RESTITUTION OF URBAN LAND IN SOUTH AFRICA: THE STORY OF DISTRICT SIX

SHAUNNAGH DORSETT*

> We consider that the history of the races, especially having regard to South African History, shows that the co-mingling of black and white is undesirable. The native should only be allowed to enter urban areas, which are essentially the white man's creation, when he is willing to enter and to minister to the needs of the white man, and should depart therefrom when he ceases to so minister.[1]

I. INTRODUCTION

Current land ownership and development patterns in South Africa are the legacy of the apartheid era. During that era, a number of racially-based land policies, underpinned by legislative schemes, were the cause of the removal, often by force, of non-white South Africans from designated areas. The official statistics of removals are in themselves quite staggering: over three and a half million people were removed from their homes and resettled in inferior areas, sometimes with little or no housing. This figure, stark as it is, does nothing to convey the suffering and loss of human dignity which accompanied these removals. Official removals policy initially focused on the segregation of Black Africans, but was soon extended to include all non-whites: for example those designated coloured, Indian, Malay, or Chinese.[2]

---

* Lecturer in Law, Faculty of Law, Griffith University. I would like to express my thanks to everyone at the District Six Land Claims Unit, and the Commission on Restitution of Land Rights (Northern and Western Cape) who made me feel welcome and patiently answered all my questions. In particular I would like to thank Katherine Ryan, without whose guidance I would never have found my way through the restitution maze. While I benefited enormously from the insight gained into the restitution process from my time with the Commission, all views expressed in this article remain solely those of the author.

1 The Transvaal Local Government Commission (the Stallard Commission), TP 1/1922, quoted in Davis, Melunsky and Du Randt, *Urban Native Law*, Grotius Publications (1959) p 5.

2 For the sake of clarity, the terminology used throughout this article reflects the official apartheid designations.

In 1994, South Africa began the long and difficult process of restitution. In a country in transition, such as South Africa, the acknowledgment of past suffering, and attempts at reparations, are crucial. Land reform generally, and restitution of land in particular, is seen as central to the African National Congress' programme for reconstruction and development in South Africa. Post-apartheid, a fundamental redistribution of land is required and such a redistribution must be state driven, rather than market based.

In this article, I consider one aspect of the land reform programme, that of restitution of land. In particular, this article focuses on the restitution of urban land. Although the restitution of land process has been in existence for three and a half years, at this stage only eight claims have been finalised and none have involved individual urban claims. Many fundamental questions still await determination by the Land Claims Court, and the final parameters of the process are still unclear. For example, issues relating to proof of dispossession and quantum of compensation remain undecided. Further, the extent to which the slowly changing political climate and the escalating cost of the process will affect outcomes is destined to remain unknown for some time.

The area known as District Six in Cape Town provides a fascinating insight into the problems and prospects for urban restitution. District Six is at the foot of Devil's Peak, adjacent to Table Mountain, in Cape Town. Under the *Group Areas Act*,[3] between 1966 and 1983 around fifty thousand of its occupants were dispossessed, often forcibly, of their homes. Most were relocated to a distant area known as the Cape Flats. Almost the entire suburb was razed to the ground, and approximately 49 per cent of the area is now covered by the Cape Technikon, an educational institution which was established for white students on the ruins of District Six. Much of the rest remains vacant, despite the fact that it is prime residential land. In many ways, District Six is not a typical example of urban restitution. The physical alteration of the area since the 1960s, and the extent of the dispossession which occurred, set District Six apart from other urban areas. However, precisely because of its somewhat atypical nature, District Six throws many of the issues of urban restitution into relief.

This article considers the process of urban restitution from the perspective of District Six. In doing so, I hope not only to explain the legal process involved, but also to convey something of the nature of the dispossession and suffering that occurred, as well as prospects for the future. The following Part considers the policy background to the restitution process in general terms. Part III briefly considers why restitution is the appropriate process for South Africa, rather than the doctrine of aboriginal title utilised in many other former British colonies. Part IV outlines the apartheid land laws under which the residents of District Six lost their homes and community. Part V provides a picture of District Six, and presents some of the stories of the former residents. Part VI explains the legal process of restitution with reference to District Six, and considers the problems of effecting restitution in an urban context.

---

3 *Group Areas Act* 1950, amended by the *Group Areas Act* 1957 and the *Group Areas Act* 1966. All references to legislation in this article are to Acts of the South African Parliament.

II. SOUTH AFRICAN LAND POLICY AND THE *RESTITUTION OF LAND RIGHTS ACT*

In 1991, following the exertion of considerable political pressure, limited land reform was introduced by the De Klerk Government.[4] The central policy of land reform was the abolition of racially based legislation relating to land. The *Abolition of Racially Based Land Measures Act* 1991 was passed, which repealed many of the statutes which underpinned territorial segregation in South Africa. Although it was initially against the return of land to those who had been dispossessed,[5] in 1991 the government also introduced a limited procedure for land restitution. Chapter VI of the above Act provided for the establishment of an Advisory Commission on Land Allocation with powers to recommend the return of undeveloped, state-owned land. This process was clearly too narrow, and despite the amending of the Act in 1993 to widen its ambit, these parts of the Act were repealed by s 4(1) of the *Restitution of Land Rights Act* 1994.[6]

The Interim Constitution of South Africa mandated the establishment of a process for the restitution of land.[7] Sections 121-3 provided for the enactment of legislation for the restitution of land rights, for the establishment of a Commission on Restitution of Land Rights and for a court of law to hear such claims. These sections were outside of the Bill of Rights, and separated from the property clause (s 28). In the final version of the Constitution,[8] the sections relating to land restitution fall within the Bill of Rights and the property clause. Section 25(7) provides that:

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

By the time the final form of the Constitution had been determined, the *Restitution of Land Rights Act* had already been passed, and the bodies envisaged under the Interim Constitution had been established. Subsequent amendments to the Act have brought it into line with the final wording of s 25.

---

4 See Republic of South Africa, *White Paper on Land Reform*, Government Printer, 1991.

5 Note 4 *supra* at A2.11(f).

6 *Restitution of Land Rights Act* 1994, as amended by the *Restitution of Land Rights Amendment Act* 1995, the *Land Restitution and Reform Laws Amendment Act* 1996 and the *Land Restitution and Reform Laws Amendment Act* 1997. The Act is supplemented by the Rules Regarding Procedure of the Land Claims Commission, *Government Notice R703 (Government Gazette 16407)*, 12 May 1995, as amended by *Government Notice R1961 (Government Gazette 17603)*, 29 November 1996, and the Land Claims Court Rules, *Government Notice 300 (Government Gazette 17804)*, 21 February 1997.

7 *Constitution of the Republic of South Africa* 1993, s 121 (the Interim Constitution).

8 *Constitution of the Republic of South Africa* 1996 (the Constitution).

In April 1997, the South African Department of Land Affairs published the *White Paper on South African Land Policy*.[9] The White Paper is the culmination of a two and a half year process of policy development, which included two draft policies and a Green Paper. The restitution of land process is one part of the overall South African land reform programme. This programme has three major elements:[10]

- *Redistribution of land*, which is designed to provide the disadvantaged and poor with access to land for residential and productive purposes. According to the White Paper, its scope includes the urban and rural very poor, labour tenants, farm workers and new entrants to agriculture;
- *Land Restitution*, which provides for a process of restitution with respect to cases of forced removals which took place after 1913 under racially discriminatory land laws and practices; and
- *Land Tenure Reform*, which is designed to improve the tenure security of all South Africans, and to provide for diverse forms of land tenure, including types of communal tenure.[11]

The goal of the land restitution policy is to restore land and provide other restitutionary remedies to people dispossessed by racially discriminatory laws or practices. This must be done in "such a way as to provide support to the process of reconciliation, reconstruction and development".[12] The policy explicitly acknowledges the injustices of previous land policies and acknowledges the need to make restitution for forced dispossessions.[13] This linkage between reconciliation and land, and the notion of restitution for dispossession, can be sharply contrasted with the Australian situation. The Howard government has expressly refused to acknowledge that land rights and reconciliation go hand in hand, while the native title process remains one whereby the claimants must show that, against all odds, they managed to remain on their land, rather than one whereby the injustices of dispossession are acknowledged and an attempt is made to reconnect claimants with their country.

According to the White Paper, the government has set itself the following three targets with respect to restitution:

- a three year period for the lodgment of all claims, from 1 May 1995;
- a five year period for the Commission and the Court to finalise all claims; and

---

9 Department of Land Affairs, *White Paper on South African Land Policy*, Government Printer, 1997 (the White Paper).

10 *Ibid* at 9.

11 Examples of Acts passed in fulfilment of this policy include the *Communal Property Association Act* 1996, the *Labour Reform (Labour Tenants) Act* 1996; and the *Extension of Security of Tenure Act* 1997.

12 White Paper, note 9 *supra* at 52.

13 *Ibid* at 9, 30.

- a ten year period for the implementation of all court orders.[14]

These targets were clearly overly optimistic. The deadline for claims has already been extended twice: at the time of writing (September 1998), the deadline for lodgement of claims is 31 December 1998. For a number of reasons, it is also already clear that the five year target period for the finalisation of claims will not be met. First, the number of claims made has been far higher than expected. At the time of writing, over 27 000 claims have been lodged, and it is expected that this number will increase, possibly significantly, closer to the 31 December cut-off. Secondly, the type of claims made has not been as originally envisaged. Originally, the restitution process was designed for the benefit of rural communities, and the Act was drafted accordingly. In fact, five years later, the majority of claims are individual and urban. As will become more apparent in the discussion of the actual restitution process later in this article, the *Restitution of Land Rights Act* is not suited to this context. Further, as each claim must be separately researched by the Commission, this places considerable strains on a process which appears inadequately funded to deal with the high number of claims. Finally, it seems that in South Africa, as almost everywhere else, bureaucracy and politics inevitably play a large part in the process.

Prior to considering the particular case of District Six, it is helpful to consider the criteria for making a claim under the *Restitution of Land Rights Act*. The process will be discussed in the particular context of District Six. The criteria for claiming are established by s 25 of the Constitution (see ss 28, 121-3 of the Interim Constitution) and s 2 of the *Restitution of Land Rights Act*. In order to make a claim, a person or community must have been dispossessed of a right in land after 19 June 1913 as the result of past racially discriminatory laws or practices, or be the direct descendant of such a person.[15] Further, no person or community will be entitled to restoration if just and equitable compensation was paid at the time of dispossession.[16]

The cut-off date for claims of 19 June 1913 was chosen to reflect the date of enactment of the *Native Administration Act* 1913, a racially discriminatory law which ushered in the formal adoption of territorial segregation as the leading principle of post-Union land policy.[17] This Act divided the land area of South Africa into white and black areas. Initially, an area of only 7.3 per cent of the total land area of South Africa was set aside for the exclusive occupation of Africans, with the possibility of another 6.7 per cent as "released areas" in which

---

14 *Ibid* at 52.

15 *Restitution of Land Rights Act* 1994, s 2(1)(a). The Land Claims Court has defined 'direct descendants' strictly. In *In re Mayibuye I-Cremin Committee Land Claim: re Sub 121 of the Farm Trekboer*, LCC28/1996, 21 November 1997, the court confirmed that collateral relatives such as brothers and sisters and nieces and nephews of the dispossessed cannot claim: para 24, per Moloto J. However, s 1 specifically provides that spouses are included within the scope of 'direct descendant'. The narrow interpretation of 'direct descendant' is unfortunate, as it ignores customary family laws and practices in favour of Western notions of the nuclear family.

16 *Restitution of Land Rights Act* 1994, s 2(1A).

17 White Paper, note 9 *supra* at 54.

Africans would be able to buy land. In the end, 13 per cent of South Africa was set aside as "Native Reserves". The Act also prohibited Africans from purchasing or leasing cultivatable land in the remaining 87 per cent.[18] This Act, of course, formed the basis of the eventual 'homelands' or 'Bantustans'.[19] The Secretary for Native Affairs stated that the Act was:

> a first step in the direction of territorial segregation of black and white, Parliament having decided that an effort should be made to put a stop to the many social and other evils which result from too much close contact between European and native.[20]

According to the White Paper, the choice of 1913 as a cut-off date recognises that systematic dispossession occurred prior to the beginning of the "grand apartheid era" in 1948.[21] However, it is also well known that extensive dispossession occurred prior to 1913, particularly during the nineteenth century colonial period.[22] Despite this, it was determined by the government that to provide for the possibility of restitution for acts prior to 1913 would lead to massive upheavals in the stability of land ownership in South Africa. In order to ameliorate the possible hardships caused to those dispossessed just prior to 1913, the Department of Land Affairs has stated that those affected will be given priority status in other land reform programmes.[23]

Claimants must also have been dispossessed of a "right in land". The definition, contained in s 1 of the *Restitution of Land Rights Act*, is extremely broad:

> any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.

As can be seen, this definition allows claims not only by those who had registered interests in land, but also by those who were owners under customary

---

18 AT Moleah, *South Africa: Colonialism, Apartheid and African Dispossession*, Disa Press (1993) pp 256-7.

19 The 'homelands' or 'Bantustans' were intended to be "sovereign and independent" states, and were part of a process of internal decolonisation of South Africa. Black South Africans were to be removed to the homelands, effectively confining over 80 per cent of the population to 13 per cent of the land. These self-governing states received title to their lands, and legislative authority in land affairs. In a further move to confine the black population to these areas, their South African citizenship was revoked, and replaced with citizenship of one of the Bantustans.

20 Circular Letter to all Magistrates, Native Commissioners, Sub-Native Commissioners and all Officers of the Native Affairs Department, throughout the Union, Pretoria, 12 November 1913, Appendix IV, at 29, cited in M Murray, "The Formation of the Rural Proletariat in the South African Countryside: The Class Struggle and the 1913 *Natives' Land Act*" in M Hanagan and C Stephenson (eds), *Confrontation, Class Consciousness, and the Labour Process*, Greenwood Press (1986) 107.

21 White Paper, note 9 *supra* at 54.

22 See Moleah, note 18 *supra*, chs 3 and 4.

23 White Paper, note 9 *supra* at 55.

laws, as well as those who occupied the land without the benefit of any formal arrangement for more than 10 years. The Department of Land Affairs hopes to limit the breadth of this provision by preferring that certain categories of potential claimants receive redress through alternative programmes of land redistribution and tenure reform.[24] In addition, it should be noted that dispossession need not be physical. In the decision of *Dulabh*,[25] the applicants' grandparents owned and operated a shop in King William's Town. They were forced to sell the property to the Community Development Board in 1973, but the family continued to live and trade on the premises as tenants. In 1994, they repurchased the property. The Land Claims Court considered the question of whether there had in fact been a dispossession, and concluded that the loss of the grandmother's right to inherit the property as part of her husband's estate was a right in land of which she had been dispossessed.[26]

Finally, the dispossession must be the result of past racially discriminatory laws or practices. Racially discriminatory laws might include any of a number of acts passed since 1913. Examples include the *Black Resettlement Act* 1954 or the *Group Areas Act* 1957/66, which are discussed in some detail below. Notably, however, the Act also allows for claims as a result of racially discriminatory practices. Thus, dispossession under supposedly racially neutral laws, such as the *Slums Act* 1979 or the *Prevention of Illegal Squatting Act* 1951, may entitle a person to claim, as may dispossession by non-state parties.[27] The criterion that dispossession must be the result of past racially discriminatory laws or practices was recently considered by the Land Claims Court in *Minister of Land Affairs v Slamdien*.[28] Mr Slamdien and his father applied for restitution with respect to a property formerly owned by them in an area called Surrey Estate, in Cape Town. In 1960, Surrey Estate was declared a group area for the "coloured group". In 1970, the state purchased a number of properties in Surrey Estate, including that of the respondents, in order to erect a coloured primary school. The Land Claims Court held that the Slamdiens had failed to show that the dispossession was "as the result of" a racially discriminatory law. While the Court agreed that the *Group Areas Act* was a racially discriminatory law, the words "as a result of" required a direct causal link between the dispossession and the *Group Areas Act*. Adopting a purposive approach, the Court determined that the purpose of the *Restitution of Land Rights Act* was to allow persons to bring claims if they were dispossessed of a right in land as the result of racially discriminatory laws which created and enforced separate racial areas ('racial zoning') in South Africa. Therefore, to recognise a causal link between the dispossession and the building of the school would be to allow restitution in circumstances which fall outside of the purposes of the Act. The dispossession

---

24 For example, the *Labour Reform (Labour Tenants) Act* 1996 provides a procedure whereby labour tenants who currently occupy land can acquire ownership of that land.

25 *Ex parte Dulabh and Dulabh*, LCC 14/1996, 16 July 1997.

26 *Ibid* at para 34.

27 White Paper, note 9 *supra* at 54.

28 *Minister of Land Affairs v Slamdien*, LCC107/98, 10 February 1999.

was as the result of the need to build a coloured school, not as the result of a law designed to create or enforce racial zoning.

Essentially, the Court accepted a 'floodgates' argument made by the Department of Land Affairs, which pointed to the fact that almost every aspect of pre-1994 South Africa was regulated on a racial basis and to allow persons in the position of the respondents to claim was to admit a large number of potential restitution claimants to the process. There were, after all, separate institutions for any number of activities. On similar reasoning, there had also been no racially discriminatory practice. Obviously, this determination has the potential to reduce the number of persons who can apply for restitution of urban land.

III. ABORIGINAL TITLE IN SOUTH AFRICA

It has been questioned in South Africa whether claims could, or should, be brought utilising the doctrine of aboriginal title. Such claims may well be possible considering South Africa's status as a former British Colony, and the fact that general statutory recognition has been given to African customary law, which includes customary rights to land. However, in a leading article, Tom Bennett concluded that claims based on aboriginal title are inappropriate, due to the particular political and demographic situation of South Africa.[29] As Bennett notes, in South Africa the Indigenous population has always outnumbered the settlers. Over three quarters of the inhabitants of South Africa could be considered aboriginal, as opposed to much smaller percentages of population in other countries such as Australia and Canada.[30] Demographics alone make claims based on aboriginal title simply unmanageable. In addition, the very existence of apartheid land policies, and the wholesale dispossession which occurred under them, would make aboriginal title difficult to establish, as any connection with, or occupation of, the land has been lost. Finally, Bennett notes that:

> Elsewhere the notions of tribe, ethnicity and cultural exclusivity on which aboriginal title was based were critical to building a sense of identity among fragmented and demoralized indigenous communities. For many South Africans, however, the same notions are reminiscent of colonialism and apartheid. In this country 'traditional' cultural institutions were deliberately fostered by the state to legitimate segregation, and apartheid presupposed the allocation of ancestral 'homelands' to ethnically defined tribal groups. Ethnicity is too evocative of South Africa's history of racism to fit comfortably with the ideas of a post-apartheid era.[31]

Despite this, the possibilities of making a claim based on aboriginal title are currently being investigated by groups in Namibia, Botswana and South Africa.

---

29 T Bennett, "Redistribution of Land and the Doctrine of Aboriginal Title in South Africa" (1993) 9 *SAJHR* 443.

30 *Ibid* at 475.

31 *Ibid.*

IV. APARTHEID LAND LAW AND THE *GROUP AREAS ACT*

It is not possible here to give a comprehensive overview of the previous apartheid, or racially oriented, land laws. The following account is greatly simplified, and focuses on the Group Areas legislation, which provided the legal basis for the dispossession of District Six. Apartheid land laws, commencing with the *Natives' Land Act* 1913 and its successors, vary from earlier colonial laws and practices, as they provide a legally sanctioned statutory basis of territorial segregation. Mike Robertson suggests that the laws can be divided into four categories:

- laws which originated in early concerns about sanitation, and which command the group areas system;
- laws concerned with the rural divide between whites and Africans, formally entrenched in 1913, and culminating in the idea of separate national states, for example the 'independent' State of Bophuthatswana;
- laws aimed at controlling the entry to and residence of Africans in white-controlled urban areas; and
- a plethora of other removal laws, which have allowed dispossession either directly or indirectly. Examples are the *Slums Act* and the *Prevention of Illegal Squatting Act.*[32]

In this article I am most concerned with the first category of laws: those that form the Group Areas system. The *Group Areas Act* was first passed in 1950 and found final form in the *Group Areas Act* 1966.[33] Prior to this Act, there was some residential racial segregation. However, much of this segregation was informal, or existed under laws which applied in limited areas. The *Group Areas Act* transformed this to a rigid, nation-wide system.[34] The Act established the machinery for demarcating separate residential areas for each racial group. This most affected the Indians and coloureds who lived in racially integrated suburbs in Durban and Cape Town.[35] According to the Minister of the Interior, the purpose of the Act was to provide for racial harmony:

> [The] object [of the Act] is to ensure racial peace. ... It has been introduced because we do not believe that the future of South Africa will be that of a mixed population,

---

32 M Robertson, "Dividing the Land: An Introduction to Apartheid Land Law" in C Murray and C O'Regan (eds), *No Place to Rest: Forced Removals and the Law in South Africa*, Oxford University Press (1990) at 122.

33 Unless otherwise indicated, all references are to the 1966 Act.

34 L Platzky and C Walker, *The Surplus People: Forced Removals in South Africa*, Raven Press (1985) p 99.

35 Moleah, note 18 *supra*, p 410. Two specific laws, the *Natives (Urban Areas) Act* 1923 and the *Blacks (Urban Areas) Consolidation Act* 1945 existed to enable the government to move Africans out of mixed residential areas.

> and this is one measure ... designed to preserve White South Africa while at the same time giving justice and fair play to the Non-Europeans in this country.[36]

Group areas were those areas which were set aside by the State President for members of a specified group only to own or occupy.[37] Between the introduction of the Act in 1950 and its abolition in 1991, over 1 300 areas were designated as being for particular racial groups.[38] While these areas may not have been significant in terms of size, they included such areas as District Six, from which over 50 000 people were dispossessed. The Act provided for three major groups: white, Bantu (Black) and coloured.[39] The Act also provided for the declaration of sub-groups of either the Bantu or coloured groups by proclamation.[40] Examples of such sub-groups were Indian, Chinese and Malay.[41] Only white and coloured areas were proclaimed under this Act. No urban areas were declared to be for Africans, as policy was directed at the removal of Africans from urban areas into the homelands or Bantustans. Thus, other Acts restricted the movement of, or allowed for the dispossession of, Black South Africans.[42] Of course, the proclamation of areas as white or coloured led to the destruction of African settlements in urban areas.[43]

The *Group Areas Act* operated by declaring an area to be set aside for those of a particular group only, and then declaring everyone not of that group to be a "disqualified person".[44] Those who became disqualified persons were given notice that they were no longer entitled to occupy land or premises within the proclaimed area.[45] As it was unlawful for a disqualified person to continue to occupy land in a proclaimed area after the expiry of the notice period, any person not complying became subject to criminal prosecution.[46] It appears, however, that in practice, few criminal prosecutions took place. Rather, the government relied on enforcement by police, or simply issued expropriation notices. In District Six, at least, some residents managed to stay in their homes for years, despite being declared 'disqualified' by the Act.

---

36 Quoted in M Meredith, *In the Name of Apartheid: South African in the Post-War Period*, Hamilton (1988) pp 54-5.

37 *Group Areas Act*, ss 23(1) and 1(xii).

38 Robertson, note 32 *supra* at 125.

39 *Group Areas Act*, s 12(1). The Bantu group included any person who is, or is accepted as, a member of an aboriginal race or tribe of Africa; any woman, regardless of her race, who is married to or cohabits with a member of the Bantu group; or any white man who is married to or cohabits with a member of the Bantu group: s 12(1)(b). The coloured group included anyone who was not a member of the white or Bantu group, or who was married to or cohabited with a member of the coloured group: s 12(1)(c).

40 *Group Areas Act*, s 12(2).

41 See Proclamation No 516 of 3 April 1964, Schedules I-III.

42 Robertson, note 32 *supra* at 124. See, for example, the *Native Land Act* 1913; the *Natives (Urban Areas) Act* 1923; the *Blacks (Urban Areas) Consolidation Act* 1945; and the *Black Communities Development Act* 1984.

43 Platzky and Walker, note 34 *supra*, p 100.

44 *Group Areas Act*, ss 1(x), 23(2) and 26(1).

45 *Ibid* s 26(1).

46 *Ibid* ss 26(1), 46(1).

The *Group Areas Act* operated hand in hand with the *Community Development Act* 1955.[47] This Act established the Community Development Board, whose task it was to arrange for the disposal of property owned by disqualified persons,[48] and to develop new areas into which these persons could be moved. Theoretically, at least, people were not to be dispossessed until alternative accommodation could be provided.[49] Properties owned by disqualified persons were acquired by the Community Development Board,[50] which in turn could sell these properties to those entitled to live in that area. By notice in the *Government Gazette*, the Board could freeze all construction in an area if it deemed it necessary for "slum clearance or urban renewal".[51] In practice, built-up areas were declared white areas, all others being relocated to new townships, usually located some distance from original homes and employment.[52] This led to considerable transport costs for those now forced to commute to their places of employment. The *Community Development Act* also provided for the expropriation of properties by the Community Development Board.[53] Properties were either initially expropriated, or expropriated after their owners proved reluctant to sell their homes to the state. A significant proportion of urban dispossession actually occurred by the mechanism of expropriation. In District Six, for example, it appears that almost half of all claimants who owned their property were dispossessed by expropriation, although this is only a tentative figure.

Mass removals under the *Group Areas Act* began in the 1950s. By 1970, almost 112 000 families had been declared 'disqualified'. Over half of these had been physically removed.[54] In 1977, the Nationalist Government stated, with respect to the *Group Areas Act*, that they:

> make no apology for the Group Areas Act, and for its application. And if 600,000 Indians and Coloureds are affected by the implementation of that Act, we do not apologise for that either. I think the world must simply accept it ... out of the chaos

47 *Community Development Act* 1955, replaced by the *Community Development Act* 1966. Unless otherwise stated, references to the *Community Development Act* refer to the 1966 Act.

48 *Community Development Act*, ss 2(1) and 15(1)(b). Such properties were known as "affected properties": s 1(1)(i).

49 This, of course, applied to owners and registered tenants. No alternative housing was provided for those who did not have the benefit of a formal lease. Further, owners found themselves obliged to rent this alternative accommodation, having usually been paid less than market rate for their homes.

50 The Act gave the Board a 'pre-emptive' right in respect of the acquisition of what it termed "affected property": ss 1(1)(i), 30(1). No property could be disposed of for value unless the Board waived its pre-emptive right: s 36. Even if the Board did waive this right, if the property was disposed of for more than its value as determined by the Board, the seller was forced to refund a percentage of the difference between the Board's valuation and the sale price to the Board: see ss 33-4 and the definition of "basic value" in s 1(1)(iii).

51 *Community Development Act*, s15(2)(e).

52 M Horrell, *Race Relations as Regulated by Law in South Africa: 1948-1979*, South African Institute of Race Relations (1982) p 39.

53 *Community Development Act*, s 38(1)(a).

54 Platzky and Walker, note 34 *supra*, p 99.

> which prevailed when we came to power, [we] created order and established decent residential areas for our people.[55]

By segregating groups in this manner, the *Group Areas Act* functioned as one of the apartheid regimes most successful instruments of political, social and economic control. As noted by the Surplus People Project, the Act represented the first deliberate manipulation of the principle of ethnicity by the Nationalists, by encouraging the idea of 'us' and 'them'.[56]

So how did this Act operate in practice, and how did it affect the lives of those declared 'disqualified'? The bare structure of the Act does not convey the upheaval and destruction of lives, families, culture and community that occurred as a result of the implementation of this legislation.

V. DISTRICT SIX

District Six was originally founded at the turn of the nineteenth century as an area in which to house officers. District Six officially received its name in 1867 when the Municipality of Cape Town was divided into six districts. By the end of the nineteenth century the area had been transformed into a residential area. The wealthier Capetonians moved to the more secluded southern suburbs and, due in part to its proximity to the harbour, the area became a melting pot of new immigrants: Jewish, Russian, German and Polish. In addition, there was an increasing number of coloured, Indian and African residents.[57]

It seems universally acknowledged that the area was run down, impoverished and underserviced. The government characterised it as a slum, a blot on the urban landscape. Rather than attending to the needs of its residents, the government used the dilapidated condition of District Six as one of the justifications for its demolition. Even those of District Six admitted that it was less than salubrious. In his partially autobiographical novel, *'Buckingham Palace', District Six*, Richard Rive describes Buckingham Palace, a row of five cottages, as "mouldy" and as surrounded by "[a] sprawling open field overgrown with weeds and rusty cans".[58]

Despite this, both historians and residents characterise District Six as having been a vibrant community with strong local culture. It was a cohesive community, whose residents had a strong sense of identity with the area. Nasson comments that:

> General poverty and oppression shaped an environment marked strongly by mutual needs and sharing between families and neighbours, whatever the divisions of income, occupation or religion. Most especially when it came to defining itself

55 Senator van Vuuren, speaking in Parliament in 1977, quoted in Platzky and Walker, *ibid*, p 100.

56 *Ibid*, pp 100-1.

57 D Hart, "Political Manipulation of Urban Space: The Razing of District Six, Cape Town" in S Jeppie and C Soudien (eds), *The Struggle for District Six: Past and Present*, Buchu Books (1990) at 119-20.

58 R Rive, *'Buckingham Palace', District Six*, David Phillip (1996) pp 1-2.

> *against* external society, the communal consciousness of District Six easily smothered class and other contradictions in its internal life. Its accomodationist (sic) arrangements were vital in aiding the diffusion of a framework of social values that served to maintain stable class relations.[59]

At the time that District Six was declared a white only area,[60] many individuals and community groups made strong representations to the Government as to the likely effects of rezoning. Not surprisingly, most of these representations have turned out to be extraordinarily accurate. The District Six Residents and Home-owners committee, for example, wrote to the Department of Community Development stating:

> Cape Town has been build (sic) and moulded over the past 300 years by all its inhabitants, which was and still is today a community unique in the Republic of South Africa. This part of Cape Town is as old as the Mother City is, predominantly coloured by occupation and/or ownership. No greater inter-race harmony was and is existant (sic) in any other part of the Republic of South Africa.
>
> There are many families who have together with their parents sacrificed a lot during the past years to put a roof over their heads. Many of them have achieved this aim and are today the proud owners of a home.
>
> Can it ever be imagined what sorrow and hardship that will be inflicted on the more than 90% of the residents if they are to be removed; removed from an area that they lived and build in for umpteen years.
>
> More and more we are discovering that we have become one of the political footballs in the Republic of South Africa and that we can accordingly be pushed and kicked about regardless of the consequence, be it economical ruin or the break-up of our family life.[61]

The process of removal generally began with a letter or a visit from "the group" as those who administered the *Group Areas Act* were known. As one former resident, Nellie Christians, remembered: "[t]he man from the group, Du Plessis, told me that I had to be out by the Sunday. My husband had already died and I had no one to move my goods to Valhalla Park". Christians recounted that four of her grandchildren were standing on the balcony on the Saturday and spotted a man driving past in a bakkie. They signalled to him to stop and asked if he could take their grandmother and her furniture to Valhalla Park, which he did. Christians said that "it was the saddest day of my life. I got into the bakkie and cried all the way to Valhalla Park. It was raining that day. It was as if the sky had opened up and Jesus was crying with me".[62]

---

59 B Nasson, "Oral History and the Reconstruction of District Six" in Jeppie and Soudien (eds), note 57 *supra* at 64-5.

60 Much of District Six was declared a white only area on 11 February 1966: Proclamation No 43 of 1966, *Government Gazette* No 1370. See also Proclamation No 44 of 1966, *Government Gazette* No 1370, which declared the provisions of the *Community Development Act* 1955 to be applicable to the same area.

61 Letter from the District Six Residents and Home Owners Committee to the Department of Community Development, dated 6 March 1964, on file with the District Six Land Claims Commission, Cape Town.

62 *Sunday Times Metro*, 16 August 1998, p 5.

According to government policy, residents were to be allocated housing by the Community Development Board. In many cases, this housing was substandard. Some, particularly those who were tenants, were ineligible for alternative accommodation. Some remained, squatting, in the remains of District Six, until the final buildings were razed in 1981. Some simply refused to move. One elderly gentleman recounts that the buildings around his house were bulldozed one by one until his was the only one still standing. Electricity and water supplies were discontinued. He was finally forced to leave when the Council blocked the sewage pipes.[63]

Not surprisingly, many are reluctant to retell the stories of dispossession, preferring to dwell on the memories of life as it was in District Six. References to such landmarks as the Star and the National Bioscopes, the Seven Steps, Hanover Street, Tennant Street, Castle Bridge, the Coon's New Year and Millard's Fish and Chips shop are common. Nellie Christians remembered that:

> When we lived in District Six we could walk to the shops, to work, the bioscope, the Gardens and the museum. I worked in De Korte Street as an office cleaner and used to take a stroll to work every morning and back again.[64]

By contrast, Cape Flats, where many of the former District Six residents were located, was distant from the city and had little in the way of services. Residents could no longer go to the museum or the bioscope. Due largely to the lack of facilities and bad housing conditions, the high costs of commuting to jobs and the cultural disintegration of the community, crime and gangs flourished. Families were often separated. Some members would go to the Flats, while others went to stay with relatives in disparate suburbs. Those who do tell their stories invariably speak of the high human cost and destruction of lives that occurred. Hettie Adams recalled that:

> I had watched others going, and now it was my turn. The shock was on us all. Sammy used to go to William Street every Saturday for some time, and that was when all was empty but not knocked down yet, and he just sat there and looked and cried. Slowly. Slowly, everyone went, and Cape Town died.[65]

Tahir Levy similarly said that:

> My mother cried when they moved our old coal stove out of her kitchen and that broke her. It broke up our whole family and our community because we were all dispersed and moved to sandy soulless places like Manenberg.

Most destructive was the loss of community. In his novel *'Buckingham Palace', District Six*, Rive recounted that:

---

63 Personal interview. Details omitted due to confidentiality.

64 *Sunday Times Metro*, 16 August 1998, p 5. See also personal interview with claimant, Mrs Tennant, 15 September 1998.

65 H Adams and H Suttner, *William Street: District Six*, Chameleon Press (1988) p 56.

> We were forced to move to small matchbox houses in large matchbox townships which with brutal and tactless irony were given names by the authorities such as Hanover Park and Lavender Hill to remind us of the past they had taken away from us. There was one essential difference between the old places and the new ones. District Six had a soul. Its centre was held together until it was torn apart. Stained and tarnished as it was, it had a soul which held it together. The new matchbox conglomerates on the desolate Cape Flats had no soul. The houses were soulless units piled together to form a disparate community that lacked cohesion.[66]

Not surprisingly, many claimants tell of parents and spouses who were unable to adjust to their new homes, and who died soon after moving. Little of the original District Six remained. Rive remembered that:

> It was late one Saturday afternoon that I forced myself to go. I took the bus to Plumstead and then a train to Cape Town. I walked up to the District clambering over broken bricks and half-flattened foundations of houses once inhabited by people. And the ghosts of the past swirled around me in the growing dusk. I walked along what had been Hanover Street with a few left-over houses standing self-consciously on both sides. They resembled broken teeth with craters in between where the raw gums showed. I turned up into Tennant Street and then walked along what had been Caledon Street. From that corner to St Mark's Church every building and landmark had been flattened: Handler's Drapery Store, Bernstein's Bottle Store, Buckingham Palace, Seven Steps.[67]

Ironically, the plans to redevelop District Six as a middle-class white residential area did not go as planned. Many white people were uninterested in purchasing properties in District Six, while political protests in the 1980s deterred companies from undertaking development in the area. Eventually, a Technikon was built in the area, and much of District Six remains vacant land.

Given this background, what are the prospects for the restitution process? At the risk of being trite, obviously the restitution process cannot erase the pain, nor can it make amends for the abuses of human rights and dignity that occurred. However, there are many positives which could result from a restitution process such as that being undertaken in South Africa. As a result of apartheid, many of the former residents of District Six remain living in conditions of relative poverty and isolation, relegated to the periphery of Cape Town. The situation facing former residents of other urban areas in South Africa is similar. Restitution should at least offer the hope of increased economic well-being and the chance of reintegration into the life of the city of Cape Town. As will be seen from the final part of this article, it is not yet clear that either of these outcomes will be achieved for the majority of urban claimants.

---

66 Note 58 *supra*, pp 126-7.

67 *Ibid*, pp 127-8.

VI. RESTITUTION AND DISTRICT SIX

The *Restitution of Land Rights Act* makes provision for the Chief Land Claims Commissioner to appoint persons to assist the Commission on an ad hoc basis.[68] In 1998, pursuant to this section, the District Six Land Claims Unit was established. Its brief is to deal with the over 1 400 claims which have been made in the District Six area. Notably, well over half of the claims lodged have been by former tenants rather than owners. Although the first claims with respect to this area were lodged as early as 1994, little, if any, progress had been made on District Six. This is largely due to the local politics of the area.

A. Making a Claim

The claims process begins on lodgment of the claim form. To an Australian, who is more familiar with the (increasing) complexities of the registration of a native title claim, the lodgment process is incredibly simple. Claimants in South Africa must fill in two double-sided A4 sheets and provide a number of certified documents. Information requested includes personal details, the street address and erf number[69] of the property, details as to how dispossession occurred, and whether any compensation was paid. Many claimants provide only sketchy information on the claim form and, at the outset, they generally provide few of the documents required.

Only one claim is allowed per family with respect to each property. Despite this, the number of potential claimants can still be quite high. Often extended families lived together in small houses in District Six. Further, as mentioned above, it is not only those who were actually dispossessed who are entitled to claim, but also their direct descendants. The issue of who is entitled to claim can be complex, and is best illustrated by way of example.

As an example, let us take a house jointly owned by two persons at the time of dispossession. Joint ownership by two or more persons was not uncommon. Properties in District Six with up to nine or ten joint owners have been claimed. In this example, there are a number of potential claimants. Obviously, the joint owners who were dispossessed are entitled to claim. Each can claim for restitution of their one half share in the property. Should either or both be deceased, then it is possible for their respective surviving spouses or children to claim. If the joint owners are husband and wife and both are deceased then a claim could be made by any of their surviving children, as they are direct descendants of the dispossessed. The *Restitution of Land Rights Act* does not specify which of these children is the appropriate claimant. This is one of the problems which has occurred as a result of the Act being drafted inappropriately for the resolution of urban claims. The preferred approach would be for one of these potential claimants to be nominated to represent all of the claimants. In theory, competing claims can be presented to the Court, however this presents practical problems. Section 13 of the Act provides for the possibility of

68 *Restitution of Land Rights Act*, s 9.

69 An erf number is the equivalent of a lot on a plan reference.

mediation for the purposes of reconciling competing claims. Further, as the Act specifies that only 'direct descendants' can claim, a grandchild of the original dispossessed could also claim. The Commission's approach is to deal with claims using a 'generational approach'. Therefore, grandchildren of the original dispossessed may only apply if there are no surviving children of the dispossessed who can, or are willing, to claim. A mother, for example, could nominate her son to claim on her behalf. It is important to note that the surviving spouse, child or grandchild in this example can only claim the original half share held by the dispossessed. The other half share must be claimed by a direct descendant of the person who was dispossessed of that right in land. In these complex claims, families must also decide how the outcome of the action is to be shared. For example, compensation can be divided, or any property restored or awarded can be jointly registered. Facilitation of family disputes concerning claims is an important function undertaken by the Commission.

Once the Regional Land Claims Commissioner is satisfied that the claim meets certain criteria, it is lodged. Essentially, the Act requires that there must have been a dispossession after 1913 as the result of past racially discriminatory laws or practices; that the claim is not vexatious and frivolous; and that just and equitable compensation was not received at the time of dispossession.[70] Only a prima facie case need be made out with respect to any of these criteria.[71]

Once a claim has been accepted, notice of the claim must published in the *Government Gazette*,[72] and the owner of the land and any other interested parties must be notified of the claim.[73] The notification process is problematic. Claims are made against the state, not against individuals. Thus, in a claim simply involving financial compensation, for example, the current owner of the house is not affected by the claim. Nevertheless, the Land Claims Court insists that all owners be served with notices by the sheriff. This is a time consuming and expensive process and may, for example, in a situation where there is now a timeshare scheme on the land, involve the service of notice on hundreds of current owners who are not affected by the restitution process. This seems to be a result of an inappropriately drafted Act in combination with an overzealous Court, and is leading to an unnecessary bottleneck in the process.

B. The Process: Proving the Claim

After acceptance, claims are investigated by the Commission,[74] although it is possible for a claimant and their legal representative to apply directly to the Court for restitution.[75] This investigative role places an enormous burden on the Commission. The District Six Unit, for example, must investigate almost 1 400

---

70 *Restitution of Land Rights Act*, s 11(1).

71 *Farjas (Pty) Ltd v Regional Land Claims Commissioner Kwa-Zulu Vereniging*, LCC 21/1996, 19 January 1998.

72 *Restitution of Land Rights Act*, s 11(1).

73 *Ibid*, s 11(6).

74 The Commission has been given powers of investigation under s 12 of the *Restitution of Land Rights Act*.

75 *Restitution of Land Rights Act*, s 38B(1).

individual urban claims. However, considering the economic status of most who were dispossessed, in most cases it would be impossible for claimants themselves to afford the legal expertise required to present a claim. In transitional South Africa there is little other choice than for the Commission itself to prepare claims. This, of course, contrasts with the Australian situation, where the Native Title Tribunal is not directly responsible for preparing claims.

As noted above, in District Six claims have been made by both dispossessed owners and tenants. Proof is more straightforward in the case of dispossessed owners, as many of the tenants either had unsigned leases, or no lease at all. It was not uncommon for people to live for many years in a garage behind their family's house. Proof largely proceeds by way of legal documents: deeds; transfers; expropriation notices; leases; marriage, birth and death certificates; and wills. In an ironic twist, the apartheid regime carefully dispossessed by means of expropriation notices, deeds of transfer, documents of 'sale', and eviction notices. This, of course, now allows the Commission to prove that dispossession occurred. In addition, in cases where the claimant is not the dispossessed person, documentation such as marriage, birth and death certificates, as well as the last will and testament of the dispossessed, are required. Finally, a background statement is given by the claimants, telling their story of the hardship and suffering which occurred as a result of dispossession. This statement, of course, performs an important dual function. On the one hand it provides evidence to the Court which is taken into account in making its determination.[76] In addition, however, it allows the claimant to tell their story, perhaps for the first time, and for that story to be formally acknowledged.

In the case of a claim by a tenant, the process of investigation may be more complex. If the tenant was in occupation by virtue of a registered lease, then proving the claim will be relatively straightforward. In the case of a tenant with no lease, proof of dispossession will be more difficult. As noted earlier, claims are made with respect to a 'right in land', which includes having been in occupation for 10 years or more, even without the benefit of a lease. As no urban tenant claims have been determined by the Court, there is little direct guidance as to the issue of proof. It should be noted, however, that the usual rules of evidence are relaxed under the *Restitution of Land Rights Act*,[77] permitting a potentially wide variety of evidence to be presented to the Court with respect to tenants' claims. Examples of such evidence might include affidavits, letters addressed to the claimant at the property which is the subject of the claim, or evidence of the owner of the property that the claimant did reside

76 According the Act, the Court must take into account the history of the dispossession and the hardship caused in making a determination: s 33(eB). Other factors to be taken into account under s 33 include: the desirability of providing restitution; the desirability of remedying past violations of human rights; the requirements of equity and justice; the feasibility of restoration; the desirability of avoiding major social disruption; the amount of compensation, if any, received at the time of dispossession; and changes over time in the value of money.

77 *Restitution of Land Rights Act*, s 30. According to this section, the Court "may admit any evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law": s 30(1). This specifically includes hearsay evidence: s 30(2)(a).

there. Further, in a community as close knit as District Six, oral evidence of neighbours and friends may be crucial. Finally, in cases where tenants were reluctant to leave, the local council will have issued eviction notices.

This proof process stands in stark contrast to the situation in Australia, where reliance is placed primarily on oral histories and expert anthropological evidence, although legal documents are particularly important in order to show any extinguishment which may have occurred.

C. Referral to Court

Once the claim has been researched, an executive summary is prepared. Section 5 of the Rules of the Commission and rule 39 of the Rules of the Court require that certain information with respect to a number of issues be presented to the Court, along with all documents required to prove the claim. The first stage in the determination process is the pre-trial conference.[78] This conference is presided over by two judges (there are five judges of the Land Claims Court in total). The judges direct any queries which they may have as to the contents of the claim to the Commission and verify what form of restitution has been requested. In addition, the Department of Land Affairs (DLA), representing the state, may choose to accept certain facets of the claim, making argument on these matters unnecessary. For example, the DLA may accept that dispossession as a result of past racially discriminatory laws or practices did occur. Although no claims from District Six have reached this stage, the DLA has shown itself to be accommodating in these matters with respect to other urban areas in Cape Town, such as Goodwood or Simonstown. Examples of situations in which the DLA may be unwilling to accept that dispossession did occur as a result of racially discriminatory laws include where the claimants were of the racial group in whose favour the area was zoned or where land was expropriated for an essentially public purpose, such as road widening or a community facility. Finally, where necessary, the judges will order the preparation of a valuer's report of the right in land that was lost. This will be used either for the purposes of determining compensation or for determining the value of any alternative state land that may be awarded.

After the valuation has been prepared, the DLA will make an offer to the claimants. If this is accepted, the matter will be referred to the Court, which will, except in cases where the offer is blatantly unreasonable, make a determination of restitution on the basis of that offer. Should DLA's offer be unacceptable, the claimants may make a counter-offer. The most likely result in this case will be the referral of the matter to the Court for determination.

D. Restitution

To an outsider, the issue of possible outcomes for claimants in District Six is vexing. The nature of District Six, and its history after being declared a white area under the *Group Areas Act*, make restitution particularly problematic.

---

78 Pre-trial conferences are allowed for under the *Restitution of Land Rights Act*, s 31.

There are a number of options. According to s 35(1) of the *Restitution of Land Rights Act*, the Court may order the following forms of restitution:

- restoration of the land, or a right in the land, with respect to which the claim was made;
- alternative state-owned land;
- compensation;
- the inclusion of the claimant as a beneficiary of a state support programme for housing or the allocation and development of rural land; or
- any alternative relief.

A considerable tension with respect to property rights exists in the South African Constitution. The Constitution both guarantees existing property rights and mandates the restitution process. Thus, the process of restitution can only take place within these constitutional parameters. This tension reflects the controversy that surrounded negotiation of the property clause. The Government takes the position that in order to balance these competing principles, restitution must take place on a 'willing-seller, willing-buyer basis'. It does acknowledge, however, that where this is not possible the state must be able to expropriate privately or publicly owned land in the public interest.[79] The Bill of Rights expressly acknowledges that 'public interest' in this context includes the "nation's commitment to land reform".[80] In line with this, the Land Claims Court has wide powers to order restoration of land. If the Court deems it appropriate, it may order the state to expropriate land, or any right in land, in order to restore it to the claimant.[81] Of course, the current owner is entitled to compensation in accordance with the Constitution. Many elderly claimants request restoration of their homes, so that they "can live out the remainder of their lives in District Six".[82] Unfortunately, many cannot be restored to their properties, as their homes simply no longer exist. Only a small number of streets escaped unscathed. Sadly, those who do return are likely to find that the current District Six bears little relationship to the community they remember. In addition, some former traders are anxious to return, hopeful of developing businesses in an inner city area. How willing the Court will be to award restoration remains unclear, particularly in the context of individual urban claims. Those orders of restoration that have been made to date have been with respect to communal rural claims. Where thousands of individual urban claims are concerned, the restoration of rights seems likely to be a politically sensitive issue, particularly in urban areas where, unlike District Six, many homes still exist and are now in private ownership. It is worth noting, however, that some

79 White Paper, note 9 *supra* at 16.
80 *Constitution*, s 25.
81 *Restitution of Land Rights Act*, s 35(5).
82 See, for example, interview with Nellie Christians, note 62 *supra*, p 5.

claimants have requested restoration of the land, even though the buildings have been destroyed. Some former traders, for example, would like to redevelop their former land to take advantage of its inner city position.

Finally, particular problems with the remedy of restoration arise with respect to former tenants. Section 35(1)(a) of the Act provides that the Court may order:

> the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim.

In addition, s 35(4) states that the Court's power to award restitution in the form of restoration or alternative state land includes the ability to adjust the nature of the right in land previously held by the claimant. In other words, the Court has the power to grant an interest in the nature of ownership to a former tenant. However, despite this broad wording, there is some considerable doubt as to whether the Court will be willing to award ownership to a claimant of the former property in which he or she had only a tenant's interest. One practical reason for this is that former owners may also make a claim with respect to the same property. Further, restoration of the lesser interest of a leasehold is also problematic, as the property will undoubtedly have current owners. Problems with the drafting of the Act are exacerbated in the case of former tenants.

Claimants also commonly seek compensation, either because they do not wish to return to District Six, or because restoration is not feasible. Further, some claimants request additional compensation for hardship and suffering and for the high costs of transportation incurred because of the distance of the Cape Flats from their places of employment. As yet, no judicial determination has been made as to whether compensation can be awarded for hardship, or whether it is restricted to compensation (as escalated to the late 1990s) for loss of the right in land. At pre-trial conferences, the Land Claims Court has indicated that it will not presume that it has statutory authority to award compensation for hardship and suffering, despite both the broad wording of s 35(1), which simply refers to "compensation" and its statutory mandate in s 33(eB) to take hardship and suffering into account in reaching a determination as to the appropriate form of restitution. It may be that the Land Claims Court is of the opinion that to allow compensation claims other than simply for the loss of the right in land will lead to an unacceptable overall cost to the restitution process. However, one must question whether compensation will prove an effective remedy if it is limited to compensation for the right lost in land.

Many of the claimants did receive some compensation (albeit below market value) at the time of dispossession. The amount that claimants will receive from the restitution process hinges on which method of valuation of the original compensation is chosen. So far these issues remain undetermined. There are indications that the Court favours a method whereby the market value of the right in land at the time of dispossession is determined, any compensation actually paid is deducted, and the result is escalated by reference to the consumer price index. Much hinges on the determination of market value at the time of

dispossession. Early valuations carried out in urban areas other than District Six indicate conservative figures, in many cases market valuations not much greater than the actual compensation paid at dispossession. The likely result if these valuations are accepted is that the final compensation payment will almost certainly not be enough to enable claimants to purchase a house. Post-dispossession, many claimants were unable to afford a new home, forced instead to rent in the Cape Flats or other areas. Many still do not own a home. The outcome of a compensation claim, therefore, will not necessarily be the security of home ownership. It seems questionable whether any true restitution will have occurred in the absence of additional compensation for hardship, suffering and loss of human dignity. The problems of compensation are exacerbated with respect to tenants' claims. What compensation is appropriate for loss of an informal tenancy? How does one value 10 years of beneficial occupation? It will certainly be less than that awarded to most former owners, arguably leaving many tenants in no materially better position than prior to their claims, perhaps only with the 'satisfaction' of having their dispossession officially acknowledged.

Claimants in District Six could also be awarded alternative land in District Six, or elsewhere, or receive priority status in the National Housing Programme (which currently has a waiting list of over 10 years). Again, this remedy is particularly problematic in the case of former lessees.

E. Development Schemes

One final option does exist for District Six. It may be that restitution for District Six could be effected by way of a development scheme. The possibility of an integrated development scheme has been mooted with respect to a number of areas, not just District Six. This type of scheme could take a number of forms, but would probably consist of a housing development on the approximately forty-five hectares of vacant land in District Six, for the purpose of providing housing for former residents. A Community Facilitation and Development Fund has been established from grants made by the European Union, as well as from the British and Danish Governments independently, to investigate and support claimant driven restitution initiatives. Although there are housing schemes currently underway to alleviate the general housing shortage in post-apartheid South Africa, there are some (not unreasonable) fears that these may lead to a new form of segregated suburb. Further, such schemes are often not in the inner city, exacerbating the problems of re-integration into city life. Development schemes as part of the restitution process at least have the advantage of allowing the possibility that new communities will develop in inner city areas. Of course, the number of areas in which inner city restitution developments would be physically feasible is limited.

The vacant, state-owned land in District Six is partly a legacy of the failed attempts of the 1970s and 1980s to redevelop the area. Some kind of integrated development scheme, providing inner city housing for claimants, could be built on this land. Such a scheme would have several benefits. First, it would allow former residents to be brought back to the city, and to give them an opportunity

to participate in Cape Town life, something which they have been denied since dispossession due to the distance of Cape Flats from the central city area. Reintegration is clearly a crucial process. Secondly, streamlining the outcome of the process into a package would almost certainly shorten the time frame in which restitution in District Six could be effected. Thirdly, a development scheme may also provide some equality of outcomes between those dispossessed of different rights in land, for example owners and tenants. As noted above, the options for tenants are limited. However, as part of a negotiated settlement, it would be possible for former tenants to also receive ownership of a home within District Six. Restoration could be effected for those whose properties still survive and which are outside the proposed development area. In fact, a proposal has recently been made for such a development.

On 13 September 1988, the DLA, the City of Cape Town and a group called the District Six Beneficiary and Redevelopment Trust publicly signed a "Record of Understanding" with respect to District Six. Although widely reported as a settlement, with a proposed timeline of six months, the agreement in fact does no more than commit the parties to begin talks with respect to a development in District Six. The signing of this simple agreement has already highlighted the problems of undertaking such a process.

Given the current drafting of the *Restitution of Land Rights Act*, there are two mechanisms through which the development process could be undertaken. The first involves s 42D, which provides that:

> (1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land, and that person has entered into an agreement in terms of which he or she has waived any or all of his or her rights to relief under this Act, the Minister may, after consultation with the Commission and on such conditions as he or she may determine –
>
> > award the claimant land, a portion of any other right in land and, where necessary, acquire such land, portion of land or other right in land; or
> >
> > pay compensation to such person; ....

This section, therefore, empowers the Minister to acquire and award interests in land to claimants. Although not specified by the section, it is implicit that claims would still need to be researched by the Commission in order that the Minister could satisfy him or herself that the claimant is entitled to restitution of a right in land. If s 42D is utilised, the claim will not proceed to the Court for determination, as the Minister is effectively exercising the powers of determination vested in that body. Section 42D operates in parallel to the remainder of the claims process. To date, only two claims have been referred to the Department of Land Affairs under this section. No agreement has yet been entered into in either case.

The second mechanism involves what is known as a s 34 application. Section 34 of the *Restitution of Land Rights Act* allows any level of government to make an application to the Court for an order that land either owned by those governments, or within their jurisdiction, not be restored to the claimants. The

Cape Town Municipal Council, or the Provincial or National spheres of government, could bring such an application with respect to the land in District Six. This has the effect of removing the land from the restitution process. The DLA, the Beneficiary Trust and any current owners would then be free to negotiate a development package with respect to the land in District Six. Claimants who do not wish to return to District Six, and have therefore claimed compensation, alternative state land or priority in a housing scheme would be able to continue through the claims process as before. None of those remedies is dependent on the land being available for restoration.

There are, however, a number of problems with either approach. Under the first mechanism, the development would proceed alongside the restitution process. The more individual determinations that are made by the Court, the more difficult it will become for a development to be devised around these determinations, particularly if they involve the remedy of restoration. Conversely, the s 34 application involves an 'all or nothing' approach. Once the land has been removed from the process, no individual claims can proceed with respect to restoration of that land. Despite the claims of the Community Beneficiary Trust to represent all claimants, it seems clear that there is already significant opposition by some former residents to the development approach, particularly from those who wish restoration of their land in order to develop it on an individual basis. A further problem with the process includes the amount of land physically available for restitution. Despite claims that more than 45 000 people (families of tenants and land owners who were thrown out under the despised *Group Areas Act* in the 1960s) are expected to return to affordable housing in District Six, this is clearly not possible. In fact, the number seeking to return is potentially higher, as many former residents have expressed a wish to return with their now considerably extended families. The reality is that there is simply not enough vacant land remaining in District Six to house that number of people.

At present, the development process is still long on rhetoric and short on detail. Despite the Government's stated six month time line for reaching a settlement, the process will inevitably take much longer. The vital issue of balancing the development approach with the rights of claimants who wish to continue through the individual claims process will undoubtedly prove difficult. Neither of the available mechanisms for an integrated development seems adequate for the task at hand. How will it be decided, and by whom, which former residents return to the limited land in District Six? What alternatives will be offered to others? Can only those who have actually claimed under the Act take part in the development scheme, or will it be open, as seems the current approach, to all former District Six residents? If the latter approach does prevail, how will these former residents be identified? Will their children and grandchildren also have a right to reside in District Six? How will the relative claims of former tenants and owners be balanced? Will all who return receive ownership of a house, or will some be forced to purchase or rent? These are just some of the issues which must be resolved in order for there to be any successful outcome to the restitution process in District Six.

VII. CONCLUSION

Urban restitution is proving a complex issue in South Africa. The problems caused by the overwhelming number of claims are compounded by an inadequately drafted Act. In the next year, the Land Claims Court will establish the parameters within which the urban restitution process will proceed. Much of the success of urban restitution will depend on the attitude of the Court to vital issues such as compensation. Without a generous approach by the Court, in the spirit of reconciliation, the outcome for many claimants may be disappointing. Some will undoubtedly find themselves little better off in economic and social terms. In addition, the likelihood exists of a disparity in outcomes between the former residents of a high profile area such as District Six, where there are political gains to be made in fostering the restitution process, and the claimants in other, less notorious, areas which remain largely intact and which are now in the hands of new private owners. Former tenants, for example, may receive parity of treatment with owners under a development solution such as may occur in District Six, while in other areas they could be left with little to show as a result of having taking part in the restitution process.

Undoubtedly it will take many years before the restitution process is concluded. However, it seems at this relatively early stage that some additional policy input is required. Without both significant amendments to the Act, and some consideration of some of the particular problems which have been outlined in the final part of this article, urban restitution may well be an unnecessarily long and difficult process.