1. INTRODUCTION

1.1 ENTITLEMENT TO RESTITUTION

1.1.1 In terms of section 2(1) (d) of the Restitution of Land Rights Act 22 of 1994, as amended (hereinafter referred to as Act 22 of 1994, as amended) - "a person shall be entitled to restitution of a right in land if ... it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of racially discriminatory laws or practices.

2. FACTORS TO CONSIDER:

2.1 DEFINITION OF COMMUNITY

2.1.1 Section 1 of Act 22 of 1994, as amended, defines a community as “any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group.

2.1.2 In the Kranspoort matter, the court made an inference to the effect that the community must exist at two different levels, viz.

2.1.2.1 at the time of dispossession

It must be shown that at the time of dispossession, there were shared rules, which determined access to land, which was held in common by such community. Examples in this regard may include the existence of a Chief and his counselors, etc.
2.1.2.2 at the time when the claim was lodged

This can be the same community or a part of the community that was dispossessed of rights in land. It does not have to be the identical community in that changes in the constituent families, the admission of new members and the departure of other members mean that the face of a community changes over time.

2.1.3 In the application of the above test, the following may serve as indications of the existence of a community at the time of dispossession and lodgement:

(a) the formation of an association (the Kranspoort Burial Society, Elandskloof Association, etc.);
(b) annual reunions at the claimed land;
(c) community meetings in preparation for the lodgement of the claim;
(d) the formation of a "land claims committee" to deal with the land claim on behalf of the community, etc.

2.1.4 In the Baphiring matter (Baphiring v Uys and Others- LCC64/98), the court ruled that the plaintiff, as part of a community, is entitled to claim restitution of a right in land dispossessed from the full community (the Baphiring tribe). The plaintiff does not, however, act on behalf of the full community, as it is not representative of the majority of the tribe.

2.2 NATURE OF RIGHTS IN LAND LOST

2.2.1 The nature of rights lost would assist in understanding the circumstances and activities that took place at the time of dispossession. Some communities had registered rights while others had unregistered rights (beneficial occupation, labour tenancy, etc.)

2.2.2 In most cases, communities lost rights to or used the land for: residential, burial, cropping, grazing, irrigation, breeding livestock, extracting certain minerals such as clay/sand, collecting grass and herbs, etc.

2.3 LEGISLATIONS USED FOR DISPOSSESSION

2.3.1 Some of the legislations used include:
2.3.1.1 The Native Land Act 27 of 1913
2.3.1.2 The Natives Trust and Land Act 18 of 1936
2.3.1.3 The Native (Bantu) Administrative Act 38 of 1927
2.3.1.4 The Forestry Acts
2.3.1.5 The Irrigation Acts
2.3.1.6 The Parks Board Acts
2.3.1.7 The Transvaal Asiatic Land Tenure Amendment Act 30 of 1936
2.3.1.8 Coloured Persons Settlement Act 31 of 1967
2.3.1.9 Rural Coloured Areas Act 24 of 1963
2.3.1.10 Bantu Labour Act 67 of 964
2.3.1.11 Promotion of Bantu Self-governing Act 46 of 1959
2.3.1.12 Bantu Homelands Citizens Act 92 of 1969
2.3.1.13 Bantu Affairs Administration Act 45 of 1971
2.3.1.14 The Native Areas Act 21 of 1923
2.3.1.15 The Community Development Act 31 of 1966 Prevention of illegal Squatting Act 57 of 1951
2.3.1.16 The Expropriation Act
2.3.1.17 Slums Act of 1934, etc.

2.4 COMPENSATION RECEIVED AT THE TIME OF DISPOSSESSION

2.4.1 Section 33(eA) of Act 22 of 1994 as amended, provides that compensation received at the time of dispossession must be taken into account when making a restitution award.

2.4.2 There are communities who were not financially compensated at all; others were only compensated for improvements, while others were not justly and equitably compensated.

2.4.3 Most communities were however, dumped at areas (the so-called "compensatory land") where they either joined or were joined by other communities who were also victims of land dispossession. In some cases the size and quality of land to which communities were relocated was worse as compared to where they came from.

2.4.4 Communities therefore did not have the exclusive use and jurisdiction of the area to which they have been resettled.

2.4.5 Other communities were left to fend for themselves and they therefore were scattered around the country.

2.4.6 For those communities who owned the land and were also compensated for it, the valuation of such land was done by government officials, and they were therefore not independent and
credible valuations. The money for such land could therefore not be used to acquire property of the same size and quality, elsewhere.

2.4.7 The practice in the Commission is therefore that if any of the above or similar circumstances prevailed with regard to a particular community, then the "compensation" received at the time of dispossession is taken into account when determining the restitution award, but disregarded due to the above or similar circumstances. Refer to policy guideline document on compensation received at the time of dispossession in this regard.

2.5 OPTIONS WORKSHOP

2.5.1 An options workshop must be held with the entire community as early as possible.
2.5.2 The purpose of an options workshop is to explain what restitution options are available to the community, taking into consideration the needs of the community and the size of such community vis-a-vis the intended land use plan.
2.5.3 The objective is that the claimants must be able to make an informed decision based on the information provided with regard to each option. This means that a thorough investigation of the advantages and disadvantages of each option must be presented.
2.5.4 During this process, the needs and ultimate options of particular groups in the community (youth, women and men) must be ascertained and finally aligned/brought together.
2.5.5 Once the community decides which option to take, the documented resolution of the claim should therefore be guided by such an option.

2.6 VERIFICATION

2.6.1 The verification of claimants is done for three purposes:

2.6.1.1 to establish the existence of an element of commonality within the community which existed at the time of dispossession,
2.6.1.2 to determine whether the restoration of such a community is feasible, taking into consideration the increased size of the community, and
2.6.1.3 to determine the number of households for purposes of restitution grants and any housing projects.

2.6.2 Where the existence of a community is not disputed, an inquiry into the membership of the community will not be necessary (Macleantown). However, there must be a broad inquiry into the existence of a community, in its own right, and its connection to the claimed land, so that rights in land will be restored to it (probably under a formal arrangement such as a Communal Property Association), and not to its members individually.
2.6.3 The verification for purposes of grants and feasibility are linked, in that once it is determined how many households constitutes a particular community, the question of whether the claimed land will be able to carry the number of households (feasibility of restoration) will then be answered, and the amount for grants can also be determined.

2.6.4 If a list exists of the original dispossessed people from the Archives, that list can be used as a basis for the verification.

2.6.5 If there is no list, one will look for the people who lived at the claimed land and who are still alive. You will then interview them to determine the surnames that existed at the time. Then you visit people with those surnames to draw a family tree that would link them to the claimed land.

2.6.6 For the members of the community who joined the claiming community and who for all intents and purposes form part of the claiming community, they are also counted as if they were also dispossessed with the claiming community. The same applies in the instance where several people are settled on the land that is under claim, and there is an agreement that the claiming community will absorb such people.

2.6.10 The necessary documents must be obtained, e.g. birth certificates, death certificates, proof of identity, affidavits - where required, etc. Refer to the policy guideline document on verification for a detailed explanation.

2.7 ESTABLISHMENT OF A LEGAL ENTITY/STRUCTURE

2.7.1 Prior to negotiations, the community must appoint a "land claims committee" to handle the case on behalf of the entire community. The committee must be elected at a general meeting whereby a resolution will be taken to give the committee a mandate to represent and deal with the claim until it is settled.

2.7.2 For purposes for gender sensitivity, women must also be part of such a committee.

2.7.3 During the process of negotiations or anytime before, the community must form a legal entity, which will hold the land on behalf of all members of the community.

2.8 VALUATION

2.8.1 The valuation of property is done so as to have a basis for negotiating the price of such property with the current landowner, and to also determine the monetary value of the claimant's claim.
2.8.2 A valuation of the claimed land is commissioned. Refer to DRD&LR handbook on valuations and draft terms of reference to valuer.

2.8.2 Where the land is state land, and it is feasible to restore the claimants to such land, the practice within the DRD&LR /CLCC has been to restore such land without valuation, but recently it has become standard practice to value state land for purposes of accessing section 42C grant and as per treasury requirements.

3. DERMINING THE RESTITUTION AWARD

3.1.1 In most cases communities opt for restoration of land rights. Where it is not feasible to restore the community at the claimed land, alternative (state or private) land within the vicinity of the claimed land should be considered.

3.1.2 The feasibility of restoration is determined by the value of the claim, improvements on such land and current land use of the land vis-à-vis the intended use and the carrying capacity of the land.

3.1.3 The basis for the value of a rural claim is the value of the land lost or of land of similar size and use, taking into consideration subsequent improvements and motivating accordingly.

3.1.3 Where the land is in private ownership, negotiations with the landowner will be entered into based on the valuation conducted on his property.

3.1.4 If the land is state land, the user department and/or the holder of the land would form part of the negotiations. If there is agreement that the land can be given to the community for restitution purposes, then the process of disposing of such land will commence.

3.1.5 A motivation will have to be made to the relevant Provincial Department of Rural Development and Land Reform for presentation to the Provincial State Land Disposal Committee, for the disposal of the land. After they recommend that the land can be disposed of, another motivation is written to the Minister of Rural Development and Land Reform for his approval in that regard.

3.1.6 Once the Minister approves, a submission is written to the State Land Disposal Directorate to implement the disposal as per Minister's approval.

3.1.7 Where there are issues of conservation, the relevant stakeholders must be
on board during negotiations and set up joint management committee to work out possible settlements. It is advisable to have all stakeholders on board as early as possible so that it can be established what contribution to the final restitution award each stakeholder can make. This information/commitment can then form part of the restitution package.

3.1.8 A service provider may be appointed to assist the claimants with the business plan. Three quotations will be sought and usually the least expensive is chosen. However, if one of the preferred quotations is expensive, a motivation for choosing it will have to be made in the submission that goes to the CLCC for approval of the release of funds. One of the reasons a higher quotation can be chosen is that the DRD&LR /CLCC has been satisfied by the quality of work done by the same company/institution in other restitution cases.

3.1.8 A Restitution Settlement Grant which is set at R 6 595.00 per household can be accessed by claimants for the purposes of enlisting the services of planners and other professionals to assist the claimants with the planning for the acquisition, settlement on, use and development of land. The amount will be based on the number of households’ beneficiaries. Refer to the restitution grants policy guideline document.

4. SUMMARY

4.1 It is submitted that as a result of the unique nature and extent of each restitution claim, a broad policy framework be used.

4.2 Neither the Constitution nor the Restitution Act prescribes how the restitution package should be determined. Thus clear and practical guidelines are needed to ensure consistency.

4.3 Different methods and factors can be used to determine a package, but each case must be clearly motivated for, depending on the circumstances and merits thereof.

4.4 The history of acquisition and dispossession, the nature and extent of rights lost, compensation received at the time of dispossession and the option chosen are some of the important factors that would give direction in terms of how the claim should be settled and what the package should be.

4.5 The involvement of other state departments (e.g. Agriculture, Housing, etc) will definitely enhance the value of the entire claim.

5. SUMMARY OF PRINCIPLES
When negotiating a value for a rural claim, the following should be considered:

5.1 The package should be well motivated, and take the following into account:

5.1.1 the nature and extent of the right lost;
5.1.2 compensation received at the time of dispossession;
5.1.3 option chosen (e.g. restoration) vis - a vis the current land use and intended use;
5.1.4 current value of the land and improvements;
5.1.5 carrying capacity of the land where restoration is desirable, against the increased members of the community;
5.1.6 developmental and sustainability issues;
5.1.7 the holding entity of the land.

6. LEGAL IMPLICATIONS
6.1 Neither the Constitution nor the Restitution Act prescribes how the value of a claim should be determined.
6.2 The implementation of this policy guideline document could lead to the possibility of being challenged in a court of law.

Policy Unit, CLCC Office

Updated: December 2009

RESTITUTION POLICY:
GUIDELINES FOR FINALISING CLAIMS FOR RESTORATION OF LAND

2. INTRODUCTION

2.1 ENTITLEMENT TO RESTITUTION

1.1.1 In terms of section 2(1) (d) of the Restitution of Land Rights Act 22 of 1994, as amended (hereinafter referred to as Act 22 of 1994, as amended) - "a person shall be entitled to restitution of a right in land if ... it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of racially discriminatory laws or practices.

2. FACTORS TO CONSIDER:

2.2 DEFINITION OF COMMUNITY
2.1.1 Section 1 of Act 22 of 1994, as amended, defines a community as “any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group.

2.1.2 In the Kranspoort matter, the court made an inference to the effect that the community must exist at two different levels, viz.

2.2.2.1 at the time of dispossession

It must be shown that at the time of dispossession, there were shared rules, which determined access to land, which was held in common by such community. Examples in this regard may include the existence of a Chief and his counselors, etc.

2.2.2.2 at the time when the claim was lodged

This can be the same community or a part of the community that was dispossessed of rights in land. It does not have to be the identical community in that changes in the constituent families, the admission of new members and the departure of other members mean that the face of a community changes over time.

2.2.3 In the application of the above test, the following may serve as indications of the existence of a community at the time of dispossession and lodgement:

(e) the formation of an association (the Kranspoort Burial Society, Elandskloof Association, etc.);
(f) annual reunions at the claimed land;
(g) community meetings in preparation for the lodgement of the claim;
(h) the formation of a "land claims committee" to deal with the land claim on behalf of the community, etc.

2.2.4 In the Baphiring matter (Baphiring v Uys and Others- LCC64/98), the court ruled that the plaintiff, as part of a community, is entitled to claim restitution of a right in land dispossessed from the full community (the Baphiring tribe). The plaintiff does not, however, act on behalf of the full community, as it is not representative of the majority of the tribe.
2.3 NATURE OF RIGHTS IN LAND LOST

2.4.2 The nature of rights lost would assist in understanding the circumstances and activities that took place at the time of dispossession. Some communities had registered rights while others had unregistered rights (beneficial occupation, labour tenancy, etc.)

2.4.3 In most cases, communities lost rights to or used the land for: residential, burial, cropping, grazing, irrigation, breeding livestock, extracting certain minerals such as clay/sand, collecting grass and herbs, etc.

2.5 LEGISLATIONS USED FOR DISPOSSESSION

2.5.1 Some of the legislations used include:

2.5.1.1 The Native Land Act 27 of 1913
2.5.1.2 The Natives Trust and Land Act 18 of 1936
2.5.1.3 The Native (Bantu) Administrative Act 38 of 1927
2.5.1.4 The Forestry Acts
2.5.1.5 The Irrigation Acts
2.5.1.6 The Parks Board Acts
2.5.1.7 The Transvaal Asiatic Land Tenure Amendment Act 30 of 1936
2.5.1.8 Coloured Persons Settlement Act 31 of 1967
2.5.1.9 Rural Coloured Areas Act 24 of 1963
2.5.1.10 Bantu Labour Act 67 of 964
2.5.1.11 Promotion of Bantu Self-governing Act 46 of 1959
2.5.1.12 Bantu Homelands Citizens Act 92 of 1969
2.5.1.13 Bantu Affairs Administration Act 45 of 1971
2.5.1.14 The Native Areas Act 21 of 1923
2.5.1.15 The Community Development Act 31 of 1966 Prevention of illegal Squatting Act 57 of 1951
2.5.1.16 The Expropriation Act
2.5.1.17 Slums Act of 1934, etc.

2.6 COMPENSATION RECEIVED AT THE TIME OF DISPOSSESSION

2.6.1 Section 33(eA) of Act 22 of 1994 as amended, provides that compensation received at the time of dispossession must be taken into account when making a restitution award.

2.4.2 There are communities who were not financially compensated at all; others were only compensated for improvements, while others were not justly and equitably compensated.
2.4.6 Most communities were however, dumped at areas (the so-called "compensatory land") where they either joined or were joined by other communities who were also victims of land disposessions. In some cases the size and quality of land to which communities were relocated was worse as compared to where they came from.

2.4.7 Communities therefore did not have the exclusive use and jurisdiction of the area to which they have been resettled.

2.4.8 Other communities were left to fend for themselves and they therefore were scattered around the country.

2.4.6 For those communities who owned the land and were also compensated for it, the valuation of such land was done by government officials, and they were therefore not independent and credible valuations. The money for such land could therefore not be used to acquire property of the same size and quality, elsewhere.

2.6.7 The practice in the Commission is therefore that if any of the above or similar circumstances prevailed with regard to a particular community, then the "compensation" received at the time of dispossession is taken into account when determining the restitution award, but disregarded due to the above or similar circumstances. Refer to policy guideline document on compensation received at the time of dispossession in this regard.

2.7 OPTIONS WORKSHOP

2.5.6 An options workshop must be held with the entire community as early as possible.
2.5.7 The purpose of an options workshop is to explain what restitution options are available to the community, taking into consideration the needs of the community and the size of such community vis-a-vis the intended land use plan.
2.5.8 The objective is that the claimants must be able to make an informed decision based on the information provided with regard to each option. This means that a thorough investigation of the advantages and disadvantages of each option must be presented.
2.5.9 During this process, the needs and ultimate options of particular groups in the community (youth, women and men) must be ascertained and finally aligned/brought together.
2.5.10 Once the community decides which option to take, the documented resolution of the claim should therefore be guided by such an option.

2.8 VERIFICATION

2.8.3 The verification of claimants is done for three purposes:
2.8.3.1 to establish the existence of an element of commonality within the community which existed at the time of dispossession,

2.8.3.2 to determine whether the restoration of such a community is feasible, taking into consideration the increased size of the community, and

2.8.3.3 to determine the number of households for purposes of restitution grants and any housing projects.

2.8.4 Where the existence of a community is not disputed, an inquiry into the membership of the community will not be necessary (Macleantown). However, there must be a broad inquiry into the existence of a community, in its own right, and its connection to the claimed land, so that rights in land will be restored to it (probably under a formal arrangement such as a Communal Property Association), and not to its members individually.

2.8.5 The verification for purposes of grants and feasibility are linked, in that once it is determined how many households constitutes a particular community, the question of whether the claimed land will be able to carry the number of households (feasibility of restoration) will then be answered, and the amount for grants can also be determined.

2.8.6 If a list exists of the original dispossessed people from the Archives, that list can be used as a basis for the verification.

2.8.7 If there is no list, one will look for the people who lived at the claimed land and who are still alive. You will then interview them to determine the surnames that existed at the time. Then you visit people with those surnames to draw a family tree that would link them to the claimed land.

2.8.8 For the members of the community who joined the claiming community and who for all intents and purposes form part of the claiming community, they are also counted as if they were also dispossessed with the claiming community. The same applies in the instance where several people are settled on the land that is under claim, and there is an agreement that the claiming community will absorb such people.

2.8.11 The necessary documents must be obtained, e.g. birth certificates, death certificates, proof of identity, affidavits - where required, etc. Refer to the policy guideline document on verification for a detailed explanation.

2.9 ESTABLISHMENT OF A LEGAL ENTITY/STRUCTURE

2.9.1 Prior to negotiations, the community must appoint a "land claims committee" to handle the case on behalf of the entire community. The committee must be elected at a general meeting
whereby a resolution will be taken to give the committee a mandate to represent and deal with the claim until it is settled.

2.9.2 For purposes for gender sensitivity, women must also be part of such a committee.

2.9.3 During the process of negotiations or anytime before, the community must form a legal entity, which will hold the land on behalf of all members of the community.

2.10 VALUATION

2.10.1 The valuation of property is done so as to have a basis for negotiating the price of such property with the current landowner, and to also determine the monetary value of the claimant’s claim.

2.10.2 A valuation of the claimed land is commissioned. Refer to DRD&LR handbook on valuations and draft terms of reference to valuer.

2.8.3 Where the land is state land, and it is feasible to restore the claimants to such land, the practice within the DRD&LR /CLCC has been to restore such land without valuation, but recently it has become standard practice to value state land for purposes of accessing section 42C grant and as per treasury requirements.

3. DERMINING THE RESTITUTION AWARD

3.1.4 In most cases communities opt for restoration of land rights. Where it is not feasible to restore the community at the claimed land, alternative (state or private) land within the vicinity of the claimed land should be considered.

3.1.5 The feasibility of restoration is determined by the value of the claim, improvements on such land and current land use of the land vis-à-vis the intended use and the carrying capacity of the land.

3.1.6 The basis for the value of a rural claim is the value of the land lost or of land of similar size and use, taking into consideration subsequent improvements and motivating accordingly.

3.1.3 Where the land is in private ownership, negotiations with the landowner will be entered into based on the valuation conducted on his property.
3.1.9 If the land is state land, the user department and/or the holder of the land would form part of the negotiations. If there is agreement that the land can be given to the community for restitution purposes, then the process of disposing of such land will commence.

3.1.10 A motivation will have to be made to the relevant Provincial Department of Rural Development and Land Reform for presentation to the Provincial State Land Disposal Committee, for the disposal of the land. After they recommend that the land can be disposed of, another motivation is written to the Minister of Rural Development and Land Reform for his approval in that regard.

3.1.11 Once the Minister approves, a submission is written to the State Land Disposal Directorate to implement the disposal as per Minister's approval.

3.1.12 Where there are issues of conservation, the relevant stakeholders must be on board during negotiations and set up joint management committee to work out possible settlements. It is advisable to have all stakeholders on board as early as possible so that it can be established what contribution to the final restitution award each stakeholder can make. This information/commitment can then form part of the restitution package.

3.1.8 A service provider may be appointed to assist the claimants with the business plan. Three quotations will be sought and usually the least expensive is chosen. However, if one of the preferred quotations is expensive, a motivation for choosing it will have to be made in the submission that goes to the CLCC for approval of the release of funds. One of the reasons a higher quotation can be chosen is that the DRD&LR/CLCC has been satisfied by the quality of work done by the same company/institution in other restitution cases.

3.1.13 A Restitution Settlement Grant which is set at R 6 595.00 per household can be accessed by claimants for the purposes of enlisting the services of planners and other professionals to assist the claimants with the planning for the acquisition, settlement on, use and development of land. The amount will be based on the number of households’ beneficiaries. Refer to the restitution grants policy guideline document.

7. SUMMARY

7.1 It is submitted that as a result of the unique nature and extent of each restitution claim, a broad policy framework be used.

7.2 Neither the Constitution nor the Restitution Act prescribes how the restitution package should be determined. Thus clear and practical guidelines are needed to ensure consistency.

7.3 Different methods and factors can be used to determine a package, but each case must be clearly motivated for, depending on the circumstances and merits thereof.
7.4 The history of acquisition and dispossession, the nature and extent of rights lost, compensation received at the time of dispossession and the option chosen are some of the important factors that would give direction in terms of how the claim should be settled and what the package should be.

7.5 The involvement of other state departments (e.g. Agriculture, Housing, etc) will definitely enhance the value of the entire claim.

8. SUMMARY OF PRINCIPLES
When negotiating a value for a rural claim, the following should be considered:

8.1 The package should be well motivated, and take the following into account:

8.1.1 the nature and extent of the right lost;
8.1.2 compensation received at the time of dispossession;
8.1.3 option chosen (e.g. restoration) vis-a-vis the current land use and intended use;
8.1.4 current value of the land and improvements;
8.1.5 carrying capacity of the land where restoration is desirable, against the increased members of the community;
8.1.6 developmental and sustainability issues;
8.1.7 the holding entity of the land.

9. LEGAL IMPLICATIONS
9.1 Neither the Constitution nor the Restitution Act prescribes how the value of a claim should be determined.
9.2 The implementation of this policy guideline document could lead to the possibility of being challenged in a court of law.

Policy Unit, CLCC Office

Updated: December 2009