

# **LAND JUSTICE IN SOUTH AFRICA: SOME REFLECTIONS ON THE SOUTH AFRICAN LAND REFORM AND RESTITUTION PROCESS**

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The phrase "land and justice" is arguably a contradiction in terms, for history tells us that throughout the ages, and in most of the world, the story of land has been one of plunder, conquest and dispossession, culminating in the concentration of land in a powerful minority at the expense of a powerless, down-trodden majority, and so too the history of land in South Africa.

I have divided my discussion on land and justice in South Africa into three sections. The first which I call, "Land and Injustice in South Africa", briefly explains the history of land dispossession in South Africa.

The second section, which I call "Land Reform in the new South Africa" briefly explains the land reform policies introduced by the first democratic government in South Africa post 1994, focusing on the land claims process and restitution of land to persons dispossessed by racial laws or practices.

The third section, which I call "Restorative Justice", attempts to give some idea of the workings of the Land Claims Court of South Africa, now the Land Court, in restoring rights in land to persons dispossessed thereof by racial laws or practices.

## **LAND AND INJUSTICE IN SOUTH AFRICA:**

Land dispossession in South Africa dates back to 1652 when the first Dutch settlers arrived, and continued at a steady pace over successive periods of conquest and colonization, so that by the dawn

of the 20<sup>th</sup> century, the indigenous peoples of South Africa, amongst them the Khoi and San in the South, the Xhosa to the East, and the Zulu to the North, had all but been ousted off their land. The early 20<sup>th</sup> century saw the introduction of the first of a battery of repressive racial laws which relegated Black South Africans to arid reserves from where they could be controlled as pools of migrant labour, and whence they could leave only to satisfy the labour and economic requirements of White South Africa.

The 1913 Land Act was a key measure aimed at dispossessing Black South Africans of their land. Its focus was to schedule 7 % of the country as reserves for occupation by Blacks. The 1936 Native Land and Trust Act, expanded this to 13%.

After the National Party government took power in 1948, and with the introduction of apartheid or separate development, an even more far reaching racially divisive programme of land restructuring was implemented. What is referred to as spatial apartheid, lead to the re-settlement of 3,5 million urban and rural peoples, mostly Black.

The infamous Group Areas Act of 1950, was a critical piece of legislation in this process aimed at effecting racial fragmentation and securing the best residential and agricultural land for whites through large-scaled forced removals. This law gave the apartheid government the authority to proclaim certain areas as "White", "Coloured" or "Indian". Ownership of property, residence, education and commerce in each group area was limited only to members of the specified group.

The Group Areas Act is only one example of what is estimated to be about 17 000 statutory measures (including proclamations, regulations and government notices) which were issued between 1913 and 1991 to regulate land control along racial lines.

Ultimately, this process ensured that 87% of the land was placed in the hands of the white minority, while millions of black people were forced to eke out a living in overcrowded and impoverished conditions on the remaining 13%. A 1996 census revealed that whites who constituted 10,9% of the nation's population, owned and controlled over 80% of South Africa's farmland. In contrast, blacks who make up 76,6% of the population had control over less than 15% of this land<sup>1</sup>. In aggregate terms, less than 1% of the population owned over 80% of farmland and over 67% of the total land in South Africa<sup>2</sup>.

These statistics indicate the enormity of the task which the new democratic government in 1994 confronted as it looked to redress the wrongs of the past in the field of land re-distribution and reform.

## **Land Reform in the new South Africa**

### **The Property Clause**

It is against this background that the African National Congress, which later became the first elected democratic government in South Africa had to address the issue of land. During the multiparty negotiation talks which preceded the drafting of the Constitution for a democratic South Africa, the issue of the protection of property rights versus the need for large scale reform and re-distribution of land was hotly debated. The property clause consequently was one of the most contentious issues in the formulation of the Constitution and was amongst the last to be resolved.

Those who aligned with the African National Congress, expected at the time, that land reform would be accomplished at least in part,

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<sup>1</sup> Nkunzi Development Association. *No policy change (2003)* available at [http://www.nkunzi.org.za/no\\_policy.htm](http://www.nkunzi.org.za/no_policy.htm)

<sup>2</sup> Cheryl Change, *Gender and Land Reform: A South African Case Study*. United Nations Research Institute for Social Development Programme (Social Policy and Development Programme) Paper 10 2002 at 21-22

through the expropriation and redistribution of white farmland. The radical land reform policies however quickly gave way in the thinking of the newly elected leadership to the strictures of a surprisingly conservative economic strategy<sup>3</sup>.

“A compromise ensued between advocates of a radically redistributive programme aimed at turning on its head the existing extremely unequal property dispensation and the defenders of a property regime based on existing rights of ownership and the primacy of the market in regulating state initiatives to achieve a more equitable distribution of land.”<sup>4</sup>

Ultimately the new Constitution Act 108 of 1996 found the middle ground between these two positions. Section 25 of the Bill of Rights in the Constitution, which deals with property rights, provides a guarantee of existing property rights but places the state under a constitutional duty to take reasonable legislative and other measures to foster conditions which enable citizens to gain access to land on an equitable basis.

### **The Land Reform Programme**

Three key programmes drive the land reform process:

- (i) The Redistribution Programme which aims to provide the disadvantaged and the poor with access to land for residential and productive purposes, with particular emphasis on the need to promote and protect the rights of women land owners. The programme has taken the form of a grant mechanism to allow purchase of land for group production, commonage skills as well as planning for on-farm settlement

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<sup>3</sup> Jill Zimmerman, ‘*Property on the line: Is an expropriation centered land reform constitutionally permissible?*’ 2005 122 SALJ 378 at 379

<sup>4</sup> C Walker, ‘*Agrarian change, gender and land reform*’, <http://www.unrisd.org>

of farm workers. A briefing to Parliament by the Department of Rural Development and Land Reform in 1994, indicated that since 1994 5.3 million hectares of land had been redistributed. In his state of the nation address in 2024 President Ramaphosa stated that through redistribution around 25 % of farm land is now owned by Black South Africans bringing us closer to the target of 30 % by 2030.<sup>5</sup>

(ii) The Land Tenure Reform Programme which has as its intention the securing of tenure rights of more than 7 million farm dwellers living on 65 000 mainly white owned commercial farms, and the tenure rights of more than 12 million people living in the former homelands.<sup>6</sup> Until the 1990's it was government policy that black people should not own land and hence the wide scale absence of tenure rights.

(iii) The Land Restitution Programme, the third element in the government land reform programme, seeks specifically to redress the wrongs caused by the forced removals that took place after 1913.

South Africa's land restitution process was borne out of a constitutional imperative contained in the property clause at section 25 of the Bill of Rights. This instructed Parliament to legislate for the restitution of property to those dispossessed. Parliament responded with the promulgation of the Restitution of Land Rights Act 22 of 1994, the first piece of transformative legislation to be passed by South Africa's newly elected democratic parliament in 1994.

The Restitution Act established the Land Claims Court of South Africa, now known as the Land Court of South Africa, a specialist court which adjudicates claims for restitution of rights in land by persons who were

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<sup>5</sup> Conversation, March 21, 2024, Jonathan Kirsten and Wandile Sihlobo, Stellenbosch University.

<sup>6</sup> Andile Mngxitama, '*Land reform - South Africa at the Crossroads*'. Naledi Policy Bulletin, November 2002. <http://www.naledi.org.za/pbull/vol5no3/9.pdf>

dispossessed of land. The Act also established a Land Claims Commission, an administrative body through which land claims are processed and mediated.

Section 2 of the Restitution Act provides for restitution of rights in land to persons who were dispossessed of land as a result of racially discriminatory laws or practices after 1913, and who did not receive just and equitable compensation at the time of dispossession. They may claim physical restoration of land or equitable redress, for example monetary compensation. Claimants can be either dispossessed persons, their direct descendants, a community that was dispossessed and even a dispossessed deceased estate. The cut-off date by when claims had to be lodged was in 1998.

The Restitution Act defines a right in land which may be restored, widely to include inter alia registered or unregistered rights, a customary law interest and beneficial occupation of not less than 10 years. Restitution does not necessarily entail physical restoration of the land which was dispossessed, and can also take the form of equitable redress such as:

- provision of alternative land,
- payment of compensation, or
- priority access to state resources in the allocation of housing and land.

Claimants for restitution may either submit claims directly to the Land Claims Court or approach the court via the Land Claims Commission, in which case the Commission fully investigates, attempts to settle claims through mediation, and only when this fails, refers the claim to the Land Claims Court for determination.

According to the Land Claims Commission" since its inception in 1995 up until 30 June 2024, the Commission has settled 83,234 claims providing restitution to more than 465,488 households. Additionally the

Commission has provided grants to support claimants. This has amounted to an “investment exceeding R58 billion, dedicated to addressing the profound legacy of dispossession, fostering healing and renewal.”<sup>77</sup>

There apparently remain some 5755 claims lodged by 1998 still to be settled. In addition some 163000 claims which were briefly permitted to be lodged beyond the 1998 cut off date still remain unattended to.

## **RESTORATIVE JUSTICE**

Numerous claims for restitution of rights in land have been brought to the Court, by dispossessed communities and individuals alike. I have selected a few which I hope you will find interesting.

### **Case 1: District Six**

The first is commonly known as the *District Six* case. This case concerned a claim for restitution of rights in land arising from the forced removal under the Group Areas Act 41 of 1950, of a vibrant, multiracial community of some 6000 persons who lived in an area called District Six close to the centre of Cape Town. The District Six removals is an iconic example of how a vibrant community was destroyed by apartheid legislation. District Six was declared a "white group area" in 1966 under the Group Areas Act, and this led to the forced removal of tens of thousands of residents from the area, beginning in 1968 and continuing until about 1982. The community was dispersed and their houses flattened. By and large the land lay vacant and was largely so until 1994. One of the first cases brought to the Land Claims Court was that of former District Six residents and their descendants who claimed either physical restoration of the land taken away from them or financial compensation. They succeeded in their claim, half of them opting for physical restoration, and the other half for equitable redress by way of financial compensation.

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<sup>77</sup> Restitution: Frequently asked questions, 14 November 2024, [nda.gov.za](https://nda.gov.za)

A District Six Beneficiary Trust was established to coordinate and monitor the land restitution process.

### **Case 2: Lohatla Case**

Another community claim was that of the *Minister of Defence and another v Khosis Community at Lohatla & Others (LCC16/1997 [2002] ZALCC 39*. This concerned a claim for restitution of rights in land by three communities namely the Khosis, Gathlose and Maremane communities who had lived harmoniously for centuries in a large area of land in the Northern Cape. They were forcibly removed between 1976-1977 when the land was declared to be prohibited for occupation by Black persons.

The communities were relocated some 200km away to the Black homeland of Bophuthatswana, a barren and inferior land. Thereafter the land from which they were removed became the site of the South African Army Battle School where the South African Defence Force trains its soldiers.

The claimant communities applied for physical restoration of the land from which they were dispossessed. The State, through the Minister of Defence and the Premier of the Cape Province, whilst not opposing the claim, sought a preliminary application opposing the physical restoration of the land on the basis that this would not be in the public interest.

It was argued that the Battle School is a national asset, that the land is contaminated, that it posed a danger to life and would be exorbitantly expensive to decontaminate. The claimant communities argued that the correction of the socio-economic injustices of the past trumped these considerations. The Court accepted that physical restoration would not be in the public interest and ordered the restoration of alternative state owned land or land to be acquired by the state for restoration.

### **Case 3: Mazinini Community**

Competing claims over the same land, are often encountered and prove to be challenging and complex to adjudicate. In *Mazinini Community and Others v Minister of Rural Development and Land Reform and Others* (LCC23/2007) [2018] ZALCC 14, three competing claims were lodged over a large tract of land in the Eastern Cape by three communities. After a protracted trial, one of these, the Prudhoe community was found to have been dispossessed of the bulk of the claimed land. Lesser tracts of land were awarded to the other 2, being the Mazinini and Tharfield Communities.

#### **Case 4: Singh v Minister of Agriculture Rural Development and Land Reform and Others**

In *Singh Family v Minister of Agriculture, Rural Development and Land Reform and Others* (LCC 79/2023) [2025] ZALCC 29, there was a claim for financial compensation by the descendants of a Mr Singh, an Indian farmer who was dispossessed of his farm under the Group Areas Act when the area in which the farm was located was declared a white group area in which Indians could not own property.

Mr Singh was forced to sell his very lucrative farm for well below market value to a white farmer. His descendants succeeded in their claim. The compensation of some R33 million they were awarded took into account the current value of the under compensation at the time of dispossession (calculated using the consumer price index), the current market value of the farm and factored in an allowance for possible negative contingencies.

#### **Case 5: Koloko v Minister of Agriculture**

Another individual claim was that of *Koloko N.O. v Minister of Agriculture, Land Reform and Rural Development and Others (LCC 85/2020) [2022] ZALCC 39*, which involved the restoration of a farm to a Black family who had been dispossessed and forcibly removed to an African township by a racial law. A particular poignant feature of that dispossession, was that the father of the family, was classified as Coloured, and was prohibited from living with his family in the African township.

### **Case 6: Randall, Knott and Phillips v Minister of Agriculture**

A series of claims were brought from persons who were not foreseen as the primary beneficiaries of the restitution process namely, white farmers. *Randall & another v Minister of Land Affairs, Knott & another v Minister of Land Affairs (LCC 136/99, LCC 01/00) [2002] ZALCC 18*, and *Phillips v Minister of Rural Development and Land Reform and another LCC 76/2010 [2013] ZALCC 13* were claims for restitution of rights in land by way of monetary compensation brought by white farmers in the Eastern Cape. They were dispossessed of their farms in the 1970's when the area in which they farmed was declared to be part of a Black Homeland, named Ciskei. They succeeded in their claims for monetary compensation on the basis that they were dispossessed by a racial law and had not received just and equitable compensation at the time of dispossession. The Court rejected the state's argument that it was contrary to the Restitution Act to categorise privileged white farmers as dispossessed persons entitled to restitution of rights in land.

The Court found that although the primary beneficiaries of the restitution process were intended to be the poor and the disadvantaged, the Restitution Act did not confine restitution to that category of persons. It was not the function of the court to "legislate" their exclusion. An exclusion of this nature, the court held, would go against the tenure of the Constitution and the Restitution Act, both of which seek to eliminate discrimination.

A few comments on the working of the Court. The Court operates as a permanent circuit court with jurisdiction throughout the country. The seat of the Court is in Johannesburg, but the court travels to far flung parts of the country to make justice accessible to the poor and vulnerable. As land claimants are mostly indigent and often unsophisticated litigants, state funded legal aid is made available to them and the rules of the court aim to be user friendly. The Court operates on an Inquisitorial basis and allowances are made for the acceptance of hearsay evidence where appropriate. This is especially so as many many claimants are descendants of persons who were dispossessed. Competing land claims, the complexity of claims generally, along with legal and historical challenges are part of the land adjudicating fabric.

### **CONCLUSION.**

The South African Land Reform and Land Restitution Program has restored land rights to many vulnerable persons rendered landless by racial laws and practices. As the Commission for Restitution of Land Rights notes: “The impact has been profound. Communities are not only reclaiming physical land but also revitalising their cultural heritage and dignity.”<sup>8</sup>

It is my hope that our experience and restitution model can be of assistance to you and indeed to other jurisdictions. I thank you for your patient attention.

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<sup>8</sup> Restitution: Frequently asked questions footnote 7 supra

