with claims in terms of this section shall be as prescribed by or under the said Act.
- 123 (1) Where a claim contemplated in section 121(2) is lodged with a court of law and the land in question is:-
- (a) in the 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 the 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.
- (2) The court shall not issue an order under subsection 1(b) unless it is just and equitable to do so, taking into account all relevant factors, including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interest of the owner and others affected by any expropriation, and the interest of the dispossessed: Provided that any expropriation under subsection (1)(b) shall be subject to the payment of compensation calculated in the manner provided for in section 28(3).<sup>32</sup>
- (3) If the state certifies that any restoration in terms of subsection (1)(a) or any acquisition in terms of subsection (1)(b) is not feasible, or if the claimant instead of the restoration of the right prefers alternative relief, the court may, subject to subsection (4), order the state, in lieu of the restoration of the said right:-
- (a) to grant the claimant an appropriate right in available alternative state-owned land designated by the state to the satisfaction of the court, provided that the state certifies that it is feasible to designate alternative state-owned land;
  - (b) to pay the claimant compensation; or
  - (c) to grant the claimant any alternative relief.<sup>33</sup>

---

<sup>32</sup> S 28(3) of the interim Constitution: Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, such compensation within such period as may be determined by a court of law as just and equitable taking into account all relevant factors including,....the use to which the property is being put, the history of its acquisition, its market value, the value of the investment by those affected and the interest of those affected.

<sup>33</sup> Sections 121 to 123 of the interim Constitution 200 of 1993.

In *Dulabh v Department of Land Affairs*<sup>34</sup> the LCC had to determine the meaning of restitution in the context of section 123 of the interim Constitution. The court stated that the term 'restitution' has a variety of different meanings in different legal contexts.<sup>35</sup> With reference to *Black's Law Dictionary*<sup>36</sup> the court provided that restitution was an equitable remedy under which a person is restored to his or her original position prior to the loss or injury or placed in the position he or she would have been in had the breach not occurred. Restitution is also considered to be the act of making good or giving equivalent for any loss, damage or injury. It is the act of restoring something to the rightful owner.<sup>37</sup>

The 1996 Constitution did not deviate significantly from the interim Constitution in that section 25(7) provides that:-

A person or community dispossessed of property after 19 June 1913 as a result of racially discriminatory laws and practices is entitled, to the extent provided by an Act of Parliament, either to restitution or equitable redress.

This provision did not contain the same level of detail as did the interim Constitution. In particular, section 25(7) makes no reference to feasibility. The constitutional right to restitution contained in section 25(7) is not an absolute, unlimited right to specific restoration.<sup>38</sup> The section merely sets the minimum threshold requirements for the constitutionally guaranteed right to restitution or equitable redress and then leaves it to Parliament, by way of legislation, to determine the extent of the relief.<sup>39</sup> The qualifying criteria of section 25(7) were subsequently incorporated into section 2(1)(a)<sup>40</sup> of the 1997 LRRLAA.

### **2.3 The Restitution of Land Rights Act 22 of 1994**

The purpose of the RLRA 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 CRLR and a LCC; and to

---

<sup>34</sup> 1997 (4) SA 1108 (LCC).

<sup>35</sup> *Dulabh v Department of Land Affairs* para 44.

<sup>36</sup> *Dulabh v Department of Land Affairs* para 45.

<sup>37</sup> *Dulabh v Department of Land Affairs* para 45.

<sup>38</sup> See *Concerned Land Claimants Organisation (PE) v PELCRA* 2007(1) SA 531 (CC).

<sup>39</sup> *Richtersveld Community v Alexkor Ltd* 2003 (6) SA 104 (SCA) para 17; *Pienaar Land reform* 535.

<sup>40</sup> Section 2(1)(a) of Act 22 of 1994: A person shall be entitled to restitution of a right in land if he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices.

provide for matters connected therewith.<sup>41</sup> The functioning and regulation of these role players are set out in the RLRA.

Section 1 of the Act provides for the restitution of a right in land which entails either the restoration of a right in land or equitable redress. A 'right in land' means 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.

Equitable redress is defined broadly to include any equitable redress other than restoration of a right in land, including a right in alternative state-owned land and the payment of compensation. In addition section 35(1)(d) of the RLRA provides that the LCC may order the state to include a claimant as a beneficiary of a state support programme for housing or the allocation and development of rural land and may also determine the manner in which the rights are to be held. Due to the broad formulation of the RLRA the court is able to exercise its discretion in issuing directives, time frames, stipulate conditions and formulate any appropriate orders to give effect to agreements entered into by the parties.<sup>42</sup> In considering the feasibility or otherwise of physical restoration the LCC must be guided by the provisions of section 33(a) to (f) of the RLRA.<sup>43</sup>

## **2.4 An overview of the restitution process**

Restitution is principally a legal process to restore land rights to people dispossessed of those rights. As a result the pursuit of restoring rights and the compliance with legal procedures to fulfil restoration is the main role of the commission wherein environmental considerations are often only viewed as a priority on a case specific basis.

---

<sup>41</sup> Preamble to Act 22 of 1994.

<sup>42</sup> Pienaar *Land reform* 535.

<sup>43</sup> *Khosis Community, Lohatla v Minister of Defence* para 30.

There are six phases to the restitution process namely:-<sup>44</sup>

#### 2.4.1 Lodgement of claims<sup>45</sup>

In this phase a claim is lodged against the state. The relevant Regional Land Claims Commission office deals with the claim by receiving the claim, acknowledging the claim and registering the claim.

#### 2.4.2 Screening and categorisation

During this phase the commission investigates the elementary evidence pertaining to the claim in order to reject clearly defective or frivolous claims. If there is *prima facie* evidence that a claim will be accepted by the Land Claims Commissioner then a preliminary options assessment is carried out between the project staff and the claimants. This assessment aims to determine what the claimants want and what their subsequent options are.<sup>46</sup>

#### 2.4.3 Acceptance of claim

In this phase the claim is scrutinised for meeting the formal and legal requirements set out in section 2 of the RLRA. Once a claim is validated a notice, in terms of section 11(1)(d), is published in the *Government Gazette* announcing the lodging of a claim against the land in question. On publication of a section 11 notice no person may deal with the property without first giving notice to the RLCC or obtaining his consent in respect of developing the land.<sup>47</sup> The publication of the notice acts like a 'holding measure' in terms of which the status quo of the land is 'frozen' for the duration of the process.<sup>48</sup>

#### 2.4.4 Preparation for negotiations and settlement

During this phase issues of feasibility of the various options for example restoration, alternative land and/or monetary compensation are discussed. This process is

---

<sup>44</sup> Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan* para 2.2.3; see also Pienaar *Land reform* 527.

<sup>45</sup> Section 10 of Act 22 of 1994.

<sup>46</sup> Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan* para 2.2.3.

<sup>47</sup> Section 11(7) of Act 22 of 1994.

<sup>48</sup> Section 11(7) of Act 22 of 1994; Pienaar *Land reform* 530.

guided primarily by legal and financial factors.<sup>49</sup> Sections 11(6) to (8) of the RLRA set out how the process advances.<sup>50</sup> Section 13 of the Act also provides for mediation in the event of a dispute. During this phase a negotiating 'position' is established from which actual negotiations with the relevant stakeholders will take place.

#### 2.4.5 Negotiations

At this stage the commission convenes and manages the negotiations in an attempt to achieve a settlement out of court. The negotiation process can include multiparty discussions, bilateral discussions or mediation in the event of disputes. Negotiations may lead to an out-of-court settlement, a partial settlement or no settlement.<sup>51</sup> In the event that no settlement is reached the claim is referred to the LCC for adjudication under section 14 of the RLRA.

#### 2.4.6 Implementation

This is officially the last phase of the restitution process. In this phase consultants are hired, a business plan is developed and approvals for land settlement and land uses are obtained. This phase entails the transfer of the land and all the corresponding rights such as the registration of servitudes or other limited real rights, where applicable. It also includes the payment of compensation where necessary.

#### 2.4.7 Concluding remarks

It is during the fourth phase of preparation for negotiations that the issue of feasibility of the various options, including the restoration of land, alternative state-owned land

---

<sup>49</sup> Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan* para 2.2.3.

<sup>50</sup> In terms of section 11(6) immediately after publishing the notice the RLCC shall by notice in writing advise the owner of the land in question and any other party which might have an interest in the claim of the publication of the notice and refer the owner and such other party to the provisions of subsection (7). In terms of section 11(7) once a notice has been published in respect of any land no person may in an improper manner obstruct the passage of the claim or sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the RLCC one month's written notice of his or her intention to do so; no claimant who occupied the land in question at the date of commencement of this Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner; no claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier. In terms of section 11(8) the RLCC may, at any time after the publication of a notice, if deemed necessary, authorise a drawing up of an inventory of any assets on the land, a list of persons employed or resident on the land, or a report on the agricultural condition of the land and of any excavations, mining or prospecting thereon.

<sup>51</sup> Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan* para 2.2.3.

and/or monetary compensation are considered. The consideration of options appears to be based on information from archive files, deeds and claimant testimony which guides the type of settlement 'options' to be pursued. The options considered at this stage in no way relate to land use or livelihood options since no information about the natural resource base has been taken into account. In the event that the claimants insist upon restoration as their option, they are doing so from an uninformed position because they have no idea of what livelihood options or services are possible on the land they want restored.<sup>52</sup>

A land claim that does not involve conservation land is often not subject to an assessment that looks at environmental sustainability or natural resource issues during project planning and development.<sup>53</sup> A development plan is considered only when a settlement is reached, and then only if deemed necessary. This is far too late in the process since it is only here, almost at the end of the process, where natural resource base limitations or opportunities and limited or potential livelihood opportunities will be discovered.<sup>54</sup>

## **2.5. The requirement of feasibility**

The introduction of the requirement of feasibility can be traced to the interim Constitution. In terms of section 121(2) of the interim Constitution if a person or community was dispossessed of land after 19 June 1913 as a result of a racially discriminatory law or practice then such person or community would be entitled to claim restitution of a right in land from the state. Where such a claim relating to state owned land was lodged with a court of law and the state certified that the restoration of such right was feasible the court could order the state to restore the relevant right to the claimant.<sup>55</sup> However, if the land in question was owned by a private individual and the state certified that it was feasible to acquire such land the court could order the state to purchase or expropriate such land and restore the land in question to the claimant.<sup>56</sup>

---

<sup>52</sup> Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan* para 2.2.3

<sup>53</sup> Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan* para 2.2.3

<sup>54</sup> Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan* para 2.2.3.

<sup>55</sup> Section 123(1)(a) of the interim Constitution.

<sup>56</sup> Section 123(1)(b) of the interim Constitution.

Section 15 of the RLRA, now repealed by the 1997 LRRLAA,<sup>57</sup> made provision for a certificate of feasibility. In terms of section 15 the Chief Land Claims Commissioner had to first request the minister to certify whether the restitution of the right in question was feasible before a claim in terms of section 121(2) of the interim Constitution was referred to the court. Section 15(6) provided that the minister, in determining whether the restoration or acquisition by the state was feasible, had to, in addition to any other factor, take into account the following factors:-

- (a) whether the zoning of the land in question has since the dispossession been altered and whether the land has been transformed to such an extent that it is not practicable to restore the right in question;<sup>58</sup>
- (b) any relevant urban development plan;<sup>59</sup>
- (c) any other matter which makes restoration or acquisition of the right in question unfeasible;<sup>60</sup> and
- (d) any physical or inherent defect in the land which may cause it to be hazardous for human habitation.<sup>61</sup>

These factors point to the fact that feasibility addresses the question of whether restoration is practically achievable.<sup>62</sup> Furthermore section 15(8) of the RLRA prohibited the minister from considering whether restoration, acquisition or designation was just or desirable when determining feasibility.

The clause requiring a certificate of feasibility was repealed by the 1997 LRRLAA as it was seen to hamper the restitution process.<sup>63</sup> However, the requirement of feasibility appears in another guise and was inserted by the same Amendment Act of 1997 under section 33(cA). Initially section 33 set out the following factors to be considered by the court in determining whether land should be restored to a claimant:-

---

<sup>57</sup> Section 23.

<sup>58</sup> Section 15(6)(a).

<sup>59</sup> Section 15(6)(b).

<sup>60</sup> Section 15(6)(c).

<sup>61</sup> Section 15(6)(d).

<sup>62</sup> *Kranspoort Community Concerning the Farm Kranspoort*, para 89. See also Van Wyk "'Feasibility of restoration' as a factor in land restitution claims" 590.

<sup>63</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 18; Van Wyk "'Feasibility of restoration' as a factor in land restoration claims" 593.

- (a) the desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;<sup>64</sup>
- (b) the desirability of remedying past violations of human rights;<sup>65</sup>
- (c) the requirements of equity and justice;<sup>66</sup>
- (d) the desirability of avoiding major social disruption;<sup>67</sup>
- (e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination.<sup>68</sup>

Originally the legislative intent behind these guidelines was to attempt to define how a court would weigh a claim. There had to be a commitment to restore land to people who had been forcibly removed.<sup>69</sup>

The 1997 LRRLAA added section 33(cA) to these factors. It stated :--

(cA) if restoration of a right in land is claimed, the feasibility of such restoration.

According to Carey Miller the repeal of section 15 and the insertion of section 33(cA) creates the impression that the necessary control in maintaining a system of checks and balances may have been sacrificed in the search of a system likely to deliver restitution results more expeditiously – an important aspect of the very real political concerns regarding delivery of land reform.<sup>70</sup>

The LRRLAA of 1997 further introduced the following factors for consideration under section 33:-

- (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;<sup>71</sup>
- (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;<sup>72</sup>
- (eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;<sup>73</sup> and

---

<sup>64</sup> Section 33(a).

<sup>65</sup> Section 33(b).

<sup>66</sup> Section 33(c).

<sup>67</sup> Section 33(d).

<sup>68</sup> Section 33(e).

<sup>69</sup> Van Wyk "'Feasibility of restoration' as a factor in land restoration claims" 593.

<sup>70</sup> Carey Miller *Land title in South Africa* 374.

<sup>71</sup> Section 33(eA) of Act 63 of 1994.

<sup>72</sup> Section 33(eB).



- (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution.<sup>74</sup>

Although the concept of feasibility has legislative history it is not defined in the RLRA.<sup>75</sup> This concept can cover the suitability of the land for agricultural purposes or the availability of sufficient water or development possibilities.<sup>76</sup> In the *In re Kranspoort Community* case Dodson J points out, with reference to the newly inserted section 33(cA), that it is important to bear in mind that the immediate context of the words relates to the feasibility of restoration (his emphasis).<sup>77</sup>

In *Khosis Community, Lohatla Battle School v Minister of Defence* the court, dealing with a claim in respect of land on which the Lohatla Army Battle School was situated, emphasised that it was essential to strike a balance between the different interests on the one hand and limited resources on the other.<sup>78</sup> In balancing the different interests the section 33 factors and the public interest as embodied in section 34,<sup>79</sup> as well as viability and feasibility had to be taken into account.<sup>80</sup> In determining that it was not in public interest to make an order for actual restoration the court considered that the parcel of land was too small to accommodate the entire *Khosis* community, the land in question was in the middle of a danger zone, there was no alternative land available for training on this scale and format and overlapping restitution claims had been lodged in respect of the general area. The Battle School was a national asset and played a role in the region's economy. Furthermore the court considered that if the land was restored to the *Khosis* community they would themselves be prejudiced because they would be deprived of schools, education, health care and safety in the present location.<sup>81</sup> As a result the court was satisfied that it was not in public interest to restore the land to the claimants.

---

<sup>73</sup> Section 33(eC).

<sup>74</sup> Section 33(f).

<sup>75</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 89.

<sup>76</sup> Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan* para 2.2.3.

<sup>77</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 91.

<sup>78</sup> *Khosis Community, Lohatla v Minister of Defence* para 31.

<sup>79</sup> Section 34(1) of the RLRA provides that any national, provincial or local government body may, in respect of land within its jurisdiction, apply to court for an order that the land in question or rights in relation to the land not be restored to any claimant or prospective claimant.

<sup>80</sup> *Khosis Community, Lohatla v Minister of Defence* para 33; See also Pienaar *Land reform* 613.

<sup>81</sup> *Khosis Community, Lohatla v Minister of Defence* para 42.

In the *Kranspoort Community* case, Dodson J laid down a test to be applied by the court in determining whether the restoration of the rights in the land in question to the claimants is possible and practical. The factors considered by Dodson J placed emphasis on the use and nature of the land.<sup>82</sup> With reference to *Juta's New Land Law*, Dodson J states that Roux T is of the opinion that whenever land has been substantially transformed or developed, the minister will have good reason to refuse a feasibility certificate.<sup>83</sup>

More recently in *Florence v Government of the Republic of South Africa* it was stated that in considering its decision a court must have regard to the section 33 factors. However, the court found that the most relevant factors contained in section 33 included:-<sup>84</sup>

33 (a)...

(b) The desirability of remedying past violations of human rights;

(c) The requirements of equity and justice;

(d)...

(e)...

(eA) The amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;

(eB) The history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;

(eC) In the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money.

The draft Restitution of Land Rights Amendment Bill of May 2013<sup>85</sup> suggested that section 33 of the RLRA be amended as follows:-

(cA) if restoration of a right in land is claimed:-

(i) the feasibility and cost of such restoration; and

(ii) the ability of the claimant to use the land productively.

These amendments would bring the law in line with what has been happening in practice. Despite the actual practice in court and the draft provisions in the May 2013

---

<sup>82</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 92.

<sup>83</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 89.

<sup>84</sup> *Florence v Government of the Republic of South Africa* (CCT 127/13) [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) para 14 fn 12.

<sup>85</sup> *Government Gazette* 36477(23 May 2013).

version, the Restitution of Land Rights Amendment Bill of September 2013 did not retain the amendments and the list of factors in section 33 remain unchanged.<sup>86</sup>

Chapter 5 deals with an analysis of *In re Kranspoort Community*,<sup>87</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform*,<sup>88</sup> and *Baphiring Community v Uys*<sup>89</sup> to determine how the court's interpret and apply the feasibility requirement.

## 2.6 Conclusion

The RLRA does not set out what the feasibility of restoration entails. In reality, the use to which the land is to be put after restoration, as well as the capabilities of the claimants to use the land effectively, productively and sustainably have also been considered in claims for restoration. Furthermore feasibility has increasingly been interpreted to mean financially feasible, including the cost of restoring the land or right in land.<sup>90</sup>

Thus, while feasibility has been abandoned as an institutionalised requirement, it has been introduced at the level of a consideration to which the court should have regard in considering its decision. On this basis it is more a matter of discretion and judgment than it was in the Act prior to the 1997 amendment.<sup>91</sup> Despite the amendments to the requirement of feasibility its focus remains concerned only with the nature of the remedy and not the entitlement to restoration.

Feasibility studies provide the courts with the relevant information to assist<sup>92</sup> in determining whether restoration of land is feasible. Chapter 3 looks at feasibility studies for the purpose of land restitution.

---

<sup>86</sup> Pienaar *Land reform* 585.

<sup>87</sup> 2000 2 SA 124 (LCC).

<sup>88</sup> [2012] 3 All SA 563 (LCC).

<sup>89</sup> (LCC64/1998) [2010] ZALCC 1; 2010 (3) SA 130 (LCC); [2010] 3 All SA 353 (LCC) (19 January 2010). See also *The Baphiring Community v Tshwaranani Projects CC*.

<sup>90</sup> Pienaar *Land reform* 584; see also *Baphiring Community v Uys* para 29.

<sup>91</sup> *Carey Miller Land title in South Africa* 374.

<sup>92</sup> *The Baphiring Community v Tshwaranani Projects CC* para 18.

# CHAPTER THREE

## 3. FEASIBILITY STUDIES

### 3.1 Introduction

This brings us to the most pressing and painful part of the problem - which is that the moment of return to the land cannot live up to the expectations and hopes generated by it. For of course what was lost can never be returned. Part of the problem is the fact that the land is not the only thing that was lost. What was destroyed through . . . removals was a whole way of being, a set of community relations, a system of authority and let [us] not forget, a broader system of economic relations and livelihoods *of which the land was but a part*, and which gave it its function and its value (his emphasis).<sup>93</sup>

While feasibility studies are a part of the restitution process, there is uncertainty regarding what exactly the purpose and content of such feasibility studies should be. In order to put some perspective on this tool, this chapter first looks at a definition, and deals with the basis of a feasibility study for the purpose of restoration of land rights. The legal, policy and planning frameworks are then sketched.

### 3.2 Definition of a feasibility study

The *New Shorter Oxford English Dictionary* defines a 'feasibility report or study' as a study or report 'on or into the practicability of a proposed plan.'<sup>94</sup> A *Concise Dictionary of Business* defines 'feasibility study' as –

A study of the financial factors involved in producing a new product, setting up a new process, etc. The study will analyse the technical feasibility with detailed costings of set-up expenses, running expenses, and raw-material costs, together with expected income. The capital required and the interest charges will also be analysed to enable an opinion to be given as to the commercial viability of product, process, etc.<sup>95</sup>

---

<sup>93</sup> Du Toit A "The end of restitution: Getting real about land claims" unpublished paper prepared for Land and Agrarian Reform Conference, Pretoria 26-28 July 1999; see also *Kranspoort Community Concerning the Farm Kranspoort* para 108.

<sup>94</sup> Du Toit "The end of restitution: Getting real about land claims" referred to in *Kranspoort Community Concerning the Farm Kranspoort* para 90.

<sup>95</sup> Isaacs et al (ed) *A Concise Dictionary of Business* (Oxford University Press, Oxford 1990) 143 referred to in *Kranspoort Community Concerning the Farm Kranspoort* para 90.

The dictionary definitions convey the meaning of a feasibility study to be 'commercially viable'.<sup>96</sup>

However, the order in the *Baphiring* case highlights that considering actual restoration is a complex and multi-dimensional matter. While economic considerations come into play, the issue of restoration extends beyond financial considerations.<sup>97</sup> Therefore, a feasibility study for the purpose of restoration of land rights must, in addition to the economic factor, look at the social, environmental and governance issues. These include consideration of ancestral origin and umbilical links with the land in question as well as what the claimants lost and what they stood to gain from actual restoration; what is to be done with the land after restoration and whether the claimants are capable of looking after or taking care of the land.

### **3.3. The basis for a feasibility study**

A feasibility study is an evolving, dynamic process and is usually supported by a business plan, which is considered the implementation tool.<sup>98</sup> Generally a feasibility study identifies the practical implications of resettlement to enable the various stakeholders to make informed decisions regarding the implications and logistics of resettlement.

The Department of Rural Development and Land Reform (formerly the Department of Land Affairs), in determining whether it is feasible to restore land rights in a particular piece of land, instructs a team of professionals to conduct a feasibility study. In the *Baphiring Community* case the court stated that when the question of feasibility arises, the Land Claims Commission must take the lead in placing all the relevant facts before the court and to the extent that there are budgetary issues, which the commission is not able to assist the court with, that responsibility to place evidence before the court falls on the shoulders of the responsible minister, to enable the court to make an appropriate order.<sup>99</sup> There are, however, instances where the current landowners or other interested parties may commission a

---

<sup>96</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 90.

<sup>97</sup> Pienaar *Land reform* 594.

<sup>98</sup> *A framework for securing effective settlement and implementation support* 221  
<http://www.phuhlisani.com/oid/downloads/Chapter%206.pdf> (date accessed 05/05/2015).

<sup>99</sup> *The Baphiring Community v Tshwaranani Projects CC* para 16.

feasibility study, usually to refute the view that it is feasible to restore the land in question to the claimants.

The court, in the *Baphiring Community* case, stated that what should have happened in this case is that the state ought to have conducted a feasibility study into the restoration of the land. Furthermore, the study should at the very least have taken into account the following factors:-

- the number of families that are expected to be resettled;
- the institutional and financial support for the resettlement; and
- the envisaged land usage if the land is restored.<sup>100</sup>

In addition Cachalia J stated that the following evidence should have been placed before the court:-

- the cost of expropriating the land from the current land owners;
- the extent of the loss of food production to the local community should farming activities not be continued at current levels;
- the extent of social disruption of the current landowners and their families should they be required to physically leave their farms;
- the number of farm workers who are dependent upon their incomes from their employment on the farms and the extent and impact of social disruption, including the loss of employment, to them; and finally
- should the land be restored how the problem of 'overcompensation' of the claimants will be avoided.<sup>101</sup>

From the above it is evident that the court supports the need for a feasibility study when actual restoration is claimed.

### **3.4 Legal framework**

Apart from the RLRA, there is a collection of legislation that applies to the way in which land reform, and specifically land restitution, needs to be planned and

---

<sup>100</sup> *Baphiring Community v Tshwaranani Projects CC* para 18.

<sup>101</sup> *Baphiring Community v Tshwaranani Projects CC* para 18.

supported.<sup>102</sup> In particular the Spatial Planning and Land Use Management Act<sup>103</sup> (SPLUMA) plays an important role when land is developed. In terms of section 7 of SPLUMA the development principles include, amongst others, spatial justice, in terms of which past spatial and other development imbalances are redressed through improved access to and use of land; spatial sustainability, whereby spatial planning and land use management systems must promote land development that is within the fiscal, institutional and administrative means of the Republic; efficiency, whereby land development optimises the use of existing resources and infrastructure; and good administration, whereby all spheres of government ensure an integrated approach to land use and land development.

Other statutes that may need to be considered include the National Environmental Management Act,<sup>104</sup> National Environmental Management: Biodiversity Act,<sup>105</sup> Conservation of Agricultural Resources Act,<sup>106</sup> National Water Act,<sup>107</sup> National Forest Act,<sup>108</sup> and National Heritage Resources Act.<sup>109</sup>

Ultimately the legislation to be considered in any feasibility study will depend on the land in question. Furthermore, it is important for land claim beneficiaries to be aware of the legislation affecting the land to be acquired so that they are aware of their obligations in terms of the law.

### **3.5 An overview of a feasibility study**

The former Department of Land Affairs (DLA) introduced a new approach to land reform planning and support. This involves the development of Area-based Plans (ABPs) for every district in the country. The ABP identifies district land reform and related settlement and implementation support needs and specifies how these needs will be addressed. Once approved, the ABP assumes the status of a land and

---

<sup>102</sup> National Environmental Management Act 107 of 1997 s 11.

<sup>103</sup> Act 16 of 2013. This Act replaced the Development Facilitation Act 67 of 1995 on 1 July 2015. The aim of the Act is to alter the fragmented approach to land use planning and management by introducing a single, uniform management system.

<sup>104</sup> 107 of 1998.

<sup>105</sup> Act 10 of 2004.

<sup>106</sup> Act 43 of 1983.

<sup>107</sup> Act 36 of 1998.

<sup>108</sup> Act 84 of 1998.

<sup>109</sup> Act 25 of 1999.

agrarian reform sector plan within the district municipality's Integrated Development Plan (IDP).<sup>110</sup>

When we look at the final outcome of a feasibility analysis we look at the key metrics to judge the project's merit.<sup>111</sup> What should be included in the key metrics depends on the type of project. For the purposes of land restoration and in light of the fact that land reform must take place within the municipal IDP we look at the components of a development framework<sup>112</sup> of a feasibility study. The development framework may be divided into five sections.<sup>113</sup>

### 3.5.1 Section 1: Introduction, vision and principles

Introduction of the feasibility study will provide a background which will include the circumstances giving rise to the feasibility study. At this stage a status quo assessment is undertaken to determine the socio-economic and political dynamics regarding the possible restoration of the land in question.<sup>114</sup>

In the Mala Mala community claim a large part of the judgment deals with witnesses' reports although the restitution claim was not disputed. The historical background and the reports of the witnesses contributed to the consideration of factors under section 33, in particular the history of the acquisition of the land and its use as well as the prevailing conditions when dispossession occurred.<sup>115</sup>

The vision will be specific to the site and its social, historic and geographical context.<sup>116</sup> Ultimately the vision will depend on the land in question and the community involved in the claim.

---

<sup>110</sup> *Central Karoo Land and Agrarian Reform Area-based Plan Summary*  
<http://www.phuhlisani.com/oid/downloads/CKABP%20Summary.pdf> (date accessed 27/06/2015).

<sup>111</sup> *Feasibility study template* <http://feasibility.pro/wp-content/uploads/2013/08/Feasibility-Study-Template.pdf> (accessed 05/05/2015).

<sup>112</sup> A development framework is a planning instrument which guides the development of a specified area.

<sup>113</sup> *District six "Introduction and Vision"* para 1.3.  
<http://www.districtsix.za.org/documents> (date accessed 28/04/2015).

<sup>114</sup> *Dukuduku on-site resettlement project* [http://www.permaculture2012.co.za/pages/33427\\_dukuduku-siteresettlementproject](http://www.permaculture2012.co.za/pages/33427_dukuduku-siteresettlementproject) (date accessed 28/04/2015).

<sup>115</sup> Pienaar *Land reform* 596.

<sup>116</sup> *District six "Introduction and Vision"* para 1.3.



### 3.5.2 Section 2: Contextual analysis

A broad understanding of the site, the project and its physical and social context is set out. The contextual analysis is structured into four main sections namely, socio-economic framework, the spatial design framework, infrastructure and services framework of the resettlement site. Its context will determine planning and design principles.<sup>117</sup> Planning and design principles may include the development of commercial assets to cross-subsidise the costs of development of claimant's housing or to pilot sustainable technologies.<sup>118</sup>

### 3.5.3 Section 3: Design informants and concept<sup>119</sup>

This section explains the design informants that have helped to frame and structure the development framework and may include claimants; heritage issues and the role of the site in context of the city/town. The development framework will be further informed through an understanding of the spatial opportunities and constraints which are inherent in the site. Spatial opportunities may include capitalising on strategic transport improvements<sup>120</sup> while spatial constraints may include challenging geotechnical conditions; including steep gradients, infill and level changes.

The concept may be flexible, adaptable and layered and provides a framework for further development.

### 3.5.4 Section 4: Strategies

This section outlines the key strategies that underpin the framework. Strategies may include activity and land use strategies, which look at the socio-economic profile of the returning community or sustainable services and technologies, which include addressing energy usage; existing water services and capacities. In the Cato Manor Development Project locality advantages within the metropolitan area were identified to create significant opportunities for the development of industrial and commercial enterprises.<sup>121</sup>

---

<sup>117</sup> *District six* "Contextual analysis" para 2.5.

<sup>118</sup> *Feasibility study template*.

<sup>119</sup> *District six*, ch 3.

<sup>120</sup> *Cato Manor Development Project*, [www.cmdp.org.za](http://www.cmdp.org.za) (date accessed 28/04/2015).

<sup>121</sup> Key strategic objectives of CMDP.

### 3.5.5 Section 5: Planning procedures and implementation

This section sets out, in broad principle terms, the procedures, processes and phasing informed by the business plan. The planning and development will need to follow the statutory planning and development processes set out by national, provincial and local government.

The Implementation Plan identifies a wide range of specific projects which are grouped into different programmes such as infrastructure, housing, economic development, environmental conservation and community facilities. The implementation plan prioritises the sequence of projects from which resource distributions could be estimated for the envisaged overall project duration.<sup>122</sup>

### 3.5.6 Section 6: Conclusions and recommendations

At this stage a set of conclusions is drawn up and a series of recommendations made for moving forward with the redevelopment of the site.

The impacts of the proposed development on the existing character of the land are determined. With regard to the restitution of land rights the cost of the redevelopment is analysed, including the cost of expropriating the land from the current land owners, the cost of improvements to the land, and the cost of resettlement of the claimant community.

The greater the impact on the existing character of the land, the more likely objections will be raised to the proposed development and a non-restoration order made.

## 3.6 Concluding remarks

It is evident from the *Baphiring* case that a feasibility study is an important tool required by the court to assist in determining whether actual restoration is feasible or not.<sup>123</sup> According to Du Toit the most important problem in the restitution programme is not only the slow rate of delivery, but also the question of what is being delivered:

---

<sup>122</sup> *Dukuduku on-site resettlement project*.

<sup>123</sup> *Baphiring Community v Tshwaranani Projects CC* para 15 and 19.

the vision, aim and policy that drive delivery. Restitution needs to therefore redefine what its ends are.<sup>124</sup>

The restitution process needs to be reviewed and focused on principles including, amongst others, the importance of planning and the notion of co-operative implementation. Essentially the feasibility study should ensure that the physical form should reflect a community claim based on historical settlement patterns but at the same time having regard for the need of the claimants in a current day context.<sup>125</sup>

Land claimed may include commercial farms, land developed for the purpose of eco-tourism, conservation land, land used for the purpose of national security or World Heritage sites. As a result a feasibility study for the purpose of the restoration of land rights will differ from case to case based on the facts of each matter. What is clear is that the type of feasibility study to be conducted will depend, *inter alia*, on the type of claim, the land in question and the claimant community.

Chapter four looks at specific projects in which feasibility studies have been conducted and the lessons that may be learnt from these projects.

---

<sup>124</sup> Du Toit “The end of restitution: Getting real about land claims” 75-91.

<sup>125</sup> Du Toit “The end of restitution: Getting real about land claims” 75-91.

# CHAPTER FOUR

## SPECIFIC PROJECTS WITH FEASIBILITY STUDIES

### 4.1 Introduction

As indicated in chapter 3 the factors to be considered when deciding on actual physical restoration of land will depend on the land in question and the particular community. In this chapter I look at three claims to determine which factors are considered when determining whether actual restoration or not is the preferred option and how these factors are weighed. The claims include:-

- the Cato Manor development project which deals with an urban land claim;
- the Dukuduku Community claim for land which falls within a World Heritage Site; and
- the Abekunene Community claim for land used by the South African National Defence Force for the purpose of national security.

### 4.2 The Cato Manor development project

#### 4.2.1 Historical background

In 1845 George Cato, the first mayor of Durban, was granted land in Cato Manor as compensation for a beach front property that was expropriated for military purposes.<sup>126</sup> He originally owned and farmed the land but later subdivided and sold it. By early 1928, and due mainly to the increased movement of Indian immigrants in and around Durban, shack developments started to become evident. In about 1932 Cato Manor was incorporated into the Durban municipality and shack settlements became illegal. The authorities, however, turned a blind eye.<sup>127</sup> After the Second World War, with increased industrialisation and therefore, urbanisation, thousands of African labourers were attracted to the cities. As a result of the lack of accommodation for them, shack farming in Cato Manor became a lucrative business for Indian landowners who originally used the land for market gardening.<sup>128</sup>

---

<sup>126</sup> *Cato Manor Development Project History* <http://www.cmda.org.za/history.htm> (date accessed 20/02/2015).

<sup>127</sup> *Cato Manor Development Project History* 1.

<sup>128</sup> *Cato Manor Development Project History* 1; *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* 1998(1) SA 78 (LCC) wpdoc\judg\lcc15-96.ju1 para 4.

By the mid 1950's Cato Manor had an estimated population of 120 000 Africans and 40 000 Indians. The area stretched from the University of Natal as far as Westville, Mayville and Hillary. Overcrowding was common and crime and disease widespread. Despite these problems the community was well organised. The residents established schools, religious institutions, old age and children's homes. They also developed their own political and welfare organisations.<sup>129</sup>

In 1954, the Group Areas Board recommended that the area be proclaimed for white occupation. However, the area was rejected by the Durban City Council and white people in general due to the poor condition of the area. In particular the widespread presence of ecca shale made it unsuitable and expensive for white housing. The Cato Manor residents themselves opposed the rezoning of the area. Despite the organised mass meetings around the removal of people from this area Cato Manor was officially proclaimed a white area in 1958 and massive removals got under way. By 1964 the demolition of shacks in Cato Manor was completed and by 1965 the African community had been mainly relocated to the new townships of KwaMashu, Lamontville and Umlazi, while most of the Indian community was moved to Chatsworth. All properties were frozen for development and the land owners forced to sell to the Department of Community Development or the Durban City Council. In most areas compensation paid to those whose properties were expropriated was poor. By 1968, Stella Hills, a section of Cato Manor had been developed by whites. The University of Natal had also bought almost the entire Second River complex. The Department of Community Development was only able to dispose of a small portion of all of the land and it was for this reason that in November 1979 about one fifth of Cato Manor was no longer declared a white area. In May 1980 this area was gazetted for Indian occupation once again.<sup>130</sup>

The 500 Indian families still resident in the area faced many problems. The Department of Community Development wanted to move all residents out of the area in order to develop it. There was no consultation with the people on the redevelopment plans. All the land had been expropriated with the result that the

---

<sup>129</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* para 4.

<sup>130</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* para 4.

residents of Cato Manor were now tenants of the Department of Community Development.

#### 4.2.2 Restitution and the issue of public interest

The people who lost rights in land or their descendants saw the promulgation of RLRA as an opportunity to realise their dream of returning to Cato Manor.<sup>131</sup> The North Central and the South Central Metropolitan Substructure Councils of the Durban Metropolitan Council, however, made an application to court in terms of section 34<sup>132</sup> of the RLRA to remove the land in question from the restitution process because they had development plans for the area. The proposed development envisaged the establishment of a city within a city in the area with a complete infrastructure such as residential and commercial areas, schools, hospitals, libraries, recreational facilities, places of worship and so on. Essentially the plan was to provide affordable housing.

Furthermore different institutions, including the European Union,<sup>133</sup> and communities pledged funds for the development by way of either investment or donation. It was considered one of the government's leading reconstruction and development programmes. It was envisaged that the development would generate substantial employment opportunities for residents of the Greater Durban area and provide a significant boost for the regional economy. Certain parts of the area were occupied by informal settlers and part of the development plans was to upgrade these settlements.<sup>134</sup>

---

<sup>131</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* para 5.

<sup>132</sup> Section 34(1) provides that any national, provincial or local government body may, in respect to land in its jurisdictional area, apply to a court for an order that the land in question or rights in relation to land shall not be restored to any claimant or prospective claimant when such an order was deemed to be in public interest. A court may decide to (a) dismiss; or (b) grant the section 34 application which may include any of the following:-

- (i) that the land may not be restored;
- (ii) that part of the land may not be restored;
- (iii) that rights in the land may not be restored; or
- (iv) any other order it deems fit.

<sup>133</sup> EU Assistance, Cato Manor Development Project <http://www.cmda.org.za/euassist.htm>

<sup>134</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* para 5.

The Cato Manor Development Association (CMDA), a company established in terms of section 21 of the Companies Act No 61 of 1973, was appointed as agent to oversee this development. It was the evidence of the CMDA's office bearers that if an order in terms of section 34 were not granted, the development would essentially fail and the bulk of the financing which had been made available would be withdrawn.<sup>135</sup>

During the proceedings a settlement agreement was reached. The settlement agreement consisted of three main parts. Part 1 provided for the possibility of restoration in certain instances for particular claimants. Part 2 provided for development and Part 3 provided for other forms of restitution such as financial compensation.<sup>136</sup> The court held that settlement reached by the parties was in fact the same as the court making an order in terms of section 34(5)(b) that rights in part of the land, or certain rights in the land, will not be restored to any claimant. In doing so the court had to be satisfied that the settlement agreement complied with subsection (6) before making the agreement an order of court. In determining whether the settlement agreement complied with the requirements of section 34(6)(b)<sup>137</sup> the court found it necessary to investigate the concept 'public interest':

In determining what was in the public interest in this matter, it was taken as almost axiomatic that, given the history of dispossession in Cato Manor and the resultant devastation and hardship suffered by the removed community, restoration would be in the public interest. Blanket restoration in the area would, however, have necessitated a refusal of the section 34 application and the resultant loss of the development. So, against the advantages to the public interest of restoration there had to be weighed and balanced the advantages to the public interest of the development. Put another way, and in the words of section 34(6)(b), "the public or any substantial part thereof" should stand to "suffer substantial prejudice unless" the section 34 order is granted. The advantages of the development include (a) the provision of affordable housing for the disadvantaged communities of Greater Durban near places of potential employment; (b) the opportunities for employment as a result of the development; (c) the upgrading of informal settlements; (d) foreign investment; (e) economic upliftment of the Greater Durban area with the possibility of spilling over into the entire

---

<sup>135</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* para 25.

<sup>136</sup> Pienaar *Land reform* 613.

<sup>137</sup> Section 34(6)(b) provides that the court shall not make an order in terms of subsection (5)(b) unless it is satisfied that the public or any substantial part thereof will suffer substantial prejudice unless an order is made in terms of subsection (5)(b) before the final determination of any claim.

KwaZulu-Natal area; (f) obviating potential violent strife between the informally settled communities and land claimants.<sup>138</sup>

The agreement provided that the development as planned by the applicants would proceed subject to the condition that, where it could be shown that restoration was feasible within the development area, any respondent who so wished would still be able to pursue his or her claim for restoration. The court found that both restoration and the proposed development were in the public interest and that any arrangement which accommodated both, with the consent of all the parties, would certainly be in the public interest.<sup>139</sup>

Since the issue of public interest was not argued before the court, Moloto J emphasised that while he found the settlement agreement in this instance to be in public interest his interpretation of 'public interest' was not conclusive to the meaning to be ascribed to the term.<sup>140</sup>

#### 4.2.3 The settlement agreement

In the settlement agreement 'feasibility' was defined as follows:-

'feasible' shall have its ordinary meaning and shall include but not necessarily be limited to the concept of feasibility as set out in the Act, provided that:

- (a) the Structure Plan, the Precinct Plans, the Layout Plans and the Implementational Strategy of the CMDA shall be considered as relevant urban development plans in terms of section 15(6)(b) of the Act;<sup>141</sup> and
- (b) the aforesaid plans shall not be regarded as immutable. Feasibility shall have a corresponding meaning.<sup>142</sup>

The settlement agreement set out details of structural and precinct plans and made provision for a social process which included, amongst others, public consultation

---

<sup>138</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* para 25.

<sup>139</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* para 10.

<sup>140</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* para 27.

<sup>141</sup> Section 15(6)(b) provides that in considering whether restoration or acquisition by the state is feasible in terms of subsection (1), the Minister shall, in addition to any other factor, take into account any relevant urban development plan.

<sup>142</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* Memorandum of Agreement para 2.2.11.



processes; incorporation and development of historical, cultural and religious sites into a tourist route representing and reflecting the history of Cato Manor; and where practical, integrated claimants into the existing development committees.<sup>143</sup>

Furthermore, the settlement agreement provided for an undertaking by the then Department of Land Affairs to ensure that the Regional Land Claims Commissioner (RLCC) has sufficient resources to enable the department to comply with the terms of the agreement and within its budgetary constraints, to meet its obligations in terms of the agreement.<sup>144</sup>

#### 4.2.4 Cato Manor development

The creation of an efficient and productive 'city-within-a-city' targeting primarily the poor and marginalised residents of Durban was one of the main strategic objectives of the project. The aim was to provide housing and security of tenure, the reduction of infrastructure and service disparities and the establishment of safe and secure living and working environments with sufficient economic opportunities. These objectives are being achieved through the delivery of an integrated development project and guided by a policy framework and vision that was developed through a process of intense discussion and negotiation. The development project consists of 900ha of developable land, and the project aims to produce 25 000 housing units, accommodating 150 000 people, and the creation of 25 000 permanent jobs.<sup>145</sup>

#### 4.2.5 The section 34 application

The aim of this application is to remove certain parcels of land from being restored, because it is in public interest to do so. Pienaar argues that a similar result may be achieved without this procedure or without granting a section 34 order. The following options are proposed:-

- (a) The land may be restored, but the development thereof may be made conditional. In this instance the claimants will still be able to return to their land, but there may be some form of

---

<sup>143</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* Memorandum of Agreement para 12.

<sup>144</sup> *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* Memorandum of Agreement para 13.

<sup>145</sup> *Cato Manor Development Project*.

control over the specific development. This may be one way of still acting in the public interest while at the same time ordering specific restoration.

- (b) Claimants may enter into a framework agreement with the Minister of Rural Development and Land Reform or the regional land claims commission whereby the claimants forgo their specific restoration claim, but accept monetary compensation instead or become involved in other development schemes.<sup>146</sup>

By not employing the section 34 application, it is possible to avoid some of the shortcomings associated with the application, including loss of benefits linked with actual restoration of ancestral land. The two options mentioned above give claimants some form of control of the process involved.<sup>147</sup>

#### 4.2.6 Conclusion

The Cato Manor land claim is an urban land claim which had to accommodate a very diverse group of claimants in an urban environment which had changed drastically since the claimants were dispossessed from their land.<sup>148</sup> While the CMDP is hailed as a model for integrated development some commentators argue that the project fell short of its promise within the restitution programme.<sup>149</sup> The reason for this may be attributed to the fact that the process was extremely costly for the state, it adversely affected other restitution claims and it failed to significantly incorporate individual land claims or the larger social reality that they represented into the redevelopment of the area. Also in most cases the CMDA had not been prepared to concede that restoration is feasible.<sup>150</sup> Of the 434 claimants before court claiming restoration only 22 claimants won the formal right to restoration of their land. Of the 22 only 7 claimants decided to proceed with that option.

### 4.3 Dukuduku Community claim

#### 4.3.1 Historical background

The Dukuduku forest lies in the northern part of KwaZulu-Natal, adjacent to the Greater St Lucia World Heritage Site in the Hlabisa District. It forms part of an area

---

<sup>146</sup> Pienaar *Land reform* 618.

<sup>147</sup> Pienaar *Land reform* 618 – 619.

<sup>148</sup> Walker C, Bohlin A, Hall R, Kepe T *Land, memory, reconstruction and justice* (2010) 268.

<sup>149</sup> Walker *Land, memory, reconstruction and justice* 269.

<sup>150</sup> Walker *Land, memory, reconstruction and justice* 264- 265.

under indigenous traditional authority. Different groups have occupied, used and owned the land at Dukuduku for a number of years.<sup>151</sup> However, government officials maintain that the residents of the forest are there illegally and are destroying the biodiversity of the area. As a result the government has concentrated its efforts on how to move people out. Despite these removals, many people remained or returned to the forested area.

By 1998 the government had relocated people living in the Dukuduku forest area at least four times over the course of a century for a diverse set of land use purposes.<sup>152</sup> The Dukuduku matter is a political one, and has raised concerns about the environment and economy of the area for various interested parties. According to the Department of Water Affairs and Forestry (DWAF), this forest is of immense value as some of its fauna and flora, including the gaboon viper, found only at Dukuduku Forest, is on the list of endangered species. Furthermore, the Dukuduku Forest is the last remaining coastal natural forest and vegetation area.<sup>153</sup> However, for the indigenous people in the area the dispossession of land and severe limitations of access to natural resources is at the heart of the unresolved land dispute.<sup>154</sup>

#### 4.3.2. Restitution and the issue of feasibility

The restitution process in 1994 provided an opportunity for the Dukuduku people to claim back their land. Despite the lodgement of a claim, the claimants have faced continued harassment by the state for their decision to remain in the forest during the investigation and resolution of the claim. The state continually alleged that the occupants in the forest were there illegally and there was a campaign from the state, in particular DWAF to ensure that any settlement of the claim did not include the option of residing in the forest.<sup>155</sup>

---

<sup>151</sup> *Dukuduku: The forest of our discontent* (June 2003) 3.

<sup>152</sup> Ziqubu N "Redress, social justice and reconciliation, practical experiences from AFRA's work with specific restitution claims in KwaZulu-Natal" Association for Rural Advancement Conference on the Restitution Program 3.  
<http://www.afra.co.za/upload/files/RestitutionConfPaperAug06.pdf> (date accessed 25/10/2014).

<sup>153</sup> *Dukuduku: The forest of our discontent* 19.

<sup>154</sup> Ziqubu "Redress, social justice and reconciliation, practical experiences from AFRA's work with specific restitution claims in KwaZulu-Natal" 2.

<sup>155</sup> Ziqubu "Redress, social justice and reconciliation, practical experiences from AFRA's work with specific restitution claims in KwaZulu-Natal" 3.

In 1999/ 2000 the forest was incorporated into the Greater St. Lucia Wetland Park area which is now declared a World Heritage Site. The occupation of the forest and any settlement of the restitution claim would have to be weighed up against both environmental and economic development plans for this area.

In 2000/2001 a study by DWAF argued that the existing human settlement would impact on Lake St Lucia through "potential" pollution and soil erosion, which would "spoil" the wetland system. The study raised the issue that occupation of the forest threatened the tourism potential of the area, seen to be a "primary" economic driving force for the region.<sup>156</sup> The department argued that the removal of people resident in the forest was necessary to conserve the forest.<sup>157</sup>

In 2002 the RLCC chose to dismiss the Dukuduku claim citing that it was a vexatious claim. The claimants, with the assistance of the Association for Rural Advancement (AFRA), sought legal opinion and challenged this decision in the LCC. In September 2002 AFRA presented a *Research Report* with the intention to provide and promote positive options for all stakeholders.<sup>158</sup>

In the review application the court stated that:-

It appeared from oral history as represented (sic) by the claimants that there were indigenous people who resided in the Dukuduku forest from time immemorial.

Despite all the unclarity on the foundation of the claim the removals did take place in the 1970's particularly 1974 as encapsulated in the file. As a result of these removals people who were resident in the forest lost certain rights which they used to have. Those were beneficial and occupational rights.

...the Dukuduku people were dispossessed of their rights in land as alluded to above as a result of the practice or conduct of the then government officials which was utterly discriminatory.

... there was no compensation paid to the victims of these removals.<sup>159</sup>

---

<sup>156</sup> *Dukuduku: The forest of our discontent* 20 -21.

<sup>157</sup> *Dukuduku Research Project, Final Report* September 2002.

<http://www.afra.co.za/upload/files/AP16b.pdf> (date accessed 6 /06/2015).

<sup>158</sup> *Dukuduku Research Project*.

<sup>159</sup> *Dukuduku Community v Regional Land Claims Commissioner: Kwazulu-Natal and Another* (LCC30/02) [2003] ZALCC 14 (30 May 2003) para 7.

In May 2003 the presiding judge in the LCC overturned the commissioner's decision and instructed the commission to gazette the claim as valid within a 30 day period. This presented the people of Dukuduku with a better opportunity to be part of negotiations aimed at deciding their fate.

#### 4.3.3 The *Dukuduku Research Report*

In its introduction of the *Research Report* AFRA states that:-

The research for this report was commissioned both within the context of this restitution claim and also an assessment that whatever the outcome of the Land Claim Court's decision, any resolution of the Dukuduku matter would have a broadly inclusive impact both on the restitution claimants and all the other residents of the forest. It was therefore decided that the focus of such a report should be both pragmatic and proactive in identifying that resolution of the Dukuduku impasse will only be achieved with the participation of the broader community and that a holistic analysis of the issues should form the basis of recommendations for consideration by all the key stakeholders.<sup>160</sup>

The study considers various factors in determining whether it is feasible for the land in the Dukuduku forest to be restored to the residents of the forest. The forest falls within the Mtubatuba municipality and any development plans will be informed by the infrastructural framework of that municipality.<sup>161</sup> The factors considered in the *Research Report* informed the different options to settle the restitution claim. The factors considered included:-

- a. Infrastructure** of the area, which looked at the current land use in the region and Dukuduku within the Mtubatuba IDP. Essentially land uses in the region include formal and informal agriculture and forestry, nature conservation, ecotourism and mining. In terms of the Mtubatuba IDP Dukuduku is described as:-

a community of some 10 000 persons has occupied the Dukuduku Forest where they provide a livelihood for themselves in the form of subsistence farming and the manufacture of crafts, essentially in the form of wood carving using the indigenous trees.<sup>162</sup>

---

<sup>160</sup> *Dukuduku Research Project 4.*

<sup>161</sup> *Dukuduku Research Project 6.*

<sup>162</sup> *Dukuduku Research Project 7.*

Furthermore the IDP identifies Dukuduku as one of the areas most in need of improved sanitation. The bulk water services in the area, which is under pressure and inadequate, will be required to supply the Dukuduku resettlement project adjacent to Monzi. There is no formal potable water supply within the informal settlement. Natural streams, boreholes and tanker delivery are used.

- b. The Dukuduku residents** are largely poor and just over half the population is dependant. The livelihoods of the residents primarily include subsistence and agricultural produce for selling such as pawpaw, amadumbi, bananas, potatoes and sugarcane; cattle; crafts including wood carving, mat and basket weaving for selling to tourists; and wage employment outside of the forest.<sup>163</sup> The residents often attend to sicknesses themselves before resorting to the clinic as a last option because it is too far away. Traditional medicine found in the forest and home remedies are used to treat these sicknesses.
- c. The environmental context** looks at the fact that the area is located within the Greater St Lucia Wetlands Park which was inscribed as a World Heritage Site in December 1999. The area was inscribed in terms of natural criteria namely:-
- ii. be outstanding examples representing significant ongoing ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals,
  - iii. contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance, or
  - iv. contain the most important and significant habitats for in situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.<sup>164</sup>

Assessment of the Dukuduku residents and the environmental context indicated that the participants are knowledgeable about the environment in which they live. They knew that they do not have to fertilise the soil to grow their crops, neither do they have to divert water to irrigate their fields. Local resources needed to create crafts are harvested seasonally; participants

---

<sup>163</sup> Dukuduku Research Project 10.

<sup>164</sup> Dukuduku Research Project 18-19.

explained the availability and location of traditional medicines for the treatment of ailments, and reflected a good understanding of their relationship to the land and their forest surroundings. The residents expressed concern regarding clean drinking water and sanitation. It was found that the residents of the Dukuduku forest live in harmony with their environment.<sup>165</sup>

- d. **Traditional authorities** that are proclaimed are those authorities which are recognised by the national government and formally proclaimed in *Government Gazette* notices. Although there is no formally recognised traditional authority in the area this does not prevent socially recognised traditional authorities from having jurisdiction amongst their followers in the area. Due to the lack of a formally proclaimed traditional authority it was difficult to establish the extent of these socially recognised traditional authorities.<sup>166</sup>
- e. **Land** use, land claims and their impact on the environment as well as development plans and responsibility for initiatives are key features of the *Research Report*. The report focuses on stakeholder positions on land claims, authority to participate in land claim negotiations, current tenure arrangements and land use systems by the residents of the Dukuduku residents.

A mapping workshop by AFRA and the Dukuduku residents identified that clear social and land use tenure systems were in place and that these created a functioning framework for residents in the Dukuduku Forest. The residents asserted that the land in the forest belongs to them as ancestral land and that there is no question that any consideration would be given to relocating elsewhere.<sup>167</sup>

The Dukuduku South Resettlement Project was an initiative of DWAF which planned to relocate residents of the Dukuduku Forest to land purchased for resettlement purposes by the then Department of Land Affairs. Although the department initiated a social scoping exercise, the socio-institutional profile of

---

<sup>165</sup> *Dukuduku Research Project 24.*

<sup>166</sup> *Dukuduku Research Project 25.*

<sup>167</sup> *Dukuduku Research Project 30.*

this settlement project was not clear, nor at what level consultation and discussion had taken place regarding the institutional framework of this new settlement.<sup>168</sup>

- f. **Agriculture** – the agricultural potential of the land has historically impacted on the Dukuduku forest, its surroundings and inhabitants. The fact that the residents of the forest are able to live and sustain themselves and produce sufficient produce for sale at profit in the rural environment of the forest is evidence of the community's initiative and commitment being self-sufficient and industrious.<sup>169</sup>

A mapping workshop by AFRA highlighted the agricultural potential and skilled craftsmanship of the residents of the Dukuduku forest, and their ability to sustain themselves and produce goods for sale outside the forest environment. It also indicated an understanding by the residents of the constraints which inhibit their productivity and potential for economic empowerment.<sup>170</sup>

- g. **Forestry** – the areas surrounding the Dukuduku forest have for years been vital for commercial and state forestry. Both these sectors have steadily encroached on the forest precinct due to the suitability of the environment and the financial viability of the timber produced. Private commercial timber farmers and the state, through its commercial timber component SAFCOL, have derived lucrative financial benefit from this form of industry, whilst communities adjacent to or inhabiting the Dukuduku forest have been forced to relocate a number of times due to the extension of forestry plantations.<sup>171</sup>
- h. **Tourism and economic opportunities** – the Lubombo Spatial Development Initiative is a programme by the governments of South Africa, Swaziland and Mozambique to promote new investment in the area. The initiative aims to encourage linkages between tourism and other sectors including agriculture, cultural tourism, agri-business, building, construction and light manufacture

---

<sup>168</sup> *Dukuduku Research Project 31 - 32*

<sup>169</sup> *Dukuduku Research Project 34 - 35.*

<sup>170</sup> *Dukuduku Research Project 43.*

<sup>171</sup> *Dukuduku Research Project 37.*



and craft production in order to create economic activity around lead investment projects.<sup>172</sup>

- i. **Stakeholder relationships** focused on the external stakeholders in the Dukuduku forest and their stated position on the Dukuduku matter and how these relationships impacted on the development of options for the residents of the forest. The report indicated that there was no integrated or coordinated approach or much discussion between parties at local, regional, provincial or national level. In other words there was no initiative by any of the key stakeholders to create an environment conducive to negotiation.<sup>173</sup>

#### 4.3.4 Options and recommendations

Based on the *Research Report* AFRA presented different options and scenarios for consideration.

##### 4.3.4.1 Option 1

The forest residents must be moved out of the forest because people cannot coexist with the environment in an apparently sensitive biodiverse area and the forest must be allowed to return to its pristine state.<sup>174</sup>

AFRA argues that this option will be met with resistance by the residents as their homes and livelihoods are disrupted; furthermore the forced removals of the forest residents will pose a negative threat to the Greater St Lucia Wetland Park as a tourist destination.

It was recommended by AFRA that this option would not be in the best interest of the affected community and interested stakeholders.

##### 4.3.4.2 Option 2

This option would be to remove the Dukuduku forest from the Greater St Lucia Park World Heritage Site and give the residents of the forest title to the land as they have established a viable relationship with their forest environment. This would mean that

---

<sup>172</sup> *Dukuduku Research Project* 39.

<sup>173</sup> *Dukuduku Research Project* 44 – 54.

<sup>174</sup> *Dukuduku Research Project* 55.

the state and other stakeholders would have to accept that the forest is not a pristine environment. Removing the forest from the Greater St Lucia Park World Heritage Site would mean that the land would become part of the Mtubatuba Municipal area and enable the new land owners to access resources and infrastructural development opportunities as part of the IDP plans for the region.<sup>175</sup>

This option argues that the restoration of land rights is feasible in the circumstances.

#### *4.3.4.3 Option 3*

Option three recommends that an environmental scoping exercise be conducted to assess those areas of the Dukuduku Forest which are considered to be of sufficient environmental sensitivity that they require concerted protection. Under this option it was suggested that the scoping exercise would determine which areas of the forest should be set aside for continued settlement habitation. In practice the residents will remain in the forest while protecting those areas of the forest that were considered threatened or environmentally sensitive. AFRA suggested that through negotiations between the stakeholders, agreement would be reached which would accommodate the livelihoods needs of the residents, agreement on the location of the sensitive environmental areas and their management.<sup>176</sup>

The *Research Report* recommended that option two and three are more viable in changing the status quo in the Dukuduku forest and include solutions which could accommodate the interests of all stakeholders. The recommendation is made that these options form the basis of a round table discussions and negotiations between government and community stakeholders. And any agreement between the parties ought to be based on environmental integrity and sustainability involving community tenure rights and land holding principles, and use agreements in partnership between the residents of the Dukuduku forest and the state.

---

<sup>175</sup> *Dukuduku Research Project 56.*

<sup>176</sup> *Dukuduku Research Project 56 – 57.*

However, despite the recommendations of the AFRA *Research Report* and other reports conducted by DWAF and the court instructing the commission to gazette the claim as valid, very little progress had been made by August 2006.<sup>177</sup>

#### 4.3.5 Dukuduku on-site resettlement

In August 2009 the state decided, after many years of unsuccessful negotiations, to allow inhabitants to remain within the former Dukuduku forest, but, subject to certain conditions in return for the full spectrum of government service delivery. Firstly, the original forest had to be rehabilitated along a new boundary with the iSimangaliso World Heritage Site. Secondly, the environmentally sensitive Umfolozi Floodplain, where illegal agricultural activities were eroding the function of the floodplain to filter water flows into Lake St Lucia, had to be preserved.<sup>178</sup>

A team of professionals was instructed to put in place a development framework that protects and maintains prime conservation areas, and simultaneously, provides for much needed socio-economic development for the affected communities. The project was called the Dukuduku on-site resettlement project. A substantial portion of the project area was still within the iSimangaliso World Heritage Site, which now had to be re-zoned for residential use and integrated within the adjacent communities that had been relocated from this former conservation area in recent years.<sup>179</sup>

It was imperative that stakeholders settled the matter because if the Dukuduku situation remained unresolved, it posed a serious threat to the World Heritage status of the iSimangaliso Wetland Park, political stability in the area, the development of a regional tourism industry and people's livelihoods, which would have resulted in negative impacts to the province and country as a whole.<sup>180</sup>

---

<sup>177</sup> Ziqubu "Redress, social justice and reconciliation, practical experiences from AFRA's work with specific restitution claims in KwaZulu-Natal" 3.

<sup>178</sup> *Dukuduku on-site resettlement project* 1.

<sup>179</sup> *Dukuduku on-site resettlement project* 1.

<sup>180</sup> [http://cdn.webhouse.co.za/site/files/7042/Dukuduku\\_KZN\\_Economic\\_Cluster\\_20090826\\_v2.pdf](http://cdn.webhouse.co.za/site/files/7042/Dukuduku_KZN_Economic_Cluster_20090826_v2.pdf) 4 (date accessed 30/05/ 2015).

#### 4.3.6 Conclusion

Conservation and socio-economic factors played an important role in striking a balance in the Dukuduku forest claim. Also important was the involvement of the claimant community in determining how to resolve the impasse. Had the state considered the study conducted by AFRA on behalf of the claimant community and the recommendations made in that report the land dispute could have been resolved sooner, without additional cost to the state and hardship to the claimant community. Notwithstanding the state's failure to act on AFRA's report, it is evident from the above that a feasibility/research report is an invaluable tool in determining the feasibility of restoration of land and providing viable options to the stakeholders.

#### 4.4. The AbeKunene Community claim

##### 4.4.1 Historical background

Boschoek farm is situated in the area called Kwahlathikhulu, in Umzinyathi District Municipality in KwaZulu-Natal. The land once belonged to the Kunene people who were originally from Swaziland. They left Swaziland because of wars in the 18th century against Sigweje, who was their leader. The Kunene people settled initially in Paulpietersberg. Some Kunene people remained in Paulpietersberg when Sigweje moved on downwards to Pietermaritzburg next to the Umsunduzi River to a place called EmaSwazini as they had not yet secured land of their own. While in Pietermaritzburg, Sigweje was encouraged to buy land. At the time, people did not have money to buy land. However, in 1870, with contributions from the Sigweje people Boschhoek farm was bought. The people moved to the farm to occupy their territory and this is how they became landowners. The community formed a trust, which consisted of the *inkosi* as their head and seven trustee members.<sup>181</sup>

In the 1960s the apartheid government made amendments to the Development Trust and Land Act 18 of 1936 aimed at eliminating African ownership or occupation of land outside the reserves.<sup>182</sup> In 1968 the government declared Boschhoek a 'black

---

<sup>181</sup> Association for Rural Advancement *Beating about the Boschhoek* (May 2004) [http://www.afra.co.za/jit\\_default\\_1017.html](http://www.afra.co.za/jit_default_1017.html); <http://www.afra.co.za/upload/files/RestitutionConfPaperAug06.pdf> 24-25.

<sup>182</sup> Dodson A "The Native Land Act of 1913 and its legacy" <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp29-32.pdf>, (date accessed 06/06/2015). Reserves were areas identified for occupation by Blacks.

spot<sup>183</sup> and wanted it cleared.<sup>184</sup> The Sigweje tribe was removed after the state expropriated their land on 22 November 1966. The actual removal took place between 20 August 1968 and 25 October 1968 when the Sigweje people were forcibly removed from their land and relocated to Vergelegen. This was the most traumatising experience in the history of the Kunene people. The Boschoek trustees tried to fight for the restoration of their land rights, but all their efforts were in vain. While the landowners were provided with land to live on, the title deed to that land was not transferred to them.

The Boschoek farm has since been used by the South African National Defence Force (SANDF) based in Ladysmith, KwaZulu-Natal, for their military training activities. These activities have included the testing of training in weaponry and large projectile explosives.

#### 4.4.2 Restitution and the requirement of feasibility

On 9 August 1993 the Kunene tribe approached AFRA to assist it to lodge a claim for restoration of their land rights of Boschhoek with the former Advisory Commission on Land Allocation (ACLA). ACLA rejected the claim on 12 September 1994 on the grounds that the tribe was not subjected to prejudicial practices during the removal and compensatory land was provided after the removal.<sup>185</sup>

In May 1995, and in terms of the RLRA, AFRA assisted the Sigweje Traditional Authority to re-lodge their claim for restoration of their land rights to Boschhoek. The RLCC in KwaZulu-Natal accepted and validated the claim.

##### 4.4.2.1 *The Community*

The Sigweje people and the traditional authority currently reside in an established area, which is over 50 kilometres from the claimed land, but have expressed a wish to have the land restored to them. The members of the Sigweje Community were dispossessed of their ancestral land under the apartheid regime and in the process

<sup>183</sup> Where an African-owned farm was surrounded by White-owned farms, it became known as a 'black spot'.

<sup>184</sup> Association for Rural Advancement "Kunene Community makes land claim to ACLA" *AFRA News* (August/September 1993)  
<http://www.disa.ukzn.ac.za/webpages/DC/Afn2393.1562.8140.000.023.Aug1993.9/Afn2393.1562.8140.000.023.Aug1993.9.pdf> (date accessed 30/05/2015).

<sup>185</sup> Association for Rural Advancement *Beating about the Boschhoek* 25.

they lost most of their material belongings, access to natural resources and more importantly their dignity and identity as a tribe:

While waiting for the processing of our claim, we dreamt how we were going to use our restored land.<sup>186</sup>

The Sigweje people had high hopes for their ancestral land. They saw the return of their land as their ticket to prosperity and formulated plans of how they were going to use the land. They planned to use a portion of the land for settlement, another portion for farming livestock, such as cattle and sheep, cultivating mealies, peanuts and groundnuts, fruit trees like peaches, apricots and oranges. Because there are rare trees and birds found in the forests of Boschhoek, the community wanted to use a piece of the land for tourism. From the community testimonials it is clear that the Sigweje people saw the land as a means to a better life and economic upliftment as encapsulated in the phrase:

...We wanted to strike it big with that land.<sup>187</sup>

Although land restoration was the preferred option of the Sigweje people, the SANDF was unwilling to relinquish the land.

#### 4.4.2.2. *The South African National Defence Force (SANDF)*

The department of defence is one of the largest users of property in South Africa. It holds approximately 0,4 per cent of the country's surface for a wide range of defence-related purposes.<sup>188</sup> The property requirements of the department stem from its core functions and activities.<sup>189</sup> The department's principles of dealing with land claims and restitution include, amongst others:-

31.10 The land under claim will be made available for restitution unless the Department of Defence deems it not feasible. This non-feasibility could be due to the fact that:

\* It might not be financially cost-effective;

---

<sup>186</sup> Association for Rural Advancement *Beating about the Boschhoek* 25.

<sup>187</sup> Association for Rural Advancement *Beating about the Boschhoek* 25-26.

<sup>188</sup> *South African Defence Review* 1998 Chapter XII, para 5.

<http://www.dod.mil.za/documents/defencereview/defence%20review1998.pdf> (date accessed 30/07/2015).

<sup>189</sup> *South African Defence Review* 1998 Chapter XII para 6.

- \* The specific location of the facility might be unique in terms of military requirements;
- \* The facility might be in the national interest from a strategic point of view.<sup>190</sup>

Furthermore, principles dealing with environmental management of defence land include the following:-

*Clean-up of training areas*

36. Military training activities have a variety of environmental impacts on land, water or air. One of these impacts is the contamination of training land with unexploded ordnance (UXO), shrapnel, targets and remains, as well as general waste. UXO can pose direct health risks to personnel as well as civilians entering contaminated land, while all forms of waste or pollution threaten the integrity of the physical environment and natural resources. Such contamination may restrict current military utilisation of the land, as well as sustained future military use and current or future non-military utilisation.<sup>191</sup>

37....

*Graves and burial sites*

38. Some of the areas under military control contain burial sites. Relatives and descendants are allowed to visit these graves when training activities permit and with due regard to their safety. The DoD has always been very sensitive in this regard and this practice will continue. An inventory of all graves on military controlled areas is being compiled. Standardised procedures regarding access to such burial sites on military properties are currently being drafted.<sup>192</sup>

The SANDF cited two main reasons for refusing to hand over the land. First, that Boschhoek is of key strategic importance to them as a training base in the province, which will not be replaceable in terms of geographical features; and secondly that the farm has unexploded ordnance on it which would be too expensive to clear and unsafe for settlement purposes.<sup>193</sup>

AFRA assisted the claimants to examine the SANDF's decision not to restore the land by appointing professional persons to undertake a feasibility study of the farm for settlement purposes. The study included a report on the feasibility and costs of clearing the land for settlement. Furthermore, an independent valuator was appointed to investigate alternative land, which the SANDF might be able to use, and

<sup>190</sup> *South African Defence Review* 1998 Chapter XII para 31.10.

<sup>191</sup> *South African Defence Review* 1998 Chapter XII para 36.

<sup>192</sup> *South African Defence Review* 1998 Chapter XII para 38.

<sup>193</sup> Ziqubu "Redress, social justice and reconciliation, practical experiences from AFRA's work with specific restitution claims in KwaZulu-Natal" 4.

which meets its strategic requirements. The AFRA reports indicated possibilities that could be explored further to help reach a win-win solution. Despite the possible options, the RLCC and the SANDF had insisted that the claimants settle for alternative land with some limited access rights to the Boschhoek farm. The claimants eventually agreed to the settlement. Alternative land was therefore acquired for the claimants and the claim has since been settled.<sup>194</sup>

#### 4.4.3 Conclusion

The history of the community and its ancestral link to the land was trumped by national security and economic interests. It can also be argued that the issue of public interest played a role in determining the non-feasibility of restoration. This is because it is not in public interest to restore land that is unsafe for habitation.

What is apparent is that the different studies conducted provide conflicting views on the issue of feasibility. In this particular instance the interest of the SANDF outweighed the interest of the claimant community to the point that the issue of non-feasibility was non-negotiable. The fact that the studies provide such stark differences is an indication that depending on who commissions a feasibility study the factors to be considered and the weight allocated to those factors will vary from case to case. In order to overcome the disparities in the different feasibility studies it is suggested that an independent agency be tasked with conducting the feasibility study for the purpose of land restitution and any dispute raised by the relevant parties be arbitrated to ensure objectivity of the feasibility study .

#### 4.5 Concluding remarks

While a feasibility study is a valuable tool in determining the issue of feasibility of restoration the above mentioned case studies raise the question of how the authorities view conflicting feasibility studies. It would appear that the different interests of the state then have to be weighed.

In the Cato Manor Development Project the state had to balance its commitment to land restitution against the provision of low cost housing and urban development. In

---

<sup>194</sup>Ziqubu "Redress, social justice and reconciliation, practical experiences from AFRA's work with specific restitution claims in KwaZulu-Natal" 4.



the Dukuduku forest claim the state had to balance the issue of nature conservation and ecotourism against land restitution. In this instance the state was able to strike a balance by restoring land rights subject to certain conditions that would promote environmental conservation and ecotourism. In the Abekunene Community claim the state's duty of national security is weighed against the state's policy of land reform. It is clear that the state's priority in this instance is national security. It is evident from the foregoing that the issue of feasibility is dynamic and flexible and is informed by the circumstances of each individual case.

Chapter 5 looks at case law to determine how the requirement of feasibility is interpreted and applied by the courts.

# CHAPTER FIVE

## 5. THE COURTS AND FEASIBILITY

### 5.1 Introduction

The power of the Court to order restitution in one form or another is derived primarily from section 35(1) of the Restitution Act. . . . The use of the word 'may' suggests that the Court has a discretion as to whether or not it should make such an order and what the content of that order should be. The discretion, although not unfettered, is a wide one. This is also apparent from the ensuing subsections in section 35 and from section 33 which lists the factors which the Court must consider in 'considering its decision in any particular matter'.<sup>195</sup>

The Land Claims Court (LCC) is a specialised court and its role and functions are set out in chapter III of the RLRA. In adjudicating claims for restitution the LCC has to balance conflicting interests. On the one hand the LCC has to consider redress and restitution, and on the other economic development and sustainability.<sup>196</sup> When determining the form restitution should take the court has regard to the section 33 factors.<sup>197</sup>

This chapter looks at case law and how the courts have interpreted and applied the requirement of feasibility. The cases analysed include:-

1. *In re Kranspoort Community*;<sup>198</sup>
2. *Mhlanganisweni Community v Minister of Rural Development and Land Reform*;<sup>199</sup> and
3. *Baphiring Community v Uys*.<sup>200</sup>

### 5.2 *In re Kranspoort*

The *Kranspoort* farm lies at the base of the Soutpansberg mountain range. The land was purchased by a Scottish missionary Alexander MacKidd in 1863. After many troubled years *Kranspoort* became a settled missionary community on which a

---

<sup>195</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 82.

<sup>196</sup> Pienaar JM "Restitutionary road: Reflecting on good governance and the role of the Land Claims Court" 33.

<sup>197</sup> Section 33 of the RLRA.

<sup>198</sup> 2000 2 SA 124 (LCC).

<sup>199</sup> [2012] 3 All SA 563 (LCC).

<sup>200</sup> (LCC64/1998) [2010] ZALCC 1; 2010 (3) SA 130 (LCC); [2010] 3 All SA 353 (LCC) (19 January 2010). See also *The Baphiring Community v Tshwaranani Projects CC*.

number of different groups of people lived. In 1953 tension between the different groups began to build as a result of a dispute between the missionary and the church council over the burial by a Christian living in the main mission settlement, Joseph Matseba, of his non-Christian mother-in-law at *Kranspoort*. There were some attempts to resolve these tensions, but they were not successful. The problems arising from this conflict continued throughout 1954. The Church made enquiries with the authorities as to how they might get rid of some of the people at *Kranspoort* and in 1955/6 gradually set about removing people from the area.<sup>201</sup> It is common cause that these removals were effected in terms of the Group Areas Act.<sup>202</sup> In 1999 a group calling themselves the *Kranspoort* community instituted a claim for the restoration of the farm originally known as *Kranspoort No1849*.<sup>203</sup>

The current owner of the farm is 'die Nederduitse Gereformeerde Kerk van Transvaal' (the church). The church together with Messrs Goosen and Venter, who each purchased one of the two portions which now make up the farm, but who have not yet received transfer, opposed the claim. All three parties disputed the claim on the basis, amongst others, that there was no existence of the 'Kranspoort Community' at the material times; that the community did not have a right in the land and questioned whether or not it is an appropriate exercise of the discretion contemplated by section 35 of the RLRA to restore rights in land.<sup>204</sup> The Church opposed the form of relief sought, saying that even if a claim is proved, restoration is not the appropriate remedy.

The court found that the claimants did in fact prove the existence of a community<sup>205</sup> and that the community did have beneficial occupation of Portion 1 and the remainder of the farm.<sup>206</sup> With regard to the claim for restoration of land rights in what constitutes the original farm *Kranspoort*, along with an order in terms of section 35(4) of the RLRA adjusting those rights to full ownership the court held that regard must be had to the factors in section 33 of the RLRA in determining what constitutes an appropriate order.<sup>207</sup>

---

<sup>201</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 17.

<sup>202</sup> 41 of 1950.

<sup>203</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 1.

<sup>204</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 23.

<sup>205</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 48.

<sup>206</sup> *Kranspoort Community Concerning the Farm Kranspoort* paras 60 and 69.

<sup>207</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 83.

It is clear that no single factor can be viewed in isolation when determining the issue of feasibility of restoration. As a result this chapter looks at each factor as examined by the court in the *Kranspoort community* claim in order to gain a better understanding of the requirement of feasibility.

### 5.2.1 The issue of feasibility

With reference to the *Pillay* case<sup>208</sup> Dodson J set about analysing the section 33 factors to determine what form of relief is appropriate.<sup>209</sup>

The factor referred to in section 33(a) is:

... the desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices.

The court stated that because the “Restitution of a right in land” is defined to include both restoration and the other forms of relief which are available this factor seems to be neutral in relation to the particular form of relief which is appropriate.<sup>210</sup>

Section 33(b) refers to:

... the desirability of remedying past violations of human rights.

According to the court the removal of the claimant community involved serious violations of human rights and if the community preferred restoration in order to remedy those violations, they were supported in this regard by the authorities. This factor was held to weigh in favour of restoration. However, there may be situations where the remedying of past violations of human rights can be achieved without restoring rights especially where such rights were very limited in nature. Taking into account all the circumstances in this case the court was of the view that if the rights in land were not restored the community would be left in circumstances substantially less favourable than those they were in before the dispossession and this would constitute an inadequate remedying of those past violations. As a result the order of restoration is an appropriate exercise of the court's discretion.<sup>211</sup>

---

<sup>208</sup> *Pillay v Taylor-Burke Projects (Pty) Ltd and others* LCC 119/99, 19 October 1999.

<sup>209</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 83.

<sup>210</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 84.

<sup>211</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 85.

Section 33(c):

... the requirement of equity and justice.

This factor requires the positions of all the parties affected by the claim to be considered. The church argued that the community never had rights of ownership and it could never be just and equitable to take the land away from the church, as owner. The court was of the view that the fact that the church had a better title to the land is tempered by the fact that it held the land specifically for the purposes of running a mission station for the spiritual and material well-being of the community and not for its own benefit. The court held that an order which restores the land to the community comes far closer to realising the original purpose of the bequest of the land to the church than allowing the church to retain the land purely for the purposes of selling it to private individuals with no connection to the mission history of the church.<sup>212</sup>

Section 33(cA):

... restoration of a right in land is claimed, the feasibility of such restoration.

The court gave this factor considerable attention in light of the church's argument that it was not feasible to restore the land rights to the claimant community. According to the claimant's evidence they intended to re-establish themselves at Kranspoort and live off the land on the basis of the agricultural activities which they conducted on the land before. This meant that potentially some 800 hundred people would return to Kranspoort. The church argued that the infrastructure at Kranspoort could not cope with the proposed resettlement. In addition the church considered the claimant's lack of planning of their proposed return as a factor to be weighed against the feasibility of restoration.<sup>213</sup>

While the concept of feasibility is not defined in the RLRA the court was of the opinion that some guidance as to what was meant by the concept of feasibility can still be derived from the repealed section 15(6).<sup>214</sup>

---

<sup>212</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 86.

<sup>213</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 87.

<sup>214</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 89.

Section 15(6) read -

In considering whether restoration or acquisition by the State is feasible . . . the Minister shall, in addition to any other factor, take into account -

- (a) whether the zoning of the land in question has since the dispossession been altered and whether the land has been transformed to such an extent that it is not practicable to restore the right in question;
- (b) any relevant urban development plan;
- (c) any other matter which makes the restoration or acquisition of the right in question unfeasible; and
- (d) any physical or inherent defect in the land which may cause it to be hazardous for human habitation.<sup>215</sup>

After examining the meaning of feasibility the court held that it is important to bear in mind that the immediate context of the words in the context of land restitution relates to the feasibility of *restoration* (his emphasis). The feasibility of the community's plans for resettlement or community development after restoration are not expressly included in the formulation of paragraph (cA). The focus is on the process of actual restoration of the rights although the various criteria referred to in the repealed section 15(6) do seem to imply some enquiry into the intended use of the claimant in so far as it called for reference to be made to changes in the zoning for the area and any relevant development plan. These are land use planning measures and the intention of the repealed section 15(6) is that restoration would not be considered feasible where the claimant's intended use was not consistent with more recent development of the land itself or in the surrounding area.<sup>216</sup>

Dodson J held that the test which emerges from this analysis is that the court should ask: *is the restoration of the rights in land in question to the claimant possible and practical*,<sup>217</sup> considering the following factors: –

- (i) the nature of the land and the surrounding environment at the time of the dispossession;
- (ii) the nature of the claimant's use at the time of the dispossession;

---

<sup>215</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 88.

<sup>216</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 91.

<sup>217</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 92

- (iii) the changes which have taken place on the land itself and in the surrounding area since the dispossession;
- (iv) any physical or inherent defects in the land;
- (v) official land use planning measures relating to the area;
- (vi) the general nature of the claimant's intended use of the land concerned.<sup>218</sup>

The Judge stated that the test did not mean that an enquiry into the social and economic viability of the claimant's intended use is required. With regard to the church's argument about a lack of planning on the part of the claimant community the court held that this is not relevant to the feasibility of restoration.<sup>219</sup>

What is relevant is that there is no evidence of any zoning or other legal impediment to restoration, nor of any transformation of the land or the surrounding environment, nor of any physical or inherent defect in the land which makes the intended agricultural and residential use of the land hazardous or impractical.<sup>220</sup>

As a result the court was satisfied that the restoration of rights in land in respect of both Portion 1 and the Remainder is feasible.

Section 33(d):

... the desirability of avoiding major social disruption.

The court found that there were no circumstances present in this matter which suggest that a restoration order will cause major social disruption nor were there any affirmative action measures in place that required consideration in terms of section 33(e).<sup>221</sup>

Section 33(eA) requires the following considerations:

... the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession.

Although some compensation was paid to a small number of the former residents the court viewed the fact that there was no provision for any compensatory land as a

---

<sup>218</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 92.

<sup>219</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 93.

<sup>220</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 93.

<sup>221</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 94.

strong consideration in favour of an order of restoration. With regard to the circumstances prevailing at the time of the dispossession, the court held that those circumstances, as set out above, support an order of restoration.<sup>222</sup>

Section 33(eB) deals with the following issues:

- (i) the history of the acquisition and use of the land;
- (ii) the history of the dispossession;
- (iii) the hardship caused by the dispossession; and
- (iv) the current use of the land.

In considering the severe hardship suffered by the former residents as a result of the removals, Dodson J was of the view that the history of the land and the long-standing association of the claimant community with the land favour an order restoring it to them.<sup>223</sup> Furthermore the court had to consider the current use of the land, the value of that use to both the current users of the land and in terms of the public interest and then evaluate the impact of a restoration order.<sup>224</sup> With regard to *Kranspoort* not much evidence was led as to the current use of the land. The court made reference to a report which formed part of the church's bundle of documents:-

...According to Gaigher, the area is particularly important from an environmental point of view because it is unique in many respects and features a number of threatened plant and animal species. He also speaks of the vulnerability of the environment in the Soutpansberg to harmful activities by humans. There is also reference in the report to the cultural history of the area, with artefacts having been found evidencing Early, Middle and Late Stone Age activity. There are also Iron Age sites, and there is rock art. The report refers to the formation of the Western Soutpansberg Conservancy. He also says that a process is under way to have the Soutpansberg area recognised as a World Heritage Site and as a Biosphere Reserve in the relevant programme of UNESCO. The focus of the report is to argue for a clear policy and principles regarding the management of the conservancy in order to preserve its heritage.<sup>225</sup>

The claimants did not dispute the report and the court accepted that the area is an environmentally sensitive one and that the current use tends to promote the protection of the environment. It was accepted that this is in the public interest,

---

<sup>222</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 95.

<sup>223</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 95.

<sup>224</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 96.

<sup>225</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 98.



however, that is as far as it goes in terms of value to the current user and the public. The court found that ‘...if restoration will not prejudice the sustainable management of the farm from an environmental perspective, there is no reason why the current use should hold sway over restoration’. Furthermore, the community is part and parcel of the historical heritage of the area and no reason why it should not be embraced in the conservancy’s plans if the claimant community is prepared to comply with the standards set for the sustainable management of the area.<sup>226</sup>

The court was mindful of the serious problems generally encountered post restoration and identified four problems that might arise at Kranspoort. These potential problems included organisational matters; decision making on the basis of insufficient information; absence of planning; and the risk of unsustainable depletion of renewable resources. The court addressed these issues by including in its order appropriate conditions in terms of section 35(2) and 35(3) of the RLRA.<sup>227</sup>

In the circumstances the court was satisfied that the restoration of rights in land was feasible. The order for restoration was made subject to the submission of a development plan within six months after judgment; where after the transfer of the land would be ordered.

### 5.2.2 Conclusion

In arriving at a decision for actual restoration Dodson J considered as important the circumstances existing at the time of dispossession including the nature of the land and surrounding environment; the nature of the claimants use at the time of the dispossession as well as the changes that took place after the dispossession; the physical and inherent defects in the land and official land use planning measures relating to the area and finally the claimant’s intended use of the land.<sup>228</sup>

The court played an important role in balancing the different interests and provided an in-depth analysis of the circumstances and factors that supported an order for physical restoration of land rights. The fact that the order was made subject to the claimants submitting a development plan is an indication that the court views

---

<sup>226</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 100.

<sup>227</sup> *Kranspoort Community Concerning the Farm Kranspoort* para 111.

<sup>228</sup> Van Wyk “‘Feasibility of restoration’ as a factor in land restoration claims” 600 - 601.

planning as an important tool when a claim for actual restoration of land rights is made. Proper planning will provide the court with a better picture of the factors and circumstances and guide the court in its final determination. Planning will also assist the claimants in making informed decisions.

It is suggested that the claimants have a proposed plan to support their argument for physical restoration. The proposed planning framework, at the very least, ought to include the financial implications for acquiring the land and resettlement; the number of individuals and families who are expected to resettle on the land in question; the institutional and financial support available for the resettlement of the community; the intended use of the land and the available resources to assist the community in achieving its objectives should the land be restored.

### **5.3 The Mhlanganisweni Community<sup>229</sup>**

This is a claim for land on which the Mala Mala Game Reserve, a world renowned ecotourism destination, is situated. The land has an elongated shape and is sandwiched between the Sabi Sand Wildtuin to the west and the Kruger National Park to the east and is located on nine properties. The Game Reserve has been at the forefront of commercial eco-tourism in South Africa since 1962. The facilities and improvements at the Game Reserve are of world-class standard. More than 95% of its guests are from outside South Africa and over time, the Reserve has won many awards. The land owners claim that the Reserve presents the best big five game viewing on the African continent.<sup>230</sup>

Several parties lodged claims against the Mala Mala land which was consolidated, by agreement of the parties, into a single claim in the name of the Mhlanganisweni Community. In May 2008 and in an attempt to settle the claim the RLCC made an offer to the current landowners to purchase the land for an amount of R741 056 992, subject to the approval of the minister. The minister did not approve the offer which then resulted in the collapse of the settlement negotiations.<sup>231</sup> The matter was referred to court by the RLCC in August 2009 with the recommendation that the land be restored to the claimant community. However in December 2010 the RLCC made further submissions to the court that should the court find that the state might be

---

<sup>229</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform*.

<sup>230</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 45.

<sup>231</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 4.

required to pay compensation in excess of R30 000.00 per hectare that it would not be feasible to restore the Mala Mala land. As a result the RLCC recommended that the claimants receive alternative redress in the form of monetary compensation.<sup>232</sup>

The claimant community, consisting of approximately 2000 people, submitted that restitution of their land rights should take the form of restoration of land. If restored, they intended to enter into an agreement with an investor/ operator and continue the use of the land as a commercial eco-tourism destination. Their plan was to get a fixed rental from the land and a share of the turnover from the business.<sup>233</sup>

The minister, however, did not agree with RLCC that it was feasible to restore the land to the claimants. He submitted that the value of the property as recommended by the valuator was exorbitant and the state could not afford to acquire those farms at that value. Furthermore, it was questionable whether the profitability of the businesses which had been conducted in those farms was or would be economically sustainable if restoration were the preferred option. It was the minister's submission that the claimants receive equitable redress instead.<sup>234</sup>

While the land owners agreed that there was a need for restitution of the Mala Mala land to the claimants in the form of restoration of the land, they submitted that if the land had to be expropriated in order to restore it to the claimants, the just and equitable compensation to which they would be entitled would not be less than R989 057 000. In other words, the compensation payable to them would exceed R30 000.00 per hectare plus the agreed value of the improvements in the sum of R66 169 492. The owners argued that if feasibility hinged on the compensation they would receive, restoration of the land would not be feasible.<sup>235</sup>

The four use-right holders argued that the disadvantages to be suffered by them, by the land owners and by the general public through the loss of the world-renowned eco-tourism resource and the protected natural environment of the Mala Mala land, would be disproportionate to the advantages to be gained by the claimants from the

---

<sup>232</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 5-6.

<sup>233</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 9.

<sup>234</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 10.

<sup>235</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 12.

restoration of their rights in the land. As a result it was their contention that the claim for actual restoration be dismissed.<sup>236</sup>

### 5.3.1 The issue of feasibility

Following a pre-trial conference and separation of issues the principle issue to be decided in this case was whether the actual restoration of the Mala Mala land was feasible within the meaning of section 33(cA). The court held that the following factors are relevant in this particular case:

(cA) if restoration of a right in land is claimed, the feasibility of such restoration

(eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;

(eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land.

In terms of section 33(f) the Court must also consider any other factor which might be relevant and consistent with the spirit and objects of the Constitution.<sup>237</sup>

In addressing the requirement of feasibility the court made reference to *In re Kranspoort Community*,<sup>238</sup> *Haakdoornbult Boerdery CC and Others v Mphela and Others*<sup>239</sup> and *Baphiring Community v Uys and Others*.<sup>240</sup> The court held that the factors enumerated in those judgments did not constitute a *numerus clausus*. With reference to the *Nkomazi*<sup>241</sup> case the court held that the principles applied in that case for determining whether restoration is feasible or not, are also relevant to the *Mhlanganisweni Community* case. The claimants in the *Nkomazi* case were dispossessed of rural land which has since been built up and is presently urban land. The court in *Nkomazi* held that if the claimed land had to be expropriated at huge and prohibitive financial cost to the state and restored to the claimants who were dispossessed of rural land, the claimants would be substantially overcompensated at public expense. The fact that the claimants in this case intended to use the land, if restored, for the same purpose as its present owners does not counter the

<sup>236</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 13.

<sup>237</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 18.

<sup>238</sup> LCC 26/1998 (10 December 1999).

<sup>239</sup> 2007 (5) SA 596 (SCA).

<sup>240</sup> (LCC64/1998) [2010] ZALCC 1; 2010 (3) SA 130 (LCC); [2010] 3 All SA 353 (LCC) (19 January 2010): See *Mhlanganisweni Community v Minister of Rural Development and Land Reform* paras 21-23.

<sup>241</sup> *Nkomazi Municipality v Ngomane of Lugediane Community and Others* [2010] 3 All SA 563 (LCC).

overcompensation.<sup>242</sup>

In determining the factors that would have a bearing on the feasibility of restoration the court, in the Mala Mala case, looked at the following factors:

- Overcompensation<sup>243</sup>

When the claimants and/or their ancestors were dispossessed, they were labour tenants, rent paying squatters or illegal inhabitants.<sup>244</sup> The land the claimants lost was living space, grazing and cropping land. That land was now restored to its pristine wilderness condition with an eco-tourism business conducted on it. The land claimed is entirely different from what it was when the claimants were dispossessed. The court held that to restore one of the foremost eco-tourism destinations in the country to the claimants at huge and prohibitive financial cost to the state, would amount to substantial overcompensation at public expense.

- The capacity of the claimants to manage the land if it is to be restored.<sup>245</sup>

In the event of the land being restored to them, the claimants indicated that they did not intend to settle on the land, but to continue its use as an eco-tourist destination. As a result the court had to be satisfied that the claimant community would be in a position to manage the land in a sustainable manner, to preserve its ecological and conservation status, and to run the eco-tourism business on the land. The claimants recognized that they did not have the capacity to manage the land or the business themselves and that they would have to bring in a knowledgeable operator on a joint venture basis.<sup>246</sup>

The court was not persuaded by the co-operation agreement presented by the claimants with regard to the proposed joint venture. The agreement was found to be too vague and open ended. Furthermore the projected figures presented in the co-operation agreement would provide the claimants with an income which constituted a very low yield on the capital which had to be expended by the state to acquire the land. The court found that on the basis that the Mhlanganisweni Community has

---

<sup>242</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 23.

<sup>243</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 79.

<sup>244</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 94.

<sup>245</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 82.

<sup>246</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 88.

2000 members; the share of each member in the annual rental will be R3 344, before community management and distribution expenses, which comes to R279 per month per member.<sup>247</sup> Gildenhuys, J held that the state can hardly be expected to pay more than R790 million to achieve such a small income for each community member. In the end the definitive factors were that it is not in the public interest to pay an amount of R791 million to restore the Mala Mala land to some 2000 claimants, who did not have the capacity to maintain the land in its current state. The amount was excessive and would result in overcompensation.<sup>248</sup>

In contrast in the Dhlomo-Dhlomo Community<sup>249</sup> claim for land being developed as a golf estate the court held that budget and/or financial resources of the state were never intended to be a reason in itself for opposing physical restoration.<sup>250</sup> In this case the court had to balance the state's limited resources on the one hand and the developmental and employment possibilities and the associated transfer of skills on the other hand.

I am awake to the reason(s) put forward by the claimants for physical restoration. The benefits including, poverty alleviation that the restored property will bring to the claimant community. I cannot find support for the proposition that the financial compensation is an equitable redress. A simple calculation indicates that each household will be entitled to a once off payment of R 2 482.50. Whilst with restored land the benefits would be greater on a long term basis.<sup>251</sup>

Mpshe J held that the court in considering its decision, in the Dhlomo-Dhlomo Community claim, is to have regard to the guidelines as provided in section 33 of the Act. In particular the court had taken into account subsections 33(cA), 33(eB) and 33(c) and came to the conclusion that in order to satisfy equity and justice physical restoration is unavoidable. The state was ordered to acquire the land and thereafter transfer it to the claimant community.<sup>252</sup>

---

<sup>247</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 90.

<sup>248</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* para 93.

<sup>249</sup> *Dhlomo-Dhlomo Community v Minister of Agriculture and Land Affairs*.

<sup>250</sup> *Dhlomo-Dhlomo Community v Minister of Agriculture and Land Affairs* para 38.

<sup>251</sup> *Dhlomo-Dhlomo Community v Minister of Agriculture and Land Affairs* para 49.

<sup>252</sup> *Dhlomo-Dhlomo Community v Minister of Agriculture and Land Affairs* paras 50-52.

### 5.3.2 Conclusion

In the *Mhlanganisweni Community* case the court recognised that where the restoration of land was concerned actual restoration was preferable. While the court was mindful of the umbilical cords that joined certain communities to their ancestral lands, in this particular case other factors effectively trumped actual restoration.<sup>253</sup> The overriding factor was that it would not be in public interest to pay R791 million to restore the land to a community that did not have the capacity to take care of the land.

While the court in the *Dhlomo-Dhlomo Community* case held that overwhelming evidence supported actual restoration it provided no in-depth analysis of the circumstances or factors to support how it arrived at its decision.<sup>254</sup> Some commentators submit that it is for this reason that the judgment in this particular case is incomplete.<sup>255</sup> It is suggested that the court ought to have conducted an in-depth analysis to provide answers to the following questions:-

- Which factors in particular favoured the physical restoration, why and in which degree?
- What about the fact that vacant land had been lost and not land on which the groundwork had been done to accommodate a golf estate?
- Would it have made any difference if the compensation awarded as equitable redress was closer to the purchase price of R 50 million?
- This also begs the question why there was such a big difference between the amount to be awarded by government and the official valuation for purposes of the purchase agreement.
- On which terms would the restoration take place?
- Will the fourth defendant still be involved?
- How much weight was given to the fact that the fourth respondent had invested countless hours and expended thousands in securing the rezoning application and had already embarked on development expenses?<sup>256</sup>

---

<sup>253</sup> Pienaar *Land reform* 600.

<sup>254</sup> Pienaar *Land reform* 602.

<sup>255</sup> Pienaar *Land reform* 604.

<sup>256</sup> Pienaar *Land reform* 603.

In light of the various factors to be considered, and the enormous impact an order for actual restoration would have on the current owners, the claimants and the state, no question should be left unanswered.<sup>257</sup>

The Mhlanganisweni Community, however, refused to accept that it was not feasible to have the land restored to them and rejected the offer of compensation as a form of equitable redress. In 2013 the Mhlanganisweni Community approached the Constitutional Court for an order to return the land to them.<sup>258</sup> The state, however, made application to the court to have the matter removed from the roll with a view to reaching an out of court settlement with the land owners. The reason for removing the matter from the roll was that the state did not want the court to set a judicial precedent in respect of market value and thereby making restoration unaffordable.<sup>259</sup> Despite agreeing with the LCC's decision regarding the issue of feasibility the Land Minister submitted that the position of the government was that financial compensation to claimants did not address land redistribution. He stated that in many instances, it had been difficult to address land redistribution because the market value of the land sought for redistribution was extremely high.<sup>260</sup>

#### **5.4 Baphiring Community claim**

In September 1971 the Baphiring Community was dispossessed of land known as the 'Old Mabaalstat' situated in the North West Province. The farm is now referred to as the farm Rosmincol. The community was moved to other land some 80 km away, where they were resettled. This settlement is known as the 'New Mabaalstat'. At the time of dispossession evidence indicated that:-

... the land occupied by the Baphiring tribe was not commercially developed. Farming occurred on a small scale for the subsistence of community members. Surplus produce

---

<sup>257</sup> Pienaar *Land reform* 604.

<sup>258</sup> Mabuza E Mala Mala land claim heads for Constitutional Court <http://www.bdlive.co.za/business/agriculture/2013/04/24/malamala-land-claim-case-heads-for-constitutional-court> (accessed 08/03/2016).

<sup>259</sup> City Press R 1bn land claim: deal or no deal? <http://www.news24.com/Archives/City-Press/R1bn-land-claim-deal-or-no-deal-20150429> (date accessed 8/03/2016)

<sup>260</sup> Mabuza E Mala Mala price still to be negotiated [www.bdlive.co.za/business/agriculture/2013/08/06/malamala-price-still-to-be-negotiated](http://www.bdlive.co.za/business/agriculture/2013/08/06/malamala-price-still-to-be-negotiated) (date accessed 9/03/2016).



was sold in the surrounding area. Some members of the community worked elsewhere, in Johannesburg and other towns and cities. The dwellings were rustic. Homes were made out of clay bricks with soil from the river bed at old Mabaalstat. Roofs were made of grass and wood collected on the land. Water was drawn from the river for personal use and to water the vegetable gardens.<sup>261</sup>

The area to which the community was relocated, the New Mabaalstat, consisted of two villages. The land, whilst not suitable for intensive vegetable cropping, is suitable for cattle farming. The presence of a hunting facility suggests that it may have potential as a game farm. Various attempts to cultivate the land were unsuccessful partly because of insufficient water.<sup>262</sup> In 1998 the claimant community, comprising some 400 households claimed that the whole area of land known as the Old Mabaalstat (now Rosmincol) be restored to them. If the claim was successful and the claimed land restored, it was envisaged that the land would be held by a communal property association to be formed.<sup>263</sup> Rosmincol belonged to eight individual owners and, at the commencement of the case was occupied by a much smaller number of people. The land was developed for commercial farming in that large tracts of land had been cultivated and there was intensive cattle farming. The land which the claimants sought to be restored comprises a total of 7515,1629 hectares of agricultural land. The combined agricultural production of the landowners is: 1800 calves produced per year, 5900 tonnes of maize, 400 tonnes of beans, 470 tonnes of sunflower seeds and 1080 000 litres of milk.<sup>264</sup>

The parties did not agree on the form restitution was to take. As a result the court was to ‘...determine whether the restoration of Rosmincol is feasible and equitable, bearing in mind that if the community is relocated to Rosmincol the relocation will not be successful without additional financial assistance’.<sup>265</sup> Furthermore section 33(c) requires the court to consider the requirements of justice and equity taking into account that the removal to New Mabaalstat did not adequately compensate the claimant. In the circumstances the court had to determine the form of restitution

---

<sup>261</sup> *Baphiring Community v Uys* para 6.

<sup>262</sup> *Baphiring Community v Uys* para 10.

<sup>263</sup> *Baphiring Community v Uys* para 2.

<sup>264</sup> *Baphiring Community v Uys* paras 7-8.

<sup>265</sup> *Baphiring Community v Uys* para 15; See also Pienaar “Restitutionary road: Reflecting on good governance and the role of the Land Claims Court” 41.

which would redress the injustice of the past and also be fair to the *fiscus* and the landowners.

#### 5.4.1 The issue of feasibility

Evidence was placed before the court regarding what would be required to ensure that specific restoration, if ordered, would be successful. The future of Rosmincol and New Mabaalstat had to be considered. During argument four criteria were identified to guide the question of whether or not restoration would be feasible. These factors included:-

- the costs of the acquisition of the land;
- the disruption of the lives and economic activities of the present land owners;
- the ability of the claimant community to use the land; and
- the public interest, including the extent of state resources.<sup>266</sup>

It would cost the *fiscus* in excess of R70 million to acquire the land.<sup>267</sup> Regarding the full financial repercussions of restoring Rosmincol, it was explained that the various households could access integrated settlement grants valued at R6 595 per household. It was also possible to access a development grant equal to 25% of the total value of the land if the claimant community lodged an application accompanied with a detailed feasibility study.<sup>268</sup>

Furthermore, it was acknowledged that the restoration of agricultural land in the past had generally been unsuccessful due to the inadequate financial support of the community and its inadequate knowledge of and skills in commercial farming. The official in charge of resettlement in the office of the RLCC testified that not a single project of the 330 running in the North West province had been successful. Factors impacting negatively on the success rate included, *inter alia*, a lack of skills in managing projects and continuing farming, a lack of strategic partners, and a lack of funding.<sup>269</sup>

---

<sup>266</sup> *Baphiring Community v Uys* para 17.

<sup>267</sup> *Baphiring Community v Uys* para 18.

<sup>268</sup> *Baphiring Community v Uys* para 24.

<sup>269</sup> *Baphiring Community v Uys* para 25.

It was submitted on behalf of the land owners that restoration of the land would result in large-scale disruption of the lives and economic activities of persons present on the land, and would further have a negative impact on food production. However, it was submitted that restoration need not impact on food production to a great extent since other countries, like Zimbabwe, produced maize better than South Africa. It was also noted that the area in question is better suited to livestock production than cash cropping, and that South Africa has experienced a decline in commercial farming.<sup>270</sup>

The lack of support and resources weighed against relocating the Baphiring Community to the old Mabaalstat. Community members would be forced to downgrade their living space and new houses and infrastructure would have to be provided. The actual cost would be further increased by the financial assistance necessary to provide the homes and infrastructure required to enable the community to move back to the Old Mabaalstat. In addition there would be the costs of equipment and running capital necessary for continued farming on the land. It was stated that over and above the acquisition costs, another approximately R65 million would be required to ensure the community can relocate successfully to Old Mabaalstat. It later transpired that not everyone in the Baphiring Community wanted to relocate to Rosmincol.

The court held that resources in terms of expertise and financial assistance were necessary but lacking in the present case. This impacted negatively on the community's intended use of the land and the feasibility of restoration. Furthermore, the state conceded that restoration was not feasible and that the successful restoration of the Baphiring Community to Rosmincol was not within the state's financial means. In the circumstances the court should not grant the claimant's claim for restoration, but rather award equitable redress.

In light of the above evidence the court found that it was not feasible to restore Rosmincol to the claimants. However, the restoration of parcels of land comprising graves was found to be feasible.

---

<sup>270</sup> *Baphiring Community v Uys* para 23.

#### 5.4.2 The appeal

The claimants approached the Supreme Court of Appeal (SCA)<sup>271</sup> to appeal the non-restoration order. In dealing with the appeal Cachalia J made reference to a number of cases. With particular reference to *Mazizini Community v Emfuleni Resorts*<sup>272</sup> the court stated:

‘[T]he courts are not in a position to deny claimants their primary right to restitution merely because they cannot determine what is affordable to the state and what is not in a given case. Nor are they in a position to determine in advance what projects will be viable and those that will not be viable before granting restoration.’<sup>273</sup>

Cachalia J was of the view that the court a *quo* was correct to consider the cost implications of the restoration because it lies at the heart of a proper assessment of feasibility. These costs would include the cost of expropriating the land from the current landowners, resettling the claimants on this land and supporting a sustainable development plan for the resettled community. However, in this instance the evidence presented by the state on these aspects was absent, which meant that the LCC was not in a position to sufficiently assess the issue of costs.<sup>274</sup>

The Constitutional Court recently said that before a court makes a non-restoration order, it must be satisfied that this ‘is justified by the applicable legal principles and facts’. Furthermore a public body seeking a non-restoration order must place the necessary facts before the court to enable it to make this finding. Consequently a non-restoration order granted in the absence of such evidence constitutes a material irregularity that vitiates the order.<sup>275</sup>

What should have happened in this case is that the state ought to have conducted a feasibility study into the restoration of the land. That study should at the very least have taken into account the number of families who are expected to be resettled, the institutional and financial support for the resettlement and the envisaged land usage if the land is restored. In addition the following evidence should have been placed before the court: the cost of expropriating the land from the current land owners; the extent of the loss of food production to the local community should farming activities not be continued at current levels; the extent of social disruption of the current landowners and their families should they be required to physically leave their farms; the number of farm workers who

<sup>271</sup> *Baphiring Community v Tshwaranani Projects CC*.

<sup>272</sup> *Mazizini Community v Emfuleni Resorts (Pty) Ltd & Others* [2010] JOL 25378 (LCC).

<sup>273</sup> *The Baphiring Community v Tshwaranani Projects CC* para 12.

<sup>274</sup> *The Baphiring Community v Tshwaranani Projects CC* para 14.

<sup>275</sup> *The Baphiring Community v Tshwaranani Projects CC* para 15.

are dependent upon their incomes from their employment on the farms and the extent and impact of social disruption, including the loss of employment, to them; and finally should the land be restored how the problem of 'overcompensation' of the claimants will be avoided.

It was for these reasons that the appeal was upheld and the non – restoration order of the LCC was set aside. The matter was remitted to the LCC to consider and determine afresh the feasibility of restoration taking into account the following factors:

....

- 4.1 The nature of the land and the surrounding environment at the time of dispossession, and any changes that have taken place on the land itself and in the surrounding areas since dispossession.
- 4.2 Official land use planning measures governing the land concerned.
- 4.3 The cost of expropriating the land, including the costs of any mineral rights if compensable in law.
- 4.4 The institutional and financial support to be made available for the resettlement.
- 4.5 The extent of the compensation that shall be payable to the current owners of the land.
- 4.6 The numbers of the current occupants of the land, including both the current landowners and their families as well as any employee farm workers and their families. Furthermore, the extent of social disruption – including possible loss of employment – to these current occupants should they be compelled to vacate the land concerned.
- 4.7 The number of individuals and families who are expected to resettle. Moreover, to the extent that the entire community does not wish to resettle, the form and extent of restoration and/or restitution.
- 4.8 The extent to which the land, in its current state, can support those community members wishing to resettle both physically and financially.
- 4.9 The envisaged land usage should the land be restored, and the resultant extent – if any – of the loss of food production and any impact thereof on the local economy should farming activities not be continued at current levels.
- 4.10 Should the land be restored to the first appellant, the extent of 'overcompensation', if any, and how the problem of 'overcompensation', if it should occur, will be avoided.
5. Any other issue that has a bearing on the determination of the feasibility of restoring

the land or any part thereof to the first appellant.<sup>276</sup>

#### 5.4.3 Conclusion

In *Baphiring Community v Uys* actual restoration was rejected in light of the state's limited resources, the lack of expertise of the claimant community regarding the business venture and the poor track record of restitution projects generally.<sup>277</sup> The SCA held that the question of cost, including the cost of a sustainable resettlement plan, if the land is to be restored on this basis, must be considered as part of the court's assessment of feasibility.<sup>278</sup> This does not mean that the court will second guess a declaration by the state that it is unable to fund the cost of the restoration but rather that the state will be required to place convincing evidence before the court to justify this declaration. The SCA held that as the necessary evidence was lacking the LCC was in no position to fully consider whether actual restoration ought to take place. In the circumstances the court *a quo* ought to have called for additional evidence to be placed before it. Failure to do so constituted a material irregularity.<sup>279</sup> As a result the matter was remitted to the LCC for reconsideration.

It is submitted that while the financial implications of physical restoration lies at the heart of a proper assessment of feasibility, it ought not to completely overshadow other factors of consideration. The financial implications must be weighed against other factors, including satisfying equity and justice, rectifying past violations of human rights and the broader objective of land redistribution. The balancing of these and the section 33 factors in each individual case will dictate whether physical restoration is in fact feasible.

In an attempt to remove the obstacle to land reform whereby large sums of money have to be paid to land owners as compensation because of the "willing-buyer, willing seller" principle, the government has promulgated the Property Valuation Act 17 of 2014.<sup>280</sup>

---

<sup>276</sup> *The Baphiring Community v Tshwaranani Projects CC* para 22.

<sup>277</sup> Pienaar *Land reform* 603.

<sup>278</sup> *The Baphiring Community v Tshwaranani Projects CC* para 21.

<sup>279</sup> *The Baphiring Community v Tshwaranani Projects CC* paras 18-19.

<sup>280</sup> Spoor R, *Land reform - and the law of unintended consequences*.  
[http://www.dailymaverick.co.za/opinionista/2014-07-07-land-reform-and-the-law-of-unintended-consequences/#.VtmmP\\_I97IU](http://www.dailymaverick.co.za/opinionista/2014-07-07-land-reform-and-the-law-of-unintended-consequences/#.VtmmP_I97IU) (date accessed 02/03/2016).

#### 5.4.4 The Property Valuation Act

The aim of the Act is to, amongst others, provide for the establishment, functions and powers of the Office of the Valuer-General and for the regulation of the valuation of property that has been identified for land reform as well as property that has been identified for acquisition or disposal by the Department of Rural Development and Land Reform.<sup>281</sup>

In terms of the new Act the Valuer-General will determine the price that the State will pay for land to be acquired for land reform purposes.<sup>282</sup> The premise therefore being that there will be no need to negotiate and to agree on the price with the landowner, thereby ensuring that the State does not pay inflated prices for land and that the delays that are associated with protracted negotiations over price are obviated.<sup>283</sup>

It has, however, been submitted by some commentators that the Property Valuation Act may have the opposite effect to that intended. It has been submitted that:-

By effectively abolishing the “willing buyer willing seller” principle, the Property Valuation Act will result in a significant decrease in the number of land claims that are settled and a corresponding increase in the number of claims that must be referred to (the) Land Claims Court for adjudication. This will dramatically slow down the pace of land restitution.<sup>284</sup>

The reason for the above submission is that the market value of the land is only one of several considerations that the Valuer-General must take into account when determining its ‘value’. The other considerations which include the current use of the property and the history of the acquisition and use of the property tend to favour a ‘value’ lower than market value.<sup>285</sup> As a result it is more likely that fewer land claims will be settled by agreement and that more claims will have to be litigated to a conclusion.<sup>286</sup>

To date no regulations have been established, setting out the prescribed criteria procedures and guidelines contemplated in section 12 (1)(a) as to how this Act will operate in practice. The Act remains somewhat untested and its impact on restitution and the greater land reform programme remains uncertain at this stage.

#### 5.5. Concluding remarks

While actual restoration ought to take preference in all instances, it may only be granted once all the relevant circumstances and factors have been

---

<sup>281</sup> Introduction to Act 17 of 2014.

<sup>282</sup> Section 12(1)(a).

<sup>283</sup> Spoor R, Land reform - and the law of unintended consequences 1.

<sup>284</sup> Spoor Land reform - and the law of unintended consequences.

<sup>285</sup> Section 15(2) of Act 17 of 2014.

<sup>286</sup> Spoor R, Land reform - and the law of unintended consequences 3.

considered.<sup>287</sup> The *Baphiring Community* case emphasises the importance of having all the relevant facts and information before the issue of actual restoration can be considered. This highlights the fact that all the factors enumerated in section 33 of the RLRA are relevant when determining whether actual restoration is the preferred option.

The order handed down by the SCA is detailed and highlights the complexity and multi-dimensional nature of considering actual restoration or not. It is imperative that all the necessary information is placed before the court. It is only when all the relevant information is before court can a considered and weighed decision be made. The end result might still be that of non-restoration but then an in-depth analysis of all the relevant factors would have informed the final decision.

---

<sup>287</sup> Pienaar *Land reform* 603.



# CHAPTER SIX

## 6. CONCLUSIONS AND RECOMMENDATIONS

The most difficult and important question in restitution is not whether or not land claimants can get the outcome they prefer, but prior to that: whether they have made an informed choice in the first place. All too many claimants have chosen for land (or for money) - without being informed as to the exact implications, and often, it seems with very unrealistic hopes as to the kind of support and development aid they would get.<sup>288</sup>

### 6.1 Conclusions

It appears from the research conducted that the requirement of feasibility in determining actual restoration is both complex and multifaceted. Ultimately the process requires a comprehensive analysis of the section 33 factors as well as the factors set out in both the Baphiring Community and the Kranspoort Community claims *supra*. In addition there may also be other factors that would require consideration depending on the land in question and the surrounding circumstances. How these factors are weighed against each other will depend on each individual claim as there is no 'one size fits all' approach. The land in question, the claimant community, the current use and value of the land and available state resources often dictate how the various factors may be weighed against each other. Furthermore the state's various duties will have to be weighed against each other when a dispute arises as to which state duty takes priority.

6.1.1 Review of the feasibility studies for the Cato Manor Development Project,<sup>289</sup> the Dukuduku Forest<sup>290</sup> claim and the Abekunene Community<sup>291</sup> claim revealed that:-

- the state must balance its commitment to land restitution against the provision of low cost housing and urban development;

---

<sup>288</sup> Du Toit "The end of restitution: Getting real about land claims" referred to in *Kranspoort Community Concerning the Farm Kranspoort* para 109.

<sup>289</sup> See para 4.2 above.

<sup>290</sup> See para 4.3 above.

<sup>291</sup> See para 4.4 above.

- the high cost of actual restoration of a specific claim may adversely affect other restitution claims; in reality only a relatively small percentage of claimants may wish to return to their ancestral land;
- conservation and socio-economic factors play an important role in striking a balance in the final outcome;
- community consultation and education is crucial to determining the final outcome of the claim;
- a consultative process between the key stakeholders is important to negotiate viable options;
- a feasibility study is an invaluable tool in determining the feasibility of restoring land rights;
- a feasibility study provides the stakeholders with viable options so that informed decisions may be taken;
- a feasibility study helps expedite the process of land claims and reduces costs in the long run;
- the history of the community and its ancestral link to the land may be out-weighed by other factors including national security and economic interests;
- the issue of public interest plays a dual role in determining the outcome of a claim for actual restoration;
- the issue of public interest may play a role in determining the feasibility or non-feasibility of restoration;
- there are certain factors that may be non-negotiable such as national security and environmental safety;
- it is not in public interest to restore land that is unsafe for human habitation;
- the geographical location of a particular parcel of land may render it impractical to deliver bulk services (water, sanitation, waste disposal and electricity) for purposes of resettlement;
- depending on the location of the land claimant communities may be isolated resulting in the community being deprived of schools, education, health care and safety in the present location;
- sensitive issues of burial and grave sites together with spiritual and ancestral beliefs need to be evaluated against the greater social realities;
- previous population movements within the land claimed; urban development and any changes in zoning of the land in question are factors to be considered as part of the feasibility assessment; and

- diverse population demographics may give rise to specific interest groups with conflicting agendas which obstruct actual restoration.

6.1.2. Review of case law in respect of *In re Kranspoort Community*,<sup>292</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform*<sup>293</sup> and *Baphiring Community*<sup>294</sup> indicate that:-

- the court plays an important role in balancing the different interests;
- it is imperative that all the relevant information is placed before the court. It is only when all the relevant information is before court can a considered and weighed decision be made;
- it is clear that no single factor can be viewed in isolation when determining the issue of feasibility of restoration;
- the court views planning as an important requirement when a claim for actual restoration of land rights is made;
- proper planning will provide the court with a better picture of the factors and circumstances and guide the court in its final determination;
- proper planning will also assist the claimants in making informed decisions;
- the court recognises that where the restoration of land is concerned that actual restoration is preferable;
- it may not be in public interest to pay large sums of money to restore land to a community that does not have the capacity to take care of the land;
- the court is mindful of the state's limited resources, the lack of expertise of claimant communities to sustain resettlement projects and business ventures; and the poor outcomes of past restitution projects;
- the cost, including the cost of acquiring the land, improvements to the land and the cost of a sustainable resettlement plan, if the land is to be restored, form part of the court's assessment of feasibility;
- the court views restoration of land rights at huge and prohibitive financial cost to the state, as substantial overcompensation at public expense.

<sup>292</sup> 2000 2 SA 124 (LCC). See further para 5.2 above.

<sup>293</sup> [2012] 3 All SA 563 (LCC). See further para 5.3 above.

<sup>294</sup> *Baphiring Community v Uys* (LCC64/1998) [2010] ZALCC 1; 2010 (3) SA 130 (LCC); [2010] 3 All SA 353 (LCC) (19 January 2010); *The Baphiring Community v Tshwaranani Projects CC and Others* 806/12)[2013] ZASCA 99 (6 September 2013). See further para 5.4 above.

- The Property Valuation Act aims to reduce the cost of restitution with a view to facilitate and accelerate land restitution claims.
- The impact of the Property Valuation Act on land restitution and the broader land reform programme is uncertain.

## **6.2 Recommendations**

From the above conclusions and the reviews of the feasibility studies and case law examined the following recommendations are proposed.

### **6.2.1 Planning**

As discussed in chapter two the issues of feasibility of the various options including actual restoration, alternative land and /or monetary compensation are raised when the claimants are preparing for negotiations and settlement of their claim. This process is guided primarily by legal and financial factors when in fact the options should only be considered once all the relevant information regarding the land in question is available.

It is recommended that at this stage an independent feasibility study ought to be commissioned. In this way all the stakeholders will be equipped with the necessary information to make informed decisions when negotiations do in fact commence.

Some may argue that feasibility studies are a costly 'nice to have' tool. However, in light of the current process which is often long and drawn out, costly and frustrating for all stakeholders, the cost of feasibility studies can be weighed against the cost, both financial and otherwise, of proceeding without the necessary information. Furthermore, the move towards maximising the development potential of restitution projects will be better served if viable options are explored before the decision for actual restoration is pursued by the claimants and an order for actual restoration made by the courts.

A feasibility study may highlight the potentials and defects in the land or viability of the claimants intended use of the land and as such place the claimants in the best possible position to make an informed decision regarding the options available. A feasibility study also highlights the strengths, weaknesses, opportunities and threats of the proposed development and can assist all the stakeholders to weigh up the

benefits and shortfalls of actual restoration of a parcel of land. In this way unnecessary, time - consuming and costly litigation may be avoided for all stakeholders.

### 6.2.2 Amendment to RLRA

In chapter 3 it was highlighted that depending on the land in question a number of laws impact on the use and development of the land. This places an added burden on the claimants acquiring the land as evidenced by the court's consideration of whether the claimants are capable of taking care of the land. In addition the use of Area-based Plans embedded in municipal IDPs which dictate how the land claimed is to be developed adds a new dimension to the restitution process. This strategy aims to make maximum use of the obligations contained in law and policy to secure co-ordinated and effective support from all organs of state within each sphere of government.

The RLRA, however, does not provide guidance on how actual restoration and settlement agreements are to be implemented and managed within the municipal integration development plans. It is recommended that the RLRA be amended to provide a framework for a feasibility study to be conducted and provide possible options depending on the outcome of the feasibility study.

## 6.3 Concluding remarks

Due to the nature of a claim for actual restoration and in light of the various factors to be considered in any given circumstances it is difficult to formulate a universal test to determine whether it is feasible to restore land rights in any given claim. It is evident from this investigation that the issue of feasibility is dynamic and flexible and is informed by the circumstances of each individual case.

Finally the requirement of feasibility does not operate in isolation but rather forms part of the in-depth investigation of all the factors in section 33 of the RLRA, the factors enumerated in the *Kranspoort* and *Baphiring* cases and any other factor that may be considered relevant in the given circumstances.

## TABLE OF LEGISLATION

Constitution of the Republic of South Africa 108, 1996  
Interim Constitution of the Republic of South Africa 200 of 1993  
Land Restitution and Reform Laws Amendment Act 63 of 1997  
National Environmental Management Act 107 of Act 1998  
Native Land Act 27 of 1913  
Native Trust and Land Act 18 of 1936  
Property Valuation Act 17 of 2014  
Restitution of Land Rights Act 22 of 1994  
Restitution of Land Rights Amendment Act 15 of 2014  
Spatial Planning and Land Use Management Act 16 of 2013

## TABLE OF CASES

*Baphiring Community v Tshwaranani Projects CC and Others* (806/12)[2013] ZASCA 99 (6 September 2013)  
*Baphiring Community v Uys and Others* (LCC64/1998) [2010] ZALCC 1; 2010 (3) SA 130 (LCC); [2010] 3 All SA 353 (LCC) (19 January 2010)  
*Concerned Land Claimants' Organisation v PELCRA* 2007 (1) SA 371 (CC)  
*Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC)  
*Dhlomo-Dhlomo Community v Minister of Agriculture and Land Affairs and Others* (LCC175/10) [2012] ZALCC 15 (19 October 2012)  
*Dukuduku Community v Regional Land Claims Commissioner: Kwazulu-Natal and Another* (LCC30/02) [2003] ZALCC 14 (30 May 2003)  
*Dulabh v Department of Land Affairs* 1997 (4) SA 1108 (LCC)  
*Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* 1998 (1) SA 78 (LCC)  
*Farjas v Regional Land Claims Commissioner, KwaZulu Natal* 1998 (2) SA 100 (LCC)  
*Florence v Government of the Republic of South Africa* (CCT 127/13) [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC)

*Haakdoornbult Boerdery CC and Others v Mphela and Others* 2007 (5) SA 596 (SCA)

*In re Kranspoort Community* 2000 (2) SA 124 (LCC)

*Khosis Community, Lohatla Battle School v Minister of Defence and Others* 2004 (5) SA 494 (SCA)

*Kranspoort Community Concerning the Farm Kranspoort* 48 LS LCC 26/1998 (10 December 1999)

*Mazizini Community v Emfuleni Resorts (Pty) Ltd & Others* [2010] JOL 25378 (LCC)

*Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] 3 All SA 563 (LCC)

*Nkomazi Municipality v Ngomane of Lugediane Community and Others* [2010] 3 All SA 563 (LCC).

*Pillay v Taylor-Burke Projects (Pty) Ltd and Others* LCC 119/99, 19 October 1999

*Richtersveld Community v Alexkor Ltd* 2003 (6) SA 104 (SCA)

## **BIBLIOGRAPHY**

### **Articles and reports**

*A framework for securing effective settlement and implementation support*  
<http://www.phuhlisani.com/oid/downloads/Chapter%206.pdf> (date accessed 05/05/2015)

Association for Rural Advancement *Beating about the Boschhoek* (May 2004)  
[http://www.afra.co.za/jit\\_default\\_1017.html](http://www.afra.co.za/jit_default_1017.html);  
<http://www.afra.co.za/upload/files/RestitutionConfPaperAug06.pdf>

Association for Rural Advancement "Kunene Community makes land claim to ACLA"  
*AFRA News* (August/September 1993)  
<http://www.disa.ukzn.ac.za/webpages/DC/Afn2393.1562.8140.000.023.Aug1993.9/Afn2393.1562.8140.000.023.Aug1993.9.pdf> (date accessed 30/05/2015)

*Cato Manor Development Project*  
<http://www.cmda.org.za/> (date accessed 30/10/2014)

*Cato Manor Development Project History* <http://www.cmda.org.za/history.htm> (date accessed 20/02/2015)

*Central Karoo Land and Agrarian Reform Area-based Plan Summary*  
<http://www.phuhlisani.com/oid/downloads/CKABP%20Summary.pdf> (date accessed 27/06/2015).

City Press R 1bn land claim: deal or no deal? <http://www.news24.com/Archives/City-Press/R1bn-land-claim-deal-or-no-deal-20150429> (date accessed 8/03/2016).

Department of Rural Development and Land Reform *Consolidated Environmental Implementation and Management Plan* (2000)  
[http://www.ruraldevelopment.gov.za/phocadownload/spatial\\_Planning\\_Information/April\\_June2013/ceimp\\_1st\\_ed\\_2000150413.pdf](http://www.ruraldevelopment.gov.za/phocadownload/spatial_Planning_Information/April_June2013/ceimp_1st_ed_2000150413.pdf) (date accessed 30/03/2015)

*District six* <http://www.districtsix.za.org/documents> (date accessed 28/04/2015)

Dodson A "The Native Land Act of 1913 and its legacy" <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp29-32.pdf> (date accessed 06/06/2015)

*Dukuduku on-site resettlement project*  
<http://www.permaculture2012.co.za/pages/33427> (date accessed 31/05/2015).

*Dukuduku: The forest of our discontent* Association for Rural Advancement (June 2003)

*Dukuduku Research Project* Association for Rural Advancement (September 2002)  
<http://www.afra.co.za/upload/files/AP16b.pdf> (date accessed 6 /06/2015)

Du Toit A "The end of restitution: Getting real about land claims" unpublished paper prepared for Land and Agrarian Reform Conference, Pretoria 26-28 July 1999

*Feasibility Template*  
<http://feasibility.pro/wp-content/uploads/2013/08/Feasibility-Study-Template.pdf> (date accessed 05/05/2015)

Mabuza E Mala Mala land claim heads for Constitutional Court  
<http://www.bdlive.co.za/business/agriculture/2013/04/24/malamala-land-claim-case-heads-for-constitutional-court> (accessed 08/03/2016).

Mabuza E Mala Mala price still to be negotiated  
[www.bdlive.co.za/business/agriculture/2013/08/06/malamala-price-still-to-be-negotiated](http://www.bdlive.co.za/business/agriculture/2013/08/06/malamala-price-still-to-be-negotiated) (date accessed 9/03/2016).

Pienaar JM "Restitutionary road: Reflecting on good governance and the role of the Land Claims Court" (2011) 14/3 *PER* 2011 30-48

*Reconstruction and Development Programme* (1994)

*South African Defence Review* 1998 - Chapter XII  
<http://www.dod.mil.za/documents/defencereview/defence%20review1998.pdf> (date accessed 30/07/2015)

Spoor R Land reform - and the law of unintended consequences.  
[http://www.dailymaverick.co.za/opinionista/2014-07-07-land-reform-and-the-law-of-unintended-consequences/#.VtmmP\\_I97IU](http://www.dailymaverick.co.za/opinionista/2014-07-07-land-reform-and-the-law-of-unintended-consequences/#.VtmmP_I97IU) (date accessed 02/03/2016).



Van Wyk J “‘Feasibility of restoration’ as a factor in land restitution claims” (2010) 25 *SAPL* 590

*White Paper on South African Land Policy* (1997)

Ziqubu N “Redress, social justice and reconciliation, practical experiences from AFRA’s work with specific restitution claims in KwaZulu-Natal”  
Association for Rural Advancement Conference on the Restitution Program:  
<http://www.afra.co.za/upload/files/RestitutionConfPaperAug06.pdf>  
(date accessed 25/10/2014)

## **Books**

Carey Miller DL with Pope A *Land title in South Africa* Juta (2000)

Pienaar JM *Land reform* Juta (2014)

Walker C, Bohlin A, Hall R, Kepe T *Land, memory, reconstruction and justice* UKZN Press (2010)