RESTITUTION OF LAND RIGHTS IN S.A.

Restitution was introduced in South Africa in 1994, with the focus on redressing past injustices created as a result of racially based legislation or practices. It is closely linked to the need for the redistribution of land and tenure reform, thereby forming an integral part of the broader land reform programme currently underway in South Africa. The aim is to implement restitution in such a way as to provide support to the vital process of reconciliation, reconstruction and development.

HISTORICAL CONTEXT

It is estimated that more than 3.5 million people and their descendants have been victims of racially based dispossessions and forced removals during the years of segregation and apartheid. Urban removals were mostly dealt with in terms of the Group Areas Act or the Urban Areas Act. Rural removals consisted of various categories, such as black spot removals, removal of labour tenants, removals from mission stations, removals for the sake of forestry requirements and internal removals in the scheduled and released areas [later to become the homelands]. Legislation applicable to rural removals include the Black Land Act No. 27 of 1913, the Development Trust and Land Act No. 18 of 1936 and the Prevention of Illegal Squatting Act No. 52 of 1951.

RESTITUTION OF LAND RIGHTS ACT 22 OF 1994

The Interim Constitution of South Africa [Sections 121 - 123] served as the source and embodiment of restitution, whereby the legislature was instructed to put in place a law to provide redress for the victims of dispossession. This resulted in the enactment of the Restitution of Land Rights Act 22 of 1994. The aim of the Restitution of Land Rights Act 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 racial discriminatory laws or practices. This act also established the Commission on Restitution of Land Rights and the Land Claims Court.

It is stipulated by the Restitution of Land Rights Act that a restitution claim will be accepted for investigation if -

(a) the claimant was dispossessed

- of a right in land;
- after 19 June 1913;
- as a result of past racially discriminatory laws or practices;

(b) the claimant was not paid just and equitable compensation; and

(c) the claim was lodged not later than 31 December 1998.

Since the commencement of the Act it has been extensively amended. The amendments during 1995 and 1996 centred around the structure, powers and procedures of the Land Claims Court. In 1997 amendments were promulgated to bring the Act into line with the Constitution of the Republic of South Africa, 1996, and to extend the cut-off date for the lodgment of claims. During 1998 it was amended so as to provide for the secondment of

officers to the Commission, to further regulate mediation and negotiation and to extend the cases in respect of which money may be granted for the development of land.

The most important amendments up to date were those contained in the Land Restitution and Reform Laws Amendment Act, 1999. These amendments have resulted in the speeding up of the restitution process by doing away with the need for a claim to be referred to the Court where the interested parties have reached agreement as to how a claim should be finalized. The Minister is now authorized under these circumstances to make an award of a right in land, pay compensation and grant financial aid.

ROLEPLAYERS IN THE RESTITUTION PROCESS

COMMISSION ON RESTITUTION OF LAND RIGHTS

The Commission on Restitution of Land Rights was constituted on 1 March 1995. The Constitutional mandate of the Commission is reflected by it's mission statement:

To promote justice in respect of all victims of dispossession of land rights as the result of racially discriminatory laws or practices.

To facilitate negotiated settlements, bringing together all stakeholders in matters related to land claims.

To promote sustainable use of land through the restitution process.

To foster and nurture a spirit of reconciliation through the restitution process among those who use land and within the nation at large.

Apart from the Chief Land Claims Commissioner the Commission on Restitution of Land Rights consists of seven Regional Land Claims Commissioners responsible for overseeing the overall restitution process in the various regions, i.e. KwaZulu Natal, Western Cape, Eastern Cape, Free State & Northern Cape, Gauteng & North West and Mpumalanga and the Limpopo Province.

The functions of the Commission on Restitution of Land Rights, as originally outlined by the interim Constitution of the Republic of South Africa Act 200 of 1993, include the following:

to investigate the merits of claims,

to mediate and settle disputes arising from such claims,

to draw up reports with regard to unsettled claims for submission as evidence [together with any other relevant evidence] before a court of law, and

to exercise and perform any other powers and functions as provided by the Restitution of Land Rights Act 22 of 1994.

The provisions of the interim Constitution Act 200 of 1993 indicates a preference for the resolution of land claims by way of amicable settlement, where the parties involved enters willingly into negotiations and the Commission on Restitution assumes the role of mediator. However, if this envisaged approach is not attainable, section 22 of the

Restitution of Land Rights Act 22 of 1994 has made provision for the establishment of a Court of law, i.e. the Land Claims Court.

ROLE OF THE DEPARTMENT OF LAND AFFAIRS

An important aspect of the restitution process is the fact that the state recognizes that it is the respondent in all restitution cases, including claims lodged against land that had been transferred to private ownership.

The Minister of Land Affairs or the Department of Land Affairs represents the state as the primary respondent in virtually all restitution claims, as the Minister of Land Affairs is accountable to Parliament for the administration of the Restitution Act and the restitution of land rights. The Restitution Act also empowers the Minister of Land Affairs to make awards in the case of a settlement and to perform other functions relating to restitution; for instance to make regulations and to grant an advance or a subsidy for the development or management of, or to facilitate the settlement of persons on, land which is the subject of an order of the Court in terms of the Restitution Act or a settlement agreement.

LAND CLAIMS COURT

It is one of the objectives of the Restitution of Land Rights Act 22 of 1994 that, if after completion of the preceding investigation by the Commission on Restitution of Land Rights, it is evident to all parties involved that it would not be feasible to settle a claim by way of mediation and negotiation, the matter should be referred to the Land Claims Court.

This Court, constituted in 1996, serves as a specialist court with an independent adjudicatory function with regard to legal disputes arising from the government's land reform programme.

The Land Claims Court has the same status as the High Court of South Africa, with exclusive powers to determine a right to restitution in accordance with the Restitution of Land Rights Act 22 of 1994, to determine compensation payable in respect of land owned upon expropriation or acquisition of such land, and to determine a person entitled to title in land. Appeals to the Land Claims Court may be lodged with the Supreme Court of Appeal or with the Constitutional Court.

In order to speed up the restitution process the Restitution of Land Rights Act was amended to make provision for a fast track procedure, thereby entitling claimants to have direct access to the Land Claims Court to deal with a claim. This introduction of the direct access option has brought about an improvement in terms of the rate at which claims are finalised.

SCOPE OF THE RESTITUTION PROGRAMME

WHO IS ENTITLED TO RESTITUTION?

The injustices of racial dispossessions occurred on three main levels:

land dispossession leading to landlessness;

inadequate compensation for the value of the property; and

hardship which cannot be measured in financial or material terms.

According to the Restitution of Land Rights Act 22 of 1994 the following people qualify for restitution:

people who lost a right in land as the result of racially based laws and practices since 1913;

descendants of people who lost a right in land as the result of racially based laws and practices since 1913; and

communities and deceased estates who lost a right in land as the result of racially based laws and practices since 1913.

The Restitution of Land Rights Act 22 of 1994 provided the victims of forced removals in South Africa with the opportunity to lodge restitution claims from 2 December 1994. Initially the cut-off date for the lodgment of claims was 1 May 1998. By adopting the Land Restitution and Reform Laws Amendment Act, 1997, Parliament later extended this date to 31 December 1998.

FORMS OF RESTITUTION

According to the overriding principle or fairness and equity each restitution claim must be treated on its merits. In the case of a valid restitution claim the claimant has the constitutional right to participate in the formulation of a restitution package specific to that claim.

Restitution can take the following forms:

restoration of the land from which claimants were dispossessed;

provision of alternative land;

payment of compensation;

alternative relief including a combination of the above-mentioned, sharing of the land, or budgetary assistance such as services and infrastructure development; or

priority access to state resources with regard to housing and land development programmes.

Wherever possible preference should be given to the restoration of land. Compensation received at the time of removal as well as improvements to the property since dispossession had taken place should be taken into account when determining redress to the claimant.

REVIEW AND REDESIGN OF THE RESTITUTION PROCESS

COMPLEXITY OF THE PROCESS

It is estimated that the total of 67 531 claims have been lodged with the Commission on Restitution of Land Rights. [This number is subject to the validation process currently underway.] It is therefore clear that an enormous responsibility rests on the shoulders of the Commission on Restitution of Land Rights and the Department of Land Affairs to give effect to the huge and complex task of restituting land rights.

Various aspects have furthermore played a role in adding to the complexity of the restitution process as a whole. The following issues have been identified by the Ministerial Review of 1998 as contributing to the slow pace of delivery:

the legal and procedural intricacies of the Restitution of Land Rights Act 22 of 1994 have had a negative effect on the speed at which claims were settled,

the over extension of the Land Claims Court's jurisdiction in terms of the Labour Tenants Act 2 of 1996 a nd the Extension of Security of Tenure Act of 1997,

a lack of guidance with regard to the meaning of the concept "just and equitable" compensation,

a disregard among certain groups for the Restitution of Land Rights Act 22 of 1994, in the form of selling of land susceptible to land claims, indiscriminate evictions and the deliberate interference with the original geographical description of the land subject to claims, and

the adversarial relationship between the drivers of the restitution process, i.e. the Commission on Restitution of Land Rights and the Department of Land Affairs.

Although initial progress with the settlement of claims has been slow, the establishment of institutions, policies and systems to advance the restitution process should be seen as a significant achievement. Also, with the introduction of certain measures as recommended by the Ministerial Review, a remarkable increase in the number of settled restitution claims has recently been achieved. So far about 437 145 people are beneficiaries of the restitution programme.

RE-ENGINEERING OF THE RESTITUTION BUSINESS PROCESS

The Review Task Team identified the multiple lines of authority and accountability of the role players, i.e. the Commission and the Department of Land Affairs, as contributing to the slow pace of delivery.

It was therefore recommended that the Commission on Restitution of Land Rights should be integrated with the Department of Land Affairs, with the Department retaining its separate identity. In terms of this recommendation all the restitution staff of the Department of Land Affairs have been relocated to the Commission, which is now solely responsible for the processing of claims, while the Department of Land Affairs' role is of a supportive nature.

Attention has also been given to the mapping of a clear path in terms of which restitution

claims can be dealt with from lodgement to settlement. Other steps embarked upon to enhance the pace of delivery and increase efficiency include the following:

the use of project teams focussing on specific areas,

the handling of claims in batches,

outsourcing while at the same time retaining control,

the settling of a large number of claims through negotiations as opposed to the lengthy process of litigation,

referring only disputed cases to court,

direct access reviews and appeals, and

the use of alternative dispute resolution mechanisms to fast track the process.

The above-mentioned re-engineering process resulted in alleviating the duplication of functions, eliminating competition for human, material and financial resources and brought about a dramatic increase in delivery.

SHIFT FROM A JUDICIAL TO AN ADMINISTRATIVE PROCESS

After the completion of the 1999 amendments to the Restitution of Land Rights Act 22 of 1994, the shift from a judicial process which was court-driven to an administrative approach within a legislative framework, was implemented. According to this approach the Minister of Land Affairs is granted powers to settle claims on the basis of agreement between the various parties. This shift forms part of the Commission's focus on expanding and decentralising its powers and authority in order to finalise claims more swiftly and effectively, in that Ministerial powers to make awards on restitution are delegated to officers in the regional offices. This has resulted in a phenomenal and exponential increase in the number of claims settled.

Together with this the concept of the Standard Settlement offer has been introduced. This is a standard offer of financial compensation by the Minister of Agriculture and Land Affairs to all claimants in a certain urban or peri-urban area for the purpose of the full and final settlement of their claims in terms of section 42D of the Restitution of Land Rights Act, 1994.

INTEGRATED DEVELOPMENT APPROACH

Settlement plans and development strategies are considered as prerequisites for the finalisation of any restitution claim where the claimants are restored to land. The aim with this approach is to ensure delivery, not only the quantitative settlement of claims, but also the qualitative finalisation of claims through the restitution process. Since the achievement of both quantitative and qualitative restitution results cannot be achieved single-handedly, it requires the involvement of all relevant role players, i.e. provincial and local government structures, municipalities and district councils to ensure cooperation in terms of efforts and resources. It furthermore requires the need to join forces with other components within the Department of Land Affairs, such as State Land Management,

Redistribution and Tenure, Surveys and Mapping and National Spatial Planning.

FOCUS ON RURAL CLAIMS

According to the strategic direction of the Commission on Restitution of Land Rights the focus should be on the rural claims received. The rationale for this is not only because of the concentration of abject poverty in these areas, but also because rural claims involve larger numbers of people. These claims are mostly community claims, whereas most urban claims are individual household claims, with some exceptions.

If the total number of claims lodged is analysed, about 80% of these claims are urban claims, involving about 300 000 beneficiaries. In contrast to this, the 20% rural claims received represent about 3,6 million people. The aim is therefore to apply the 20 / 80 principle, i.e. do the 20% rural claims with an impact on 3,6 million people, while at the same time not excluding the urban claims which will be dealt with in tandem with the rural claims