

RESTITUTIONARY ROAD: REFLECTING ON GOOD GOVERNANCE AND THE ROLE OF THE LAND CLAIMS COURT

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1 Introduction

Although we have been walking on the road of restitution for 16 years, the journey started much earlier - officially on 19 June 1913.² Within the broad landscape of land reform the restitutionary road follows a path different from the other land reform routes. On this journey we encounter thousands of pilgrims aiming to reach their destination. The route is broadly mapped by policy frameworks and legislation setting out the boundaries within which the route may be established. Many role players are involved in guiding the thousands of claimants on this road. Gathering the claimants together and ultimately supporting them to reach their destination successfully is government, embodied by the various departments involved in land reform in general. Not everyone can enter onto this path and continue the journey. To that effect two other role players also become relevant. Bordering the road on both sides are the Commission on the Restitution of Land Rights³ and the Land Claims Court⁴ respectively. Each has a particular function to fulfil for keeping the process on track.⁵ Whereas the Commission is there to filter, to some extent, who

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² The date the *Native Land Act* 27 of 1913 commenced (later the *Black Land Act*). This Act officially divided South Africa into "Black spots" and the rest of the country. The "Black spots" were scheduled areas listed in a Schedule to the Act in which Black persons only could vest rights. This Act was followed by the South African Development Trust and Land Act 18 of 1936 that made provision for "released areas". For more information see Bennett "African Land" 65-94; Legassick "Origins of Segregation" 43-60; Haines and Cross "Historical Overview" 73-92; Van der Merwe and Pienaar "Land Reform" 334-380; Badenhorst, Pienaar and Mostert *Law of Property* 585-590; Van der Walt and Pienaar *Law of Property* 317-320.

³ Initially provided for in s 122 of the interim *Constitution of the Republic of South Africa* 1993 and thereafter established under Ch II of the *Restitution of Land Rights Act* 22 of 1994.

⁴ Initially provided for in s 123 of the interim *Constitution of the Republic of South Africa* 1993 and thereafter established and regulated under Ch III of the *Restitution of Land Rights Act* 22 of 1994.

⁵ For more information see Badenhorst, Pienaar and Mostert *Law of Property* 637-651; Pienaar and Brickhill "Land" 48-53 - 48-54.

may enter on to the road and walk along the path,⁶ it simultaneously holds the hands of the walkers and guides them along.⁷ The Land Claims Court fulfils various roles, *inter alia* separating persons who can join the journey from those who can't,⁸ assisting the other role players, namely government and the Commission, to focus on the road and to keep everyone in line,⁹ so to speak, to provide guidelines and put up sign posts¹⁰ and ultimately to point the direction for claimants to reach their final destination.¹¹

We are still proceeding on this journey. Having walked the road for 16 years it is perhaps time to stop and reflect on the road already covered and consider the journey ahead. Immediately after the journey was embarked on, the path was smooth and paved with successes: photographs were published in newspapers and journals of communities celebrating the return of ancestral land. For some communities the path followed had been a battle, right from the outset, necessitating that they negotiate the road *via* litigation, sometimes ending up in the Constitutional Court.¹²

⁶ S 6. Although one of the main functions of the Commission is to receive and acknowledge receipt of claims, the receipt of claims simultaneously acts as a screening process that enables the Commission to exclude patently bogus claims, claims without substance or claims which on a purely mechanical or purely objectively determinable reasoning fell outside the parameters of the legislation - for more detail see *Farjas v Regional Land Claims Commissioner, KwaZulu Natal* 1998 2 SA 100 (LCC).

⁷ S 6. The Commission has the general task to take reasonable steps to ensure that claimants are assisted in the preparation and submission of their claims and has to advise claimants of the progress of their claims.

⁸ In this regard the formal and legal requirements of s 2 of the *Restitution of Land Rights Act* 22 of 1994 have to be met in order for a claim to be successful. The formal requirements entail that the claim must have been lodged before 31 December 1998 and that no just and equitable compensation must have been paid to the claimant at an earlier stage. The legal requirements are more complicated and entail that claimants must prove that they had been dispossessed of a right in land under a racially discriminatory law or practice before 19 June 1913. For further information on how these requirements are interpreted and applied by the court, see Badenhorst, Pienaar and Mostert *Law of Property* 630-637; Pienaar and Brickhill "Land" 48-55 - 48-64.

⁹ See the discussion at 4.1 below.

¹⁰ Eg by granting an order that the specific parcel of land may not be restored on the basis that non-restoration is in the public interest - s 34. See also *Ex Parte North Central and South Central - Durban* 1998 1 SA 78 (LCC); *Khosis Community, Lohatla Battle School v Minister of Defence* 2004 5 SA 494 (SCA) and the discussion at 4.1 below.

¹¹ Eg by considering the factors in s 33 in the determination of the kind of restitution or restoration to be granted - see also the discussion at 4.1 below.

¹² The journey of two communities in particular in this regard had been extremely long: (a) the Richtersveld community initiated their claim in the Land Claims Court, thereafter in the Supreme Court of Appeal and finally in the Constitutional Court - see *Alexkor (Pty) Ltd v Richtersveld Community* 2004 5 SA 460 (CC), and the Popela community followed the exact same path until

Sixteen years into the restitution process the numbers are disappointing. Apparently 95% of the land claims that were submitted have been finalised,¹³ although the exact statistics are being questioned in some circles.¹⁴ The remaining 5% relate to intricate, complex claims, mainly impacting on rural land. To date the success rate of projects on land that was restored is dismal. Although the correctness of statistics in this regard may be questioned, it would seem that about 90% of the land acquired post 1994 for land reform purposes in general is lying fallow.¹⁵ While about 200 projects are currently experiencing great difficulties, various enterprises in the Limpopo, Mpumalanga and the North-West provinces in particular have already been liquidated.¹⁶

It would seem that we have reached an extremely rocky portion of the road with hazardous bends ahead and cliffs on both sides. The restitutionary road is in dire need of effective engineering. Engineering in the form of "good governance" promises a road worth travelling, with road works in place if pot-holes and steep inclines are encountered. "Sound policy and manageable procedures";¹⁷ "[p]redictable, open, and enlightened policy-making, a bureaucracy imbued with a professional ethos, an executive arm of government accountable for actions; a strong civil society participating in public affairs and all behaving under the rule of law"¹⁸ - this is what is perceived to be "good governance" - the underlying focus of this contribution.

What does the Land Claims Court have to do with "good governance"? What is the role of the Land Claims Court on the restitutionary road within this context? Essentially the Land Claims Court's strength lies in adjudicating and grappling with

they were successful in the Constitutional Court - see *Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC).

¹³ Department of Land Affairs 2009 www.ruraldevelopment.gov.za 31; Department of Rural Development and Land Reform 2009 www.pmg.org.za.

¹⁴ It is unclear how many of the outstanding claims are individual claims and how many are community claims.

¹⁵ Du Toit *Die Burger* 1. See also Minister and Department of Rural Development and Land Reform 2009 www.pmg.org.za.

¹⁶ Department of Rural Development and Land Reform 2010 www.pmg.org.za.

¹⁷ Pienaar 2009 *PER* 15.

¹⁸ Pienaar 2009 *PER* 15, 18-24.

questions and issues of law. One can approach the restitution process as a purely legal one and lawyers may choose to do exactly that, but that would be naïve. The restitution process is also a social and economic process.¹⁹ Within this process conflicting discourses exist: on the one hand redress and restitution, and on the other economic development and sustainability. It is within these discourses that the Court must find a way to be more involved in setting up signposts and acting, to some extent, as a GPS system mapping out the route to be followed.

Before the particular role of the Land Claims Court in relation to good governance is addressed, it is important to contextualise the South African restitution programme and to put the unique character of restitution *per se* into perspective.

2 The South African restitution programme in context

Dispossession of land and the consequences thereof for the country have been well-documented.²⁰ It was therefore understandable that the restoration of land and rights in land had to be addressed as soon as possible. A limited restitution process was embarked on even before the new political dispensation dawned in April 1994.²¹ Accordingly, the outer boundaries of the particular legislative and policy framework within which restitution operates predate the new constitutional dispensation in the form of the *White Paper on Land Reform* that was published in 1991.²² The point of departure of the 1991 *White Paper* was that access to land was a basic human need and that a system of free enterprise and private ownership was appropriate to fulfill this need. The 1997 *White Paper on South African Land Policy* succeeded the 1991 *White Paper* and elaborated on the aims and objectives of land reform. The overall purpose of land reform is fourfold:

¹⁹ See especially Walker *Landmarked* 34 and in general Fay and James *Rights and Wrongs*.

²⁰ See again the sources listed in fn 2.

²¹ In 1991 an Advisory Commission on Land Allocation was established in order to advise the State President on, for example, the identification and allocation of land for agricultural purposes as well as the restoration of land to persons who had been removed in terms of the apartheid legislation.

²² *White Paper on South African Land Reform* 1991.

- to redress the injustices of apartheid;
- to foster national reconciliation and stability;
- to underpin economic growth; and
- to improve household welfare and alleviate poverty.

Underlying the *White Paper* was the understanding that land reform was intrinsically linked with support programmes and that elements such as local participation in decision-making processes, gender equity, economic viability and environmental sustainability were of the utmost importance for its success.²³

Regarding the restitution programme, the constitutional foundation is found in section 25(7) of the final *Constitution*:

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

The main parameters of the restitution programme are reflected in the *Restitution of Land Rights Act 22 of 1994* (hereafter the *Restitution Act*). This was the first land reform measure to be promulgated under the new constitutional dispensation, embodying the formal and legal requirements, and it sets out the functions of the main role players.

3 Restitution of land or rights in land: a unique process

Apart from restitution, which is provided for in section 25(7), provision is also made for two further land reform programmes, namely for the redistribution of land under section 25(5)²⁴ and for tenure reform under section 25(6).²⁵ Since 1994 a plethora of

²³ Badenhorst, Pienaar and Mostert *Law of Property* 593.

²⁴ For more detail see Badenhorst, Pienaar and Mostert *Law of Property* 593-607; Pienaar and Brickhill "Land" 48-10 - 48-24; Carey-Miller and Pope *Land Title* 398-355.

²⁵ Consult Badenhorst, Pienaar and Mostert *Law of Property* 607-629; Pienaar and Brickhill "Land" 48-25 - 48-50; Carey-Miller and Pope *Land Title* 456-551.

legislation has been promulgated dealing with land reform and connected issues in general.²⁶

Restitution, redistribution and tenure reform are all constitutionally mandated. In order to be able to declare land reform as being successful, South Africa will have to perform in all of these three areas, as well as in areas linked, directly or indirectly,²⁷ with these programmes. However, the restitution of land is intrinsically *a unique process with outstanding and distinguishing features* that has elements which are different from those to be found in the other two sub-programmes. This may mean that good governance in this context requires something different.

Right from the outset the importance of restoring land or enabling another form of restitution was clear. Due to the prominence of dispossession and forced removals and the hardship they caused, embarking on the restitution process was politically and morally urgent.²⁸ But not just anyone can lodge a restitution claim. Only claimants who meet the strict requirements can be successful with land claims.²⁹ The existence of this *closed or limited category of beneficiaries* is thus the first distinguishing element. This may result in the restitution of land finally resulting in only a small percentage of land changing hands, and it is possible that more land reform may effectively take place by way of the redistribution³⁰ and tenure reform programmes.³¹ Despite this, the *impact* of restitution and the question of whether it is successful or not will resonate for generations and decades to come. Hence the importance of a successful restitution programme cannot be underestimated.

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

²⁶ This body of law is conveniently referred to as "land law" - see Pienaar and Brickhill "Land" Cha 48 in general. Compare Van der Walt and Pienaar *Law of Property* 320-335.

²⁷ Eg access to housing and access to natural resources, including access to water and minerals, as well as matters linked with the regulation of unlawful occupation of land.

²⁸ See in general Walker *Landmarked* 11; Fay and James *Rights and Wrongs* 1.

²⁹ S 2 *Restitution of Land Rights Act* 22 of 1994, incorporating both the formal and legal requirements.

³⁰ The aim of the redistribution programme is to redistribute 30% of the White-controlled agricultural land by 2014.

³¹ The tenure reform programme is aimed at securing the manner or form of entitlement in which land is held.

individuals or corporations, but against the state.³² Accordingly, *the state is integral in the restitution programme*: it provides the outline and framework within which restitution operates and it determines the language used.³³ Government institutions and departments are thus also involved in the restitution process. In this regard it is noteworthy that different emphases and approaches to land reform in general and restitution of land in particular have come and gone in government departments since 1994. Minister Nkwinti is the fourth minister to spearhead land reform in the country, his predecessors being Derick Hanekom, Thoko Didiza, and Lulu Xingwana. Each minister has brought a new perspective to the restitution of land. The latest emphasis is on rural development and land reform.³⁴

Apart from morally and politically motivated ideals and being premised on section 25(7) of the *Constitution*, restitution is also linked with other goals, such as alleviating poverty and promoting development and nation-building.³⁵ However, unofficial purposes may also be achieved, including establishing the legitimacy of a new regime, quelling popular discontent or attracting international investments and donor funds.³⁶ *Unintended consequences* may also result from restitution processes, such as transforming notions of property and ownership,³⁷ replicating or entrenching former patterns of land ownership and settlement and reinstating or entrenching economic and racial segregation.³⁸ New relationships between the state and its subjects may furthermore be created: while new land-holding communities may make new claims and demands from the state they may find the state interfering and

³² This aspect was especially emphasised in the *Popela*-judgement in the light of the causality requirement, explaining that a different kind of causality is required as all claims are against the state and not against private parties - *Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para [63].

³³ Fay and James *Rights and Wrongs* 4.

³⁴ A separate Department for Agriculture, Fisheries and Forestry is headed by Minister Tina Joematt-Petersson. Further developments relating to tenure reform especially are expected in the course of 2010 in the form of a Green Paper. See also Du Plessis, Olivier and Pienaar 2009 SAPL 608-610 for an exposition of the new approach followed in the newly restructured Department of Rural Development and Land Reform, in which an emphasis is placed on rural development, coupled with increased commercialisation. See also Hall 2009 *PLAAS Policy Brief* 1-6.

³⁵ Fay and James *Rights and Wrongs* 1.

³⁶ Fay and James *Rights and Wrongs* 1-2.

³⁷ See in general Van der Walt *Margins*. See also Mostert *et al Principles* 12-15.

³⁸ Fay and James *Rights and Wrongs* 1.

attempting to control the exercise of their ownership.³⁹ Although the underlying aim is to right the wrongs of the past during which the social fabric of a community or society was unravelled or wholly destroyed, the end result of restitution may well be that new social disruption occurs to some extent. This process of restoring and righting the wrongs of the past may inevitably pose some threats to the prevailing, dominant property regimes.⁴⁰

Finally, although it is urgent, restitution is not a once-off concept that can be dealt with in one fell swoop. Instead, it is a temporal process, invariably drawn out, which can conveniently be divided into the following distinctive stages:⁴¹

The moment of loss. The exact kind of dispossession will depend on the circumstances.⁴² In South Africa the moment played out over a period of many years. In some instances dispossession occurred overnight⁴³ while in other cases it took place over a period of time.⁴⁴

The passage of time between the moment the land or right was lost and the restitution process is due to begin. In this period the land is owned or managed by new owners or managers, improvements are effected to the land and livelihoods are created. In the meantime the dispossessed has to deal with the loss of the land and rights in the land. In the South African context the loss usually included a resettlement that required adapting to new environments and new conditions.⁴⁵

³⁹ Van der Walt *Margins* 169-208; Badenhorst, Pienaar and Mostert *Law of Property* 664-665; Mostert *et al Principles* 92-95.

⁴⁰ Fay and James *Rights and Wrongs* 5; Van der Walt *Margins* 1-12.

⁴¹ Fay and James *Rights and Wrongs* 6-9.

⁴² Walker *Landmarked* 11 refers to this stage as the "narrative of loss".

⁴³ Eg instances where areas occupied by persons of a particular racial background were proclaimed to be group areas reserved for persons belonging to another racial background in terms of the various *Group Areas Acts* 41 of 1950, 77 of 1957 and 36 of 1966 - see *Dulabh v Department of Land Affairs* 1997 4 SA 1108 (LCC).

⁴⁴ See eg the historical background set out by Moseneke DCJ in *Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) paras [6]-[19] emphasising that dispossession of this particular community occurred over a period of many decades.

⁴⁵ Dispossession coincided with large-scale removal of communities to different parts of the country in accordance with the "grand apartheid" ideal of creating independent national states and self-governing territories for different cultural groups. Also see van der Merwe and Pienaar "Land Reform" 334-349; Bennett "African Land" 81-90; Carey-Miller and Pope *Land Title* 18-40.

Creating a restitution policy and embarking on a restitution process. This is the first step in making the restitution of land or rights in land official. The prominence of restitution in the interim and final constitutions has already been referred to.⁴⁶

Lodging and dealing with land claims. This stage is complex and involves processes of negotiation and possibly litigation. The whole period from the time of lodging claims to adjudicating claims and finally determining the specific form of restoration, is included. Various state institutions and non-governmental organisations are also involved. This stage can be time-consuming and exhausting for the parties involved.

The post-transfer stage. This is the stage that follows restoration.⁴⁷ In South Africa this stage has been especially problematic.⁴⁸ Reports have indicated that the restitution of land or rights in land is in itself not enough to make the restitution process successful.⁴⁹ Additional, post-settlement support is crucial. To a large extent, South Africa's restitution process is in this stage.

Beyond the restitution stage. This stage does not necessarily mean the formalisation or finalisation of restitution as a process. It may even continue for a generation or so after the restoration had occurred. Where individual title was granted, this stage may mean a second loss of title by way of economic or market forces.⁵⁰

The restitution of land is indeed a unique, grueling process that places particular demands on all role players. These distinguishing characteristics have to be borne in mind in considering the question of "good governance" in this context.

⁴⁶ See the exposition at para 2 above.

⁴⁷ Restoration can either be specific restoration of land or alternative (usually state) land.

⁴⁸ See especially Walker *Landmarked* 198-227.

⁴⁹ Ministers and Department of Rural Development and Land Reform 2009 www.pmg.org.za.

⁵⁰ Fay and James *Rights and Wrongs* 10.

4 Focus on the Land Claims Court

4.1 General

Against the backdrop of the relevant policy and statutory framework, as well as the particular needs and challenges within which restitution has to take place, the Land Claims Court has an integral role to play. As a court of law its strength lies in adjudicating and grappling with questions and issues of law. In this regard the court has played and is playing an important role. Hence the role of the Land Claims Court within the broad spectrum of "good engineering" or "good governance" is limited. However, there is some room for involvement in relation (a) to matters leading up to restitution; and (b) to the particular form of and conditions linked with restitution. Concerning the first category, the role of the Land Claims Court is to assist the Commission and Government to keep the restitution process on track. The Court may also be involved in assisting government bodies to determine which land may be removed from the restitutionary road, so to speak, for example:

4.1.1 *By issuing directives*

Directives aimed at the Commission or the Director-General instruct particular functionaries to perform duties or functions necessary for the expedient finalisation of land claims under section 38E of the *Restitution Act*.

4.1.2 *By acting as a review forum*

Section 36 of the *Restitution Act* provides that the Court can act as a review forum for decisions made by the Commission on the same basis as the Supreme Court of Appeal.

4.1.3 *By removing land from the restitution process before the finalisation of a claim*

In this regard section 34 of the *Restitution Act* becomes relevant as it enables any national, provincial or local government body to apply to court for an order that land

within its jurisdictional area shall not be restored to any claimant or prospective claimant. The court does not initiate this procedure, but adjudicates it in the light of the demands of public interest.⁵¹

The above three functions may be performed by the Court leading up to the finalisation of claims and restitution, but are still not really linked with the *specific form restitution is to take*. In conformity with the metaphor of a road, these functions are linked with keeping the process on track and the role players in line.

However, *mapping out the exact route* to be followed and indicating specific destinations for claimants are also possible. Here the court plays a more pro-active role in actually shaping the road. Regarding the form of restitution and whether or not it is conditional, the Court may be involved in the following manner:

4.1.3.1 By issuing section 35(2)(a)-(c) conditions and directives⁵²

This means that the court can make restitution conditional and that a right in land can be restored only if and when the conditions have been complied with. If the claimant is a community, the court can also be involved in setting out the manner in which the relevant rights are to be held.⁵³ A court order can furthermore be accompanied by directives as to how the specific order is to be carried out, including the setting of time limits for the implementation of orders.

4.1.3.2 By considering the specific form restitution is to take

Once it is clear that both sets of requirements have been met, the Court would then finally consider, in the light of all the factors mentioned in section 33 of the Act, the *specific form* restitution is to take. The following options are available: (a) specific restoration; (b) awarding alternative land; (c) awarding compensation; or (d) awarding a combination of these options. Section 33-factors include the desirability

⁵¹ *Ex Parte North Central and South Central - Durban* 1998 1 SA 78 (LCC); *Khosis Community, Lohatla Battle School v Minister of Defence* 2004 5 SA 494 (SCA).

⁵² Under the *Restitution of Land Rights Act* 22 of 1994.

⁵³ S 35(2)(c) *Restitution of Land Rights Act* 22 of 1994.

of providing for the restitution of land or land rights; the desirability of remedying past violations of human rights; the requirements of justice and equity; the feasibility of the restoration; the amount of compensation or other consideration paid when the dispossession occurred; the history of the dispossession; the hardship caused and the current use of the land; and any other factor that the court considers relevant and consistent with the spirit of the *Constitution*.

To illustrate how the Court has performed this function, reference can be made to the recently handed down judgement of *The Baphiring Community v Uys*.⁵⁴ The case dealt with whether or not specific restoration would be feasible in the relevant circumstances. In 1971 the Baphiring Community was dispossessed of land known as the "Old Mabaalstat" and relocated to land known as the "New Mabaalstat". At that stage the dispossessed land was farmed on a small-scale and subsistence basis and was not commercially developed.⁵⁵ Later and up to the present it was owned by eight different owners, was highly developed and commercialised, and was generally referred to as Rosmincol. The area to which the community was relocated, the New Mabaalstat, embodied two villages, and subsistence farming continued. Various attempts to cultivate that area were unsuccessful.⁵⁶ The claimants, comprising about 400 households, claimed that the whole area of land known as the Old Mabaalstat (Rosmincol) be restored to them. If successful, the land would be held in a communal property association.

As the parties did not agree on the specific form restitution was to take, 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".⁵⁷

Regarding the future of Rosmincol and New Mabaalstat, respectively, evidence was placed before the court as to what would be needed to ensure that specific restoration, if ordered, would be successful. Four criteria were identified to guide the

⁵⁴ *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported).

⁵⁵ *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported) para [6].

⁵⁶ *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported) para [10].

⁵⁷ *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported) para [15].

question of whether or not restoration would be feasible, namely 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.⁵⁸ Each factor was thereafter scrutinised. To acquire the land would cost the *fiscus* about R70 million. 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.⁵⁹ Concerning the full financial repercussions of restoring Rosmincol, it was explained that the various households could access integrated settlement grants valued at R 6 595 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.⁶⁰ 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.⁶¹ The official in charge of resettlement in the office of the Regional Land Claims Commissioner testified that not a single project of the 330 running in the North West province had been successful.⁶² 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.

Apart from the financial implications, the actual relocation from New Mabaalstat to Rosmincol was also problematic. Community members would be forced to downgrade their living space and new houses and infrastructure would have to be provided.⁶³ It later transpired that not everyone in the Baphiring community wanted to relocate to Rosmincol. In the light of the above evidence the court found that it was not feasible to restore Rosmincol to the claimants.⁶⁴ However, the restoration of parcels of land comprising graves was found to be feasible. Exactly how that restoration was to be managed would be determined in a subsequent hearing.

⁵⁸ *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported) para [17].

⁵⁹ *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported) para [19].

⁶⁰ *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported) paras [22], [24].

⁶¹ *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported) para [22].

⁶² *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported) para [25].

⁶³ *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported) para [26].

⁶⁴ *Baphiring Community v Uys* (Case No. LCC 64/1998) (19 January 2010, unreported) para [31].

4.2 Discussion

The Court reached its conclusion in the light of the factors generally listed in section 33 of the *Restitution Act* and specifically focussed on the four questions formulated during argument, namely the costs of 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. Regarding the public interest, the Court unfortunately refrained from an in-depth investigation into what it entailed in relation to restitution specifically. Instead, it would seem as if the astronomical amounts mentioned convinced the court not to order specific restoration - which was essentially thus a reiteration of the first question dealing with the costs involved. Other matters that may be linked with the indirect or underlying aims of restitution that would feed into the public interest issue as well were not investigated.

However, what other options were available to the Court? Consider the following possibilities: (a) awarding specific restoration; (b) awarding alternative land; (c) awarding compensation; or (d) a combination of these options. Each scenario has benefits and drawbacks. Essentially to award compensation would not adjust the land ownership and settlement patterns of the country, although it would still count as redress. On the other hand, though specific restoration or the award of other state land would adjust the landholding statistics, the track record within this area is dismal.⁶⁵ This in itself, however, ought not to be an absolute prohibition on specific restoration as the track record may improve, by putting better checks and balances in place, for example, and monitoring the post-transfer stage more effectively. It is here that the Land Claims Court has an integral role to play. Thus the following questions arise: 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/restitution on the one hand and economic development/sustainability on the other, approached? Here we need an in-depth grappling with the issues and specific

⁶⁵ Ministers and Department of Rural Development and Land Reform 2009 www.pmg.org.za.

guidelines from the Court, especially in light of the fact that the remaining land claims to be dealt with by the Court would be the intricate, complex claims. It is thus imperative that the Court deal with these difficult but crucial issues in order to provide sufficient guidelines for the future.

5 Conclusion

Although adjudicating questions of law is the Land Claims Court's real strength in the context of restitution, this brief discussion has indicated that it has a definite role to play in matters leading up to the point of restitution as well as in deciding the specific form of restitution. The Constitutional Court has already found that though there is a constitutionally based right to restitution there is not a constitutionally based right to *specific restoration*.⁶⁶ It is by considering the various factors listed in section 33 of the Act that the Land Claims Court can decide the *end destination* of travellers on this journey. It is not only possible but imperative that the Court should not only indicate the *path* restitution is to take but that it should also *map out the exact route*, setting the *beacons* clearly in place and fixing time lines as to *when* and *how* markers ought to be reached. In order to do that, the Court would have to engage with difficult, often conflicting, issues and embark on in-depth investigations and analyses. Only then can the restitutionary road be navigated more successfully.

⁶⁶ *Concerned Land Claimants' Organisation v PELCRA* 2007 1 SA 371 (CC).

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List of abbreviations

PER	Potchefstroom Electronic Law Journal
SAPL	SA Public Law

RESTITUTIONARY ROAD: REFLECTING ON GOOD GOVERNANCE AND THE ROLE OF THE LAND CLAIMS COURT

JM Pienaar¹

SUMMARY

Although 95% of all claims that had been submitted by 1998 have indeed been processed, a mere 49% of the land that was restored since 1994 housed successful enterprises by the end of 2010. Accordingly, sixteen years into the restitution process the statistics are rather disappointing. Restitution of land as a land reform mechanism is a unique temporal process that involves various role players. This contribution focuses on the role that the Land Claims Court has to play within the context of “good governance”. In this regard the legislative and policy frameworks within which restitution and the Land Claims Court operate, are first set out after which the unique characteristics of the restitution programme are highlighted. Although the main function of the Land Claims Court is to grapple with and adjudicate on legal issues, it also has a role to play in effecting good governance. This may be done by its involvement in the legal process leading up to the finalization of claims by issuing directives, acting as a review forum and by removing land from the restitution process under section 34 of the Restitution Act. However, a more pro-active role may be played by the Court by its involvement in deciding the *exact form* of restitution or restoration in a particular case. In this regard the Court can find that restitution has to be conditional and that certain requirements have to be met in order for the process to be effective and successful. With reference to *Baphiring Community v Uys and Others* (Case number LCC 64/1998) it is clear that a pro-active approach would require the Court to engage in difficult, often conflicting, issues and to embark on in-depth investigations and analyses where necessary.

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KEYWORDS

Land reform; restitution; land claims; good governance; Land Claims Court; directives; restitution options