

CASE STUDIES OF THE CHANGING INTERPRETATIONS  
OF LAND RESTITUTION LEGISLATION IN SOUTH AFRICA

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# **CASE STUDIES OF THE CHANGING INTERPRETATIONS OF LAND RESTITUTION LEGISLATION IN SOUTH AFRICA**

## **SUMMARY**

This study briefly discusses land restitution in several countries in Europe and the Americas, the history of land deprivation in South Africa, and the legislation introduced to remedy the inequality of land ownership.

Differing interpretations of the legislation in respect of the valuation of land to be purchased by the state for restitution purposes and the valuation formulae recommended at various times by the state and its advisors are discussed. Some of the problems encountered in the implementation of the South African restitution program, including the highly emotional expropriation/confiscation issues, are mentioned.

Three case studies based on these differing interpretations are given. The case studies illustrate the evolution of the interpretations of the legislation concerning land restitution valuations in South Africa.

## **KEY PHRASES**

South Africa, Constitution, Bill of Rights, Property, Land claims, Land Restitution, Department of Land Affairs, Landless People, Farmers, Compensation, Equitable redress, Escalation rates, Market value, Valuation, Expropriation.

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## TABLE OF CONTENTS

	Page
Summary .....	i
Key phrases .....	i
Acknowledgements .....	ii

### CHAPTER 1: INTRODUCTION

<b>1.1</b>	<b>BACKGROUND INFORMATION</b> .....	1
<b>1.2</b>	<b>THE PROBLEM STATEMENT</b> .....	1
<b>1.3</b>	<b>PURPOSE OF DISSERTATION</b> .....	2
<b>1.4</b>	<b>DELINEATION AND LIMITATIONS</b> .....	3
<b>1.5</b>	<b>BRIEF CHAPTER OVERVIEWS</b> .....	3

### CHAPTER 2: LAND RESTITUTION AND REDISTRIBUTION IN OTHER COUNTRIES

<b>2.1</b>	<b>INTRODUCTION</b> .....	5
<b>2.2</b>	<b>EASTERN EUROPE AND THE MIDDLE EAST</b> .....	6
	2.2.1 Post communism and the aftermath of war .....	6
	2.2.2 Hungary .....	9
	2.2.3 Poland .....	12
	2.2.4 Romania .....	14
	2.2.5 East Germany .....	18
	2.2.6 Estonia .....	20
	2.2.7 Bulgaria .....	21
	2.2.8 Russia .....	22
	2.2.9 Bosnia and Herzegovina .....	23
	2.2.10 Kosovo .....	24
	2.2.11 Iraq .....	26
<b>2.3</b>	<b>THE AMERICAS</b> .....	26
	2.3.1 Canada .....	26
	2.3.2 United States of America .....	30
	2.3.3 Guatemala .....	32
	2.3.4 Hawaii .....	33
<b>2.4</b>	<b>SOUTHERN AFRICA</b> .....	35
	2.4.1 Namibia .....	35
	2.4.2 Zimbabwe .....	39
<b>2.5</b>	<b>CONCLUSIONS</b> .....	41

### CHAPTER 3: LAND RESTITUTION IN SOUTH AFRICA

<b>3.1</b>	<b>THE HISTORICAL DEPRIVATION OF PROPERTY RIGHTS</b>	
3.1.1	The period before 1948 .....	45
3.1.2	The period 1948 to 1994 .....	46
3.1.3	The period after 1994 .....	47
<b>3.2</b>	<b>RESTITUTION LEGISLATION</b> .....	49
<b>3.3</b>	<b>RESTITUTION VALUATION FORMULAE</b> .....	55
<b>3.4</b>	<b>GENERAL ACCURACY OF RESTITUTION VALUATIONS</b> .....	57
<b>3.5</b>	<b>THE EXPROPRIATION/CONFISCATION CONTROVERSY</b> .....	58
<b>3.6</b>	<b>RESTRICTIONS ON AN OWNER'S RIGHTS AFTER A LAND CLAIM IS GAZETTED</b> .....	63
<b>3.7</b>	<b>CONCLUSIONS</b> .....	66

### CHAPTER 4: CASE STUDY NUMBER 1 THE REMAINING EXTENT OF THE FARM KINDE ESTATE 269 IN: VALUATION USING HISTORICAL AND CURRENT SALES DATA

<b>4.1</b>	<b>INTRODUCTION</b> .....	70
<b>4.2</b>	<b>HISTORICAL AND PRESENT MARKET VALUE OF THE SUBJECT PROPERTY</b> .....	72
<b>4.3</b>	<b>DETERMINATION OF JUST AND EQUITABLE COMPENSATION</b> .....	81
4.3.1	Purchase price benefit .....	81
4.3.2	Interest benefit .....	82
4.3.3	Escalation rate .....	82
4.3.4	Subsidies .....	84
4.3.5	Beneficial improvements made by the present landowners .....	85
4.3.6	Present value of purchase and interest benefits .....	86
4.3.7	Current market valuation and suggested compensation .....	88
<b>4.4</b>	<b>OUTCOMES AFTER VALUATION</b> .....	88
<b>4.5</b>	<b>CONCLUSIONS</b> .....	91

### CHAPTER 5: CASE STUDY NUMBER 2 PORTION 1 OF THE FARM SCHILDPADNEST 385 KQ: ESTIMATION OF THE PRESENT VALUE OF AN HISTORICAL UNDER-COMPENSATION.

<b>5.1</b>	<b>INTRODUCTION</b> .....	93
<b>5.2</b>	<b>EXTRACTS FROM THE VALUATION OF PORTION 1 SCHILPADNEST AND THE IMPROVEMENTS ON THE ENTIRE FARM</b> .....	94
5.2.1	Valuation brief .....	94
5.2.2	Historical background including highest and best use .....	94
5.2.3	Assessing the amount and validity of the original compensation .....	96
5.2.4	Escalation Factor .....	102
5.2.5	Valuation Approach .....	102
5.2.6	The market research .....	106
5.2.7	Conclusions regarding the historical land value .....	109
5.2.8	Conclusions regarding the historic value of the improvements and financial loss .....	111
5.2.9	Explanation of the layout of the compensation table for improvements	116

<b>5.3</b>	<b>CONCLUSION.....</b>	<b>118</b>
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**CHAPTER 6: CASE STUDY NUMBER 3  
THE FARM SEBELE 931 KP: RESTITUTION VALUATION USING ONLY  
CURRENT SALES DATA**

<b>6.1</b>	<b>INTRODUCTION - PRESENT LEGAL OPINION ON THE RESTITUTION LEGISLATION .....</b>	<b>119</b>
<b>6.2</b>	<b>VALUATIONS SUBSEQUENT TO THE BUDLENDER REPORT .....</b>	<b>122</b>
<b>6.2</b>	<b>RESTITUTION VALUATION OF THE IMPROVEMENTS MADE BY THE</b>	

<b>LESSEE.....</b>	<b>123</b>	
<b>6.4</b>	<b>STATE OF THE FARM WHEN THE LESSEE TOOK OCCUPATION .....</b>	<b>128</b>
<b>6.5</b>	<b>STATE OF THE FARM IN 2003 .....</b>	<b>129</b>
<b>6.6</b>	<b>MARKET RESEARCH.....</b>	<b>130</b>
<b>6.7</b>	<b>ESTIMATED MARKET VALUE OF THE SUBJECT PROPERTY IN 2003 (AFTER VALUE) .....</b>	<b>140</b>
<b>6.8</b>	<b>ESTIMATED MARKET VALUE OF THE FARM IN ITS ORIGINAL CONDITION (BEFORE VALUE).....</b>	<b>141</b>
<b>6.9</b>	<b>CONCLUSION.....</b>	<b>145</b>

**CHAPTER 7: CONCLUSION**

<b>7.1</b>	<b>INTRODUCTION.....</b>	<b>147</b>
<b>7.2</b>	<b>OVERVIEW OF THE STUDY.....</b>	<b>147</b>
	<b>7.2.1 Chapter 1 .....</b>	<b>147</b>
	<b>7.2.2 Chapter 2 .....</b>	<b>148</b>
	<b>7.2.3 Chapter 3 .....</b>	<b>149</b>
	<b>7.2.4 Chapter 4 .....</b>	<b>151</b>
	<b>7.2.5 Chapter 5 .....</b>	<b>152</b>
	<b>7.2.6 Chapter 6 .....</b>	<b>152</b>
<b>7.3</b>	<b>CONCLUSION.....</b>	<b>154</b>

## LIST OF EXHIBITS

	Page
Exhibit 2.1: GNI of selected European countries compared with the GNI of the EU in 2000 ..	7
Exhibit 2.2: Household financial situation in selected European countries.....	8
Exhibit 3.1: Section 25 of the Bill of Rights of the Constitution of the Republic of South Africa, Act 108 of 1996.....	51
Exhibit 3.2: Section 36 of the Bill of Rights of the Constitution of the Republic of South Africa, Act 108 of 1996.....	51
Exhibit 3.3: Section 33 of the Restitution of Land Rights Act, Act 22 of 1994 .....	52
Exhibit 3.4: Sections 12(5)(a) to (h) of the Expropriation Act, Act 63 of 1975 .....	54
Exhibit 3.5: Section 12 (1) and (2) of the Expropriation Act, Act 63 of 1975.....	59
Exhibit 3.6: Subsection (7)(aA) of Section 11 of the Restitution of Land Rights Act, Act 22 of 1994.....	64
Exhibit 4.1: Photographs of subject property: Main dwelling, cattle watering facility, workers' housing, shed.....	73
Exhibit 4.2: Schedule of current sales .....	74
Exhibit 4.3: Schedule of historical sales .....	75
Exhibit 4.4: Map showing the location of the subject property in relation to the sales .....	76
Exhibit 4.5: Schedule of purchase and interest rate benefits received .....	87
Exhibit 5.1: Informal settlements on Schilpadnest 385 KQ in 1999.....	96
Exhibit 5.2: Current and old lands on Schilpadnest 385KQ in 1963 .....	99
Exhibit 5.3: Aerial photograph of informal settlements on Schilpadnest 385KQ in 1999 ....	101
Exhibit 5.4: Map showing the location of the subject property and comparable sales .....	103
Exhibit 5.5: Historical comparable sales listed in date order.....	104
Exhibit 5.6: Historical comparable sales listed in size order .....	105
Exhibit 5.7: Extract from the list of the suggested compensation for the improvements .....	113
Exhibit 6.1: Location of the subject property in relation to the Madikwe game reserve .....	124
Exhibit 6.2: Before and after photographs of the veld .....	125
Exhibit 6.3: Before and after photographs of the house.....	126
Exhibit 6.4: Lapa and pool at one of the lodges (after).....	127
Exhibit 6.5: Map showing the location of the subject property and the comparable sales ....	132
Exhibit 6.6: Sales in Madikwe .....	133
Exhibit 6.7: Sales in short term Madikwe integration potential area .....	134
Exhibit 6.8: Sales in longer term Madikwe integration potential area.....	135
Exhibit 6.9: Sales in area with no Madikwe integration potential .....	136



# **CHAPTER 1**

## **INTRODUCTION**

### **1.1 BACKGROUND INFORMATION**

Throughout most of history, including the European Colonial Expansion period, to the conquering victor belonged the spoils. This included the land itself and all, or almost all, of the assets in the countries concerned. At the time it was considered to be the natural way of life. Sometimes the original inhabitants were slaughtered, sometimes enslaved, but at least deprived of ownership and dignity. Sometimes parts of the occupied territories were allocated to them as “reserves” or “tribal trusts”.

However, the rights of the original inhabitants, what are nowadays referred to as “Aboriginals” in places such as Australia and New Zealand or “First Nations” in Canada and “Native Americans” in the United States, are being recognised. Their claims to dispossessed properties are progressively being upheld.

In some countries, such as South Africa, the state purchases the properties in terms of their acquisition legislation. In other countries, such as Venezuela (Anon, 2007b:17) and Zimbabwe farm properties were invaded, crops burnt and owners and their workers attacked. These properties were occupied and taken over by the invaders without any form of compensation, often with the tacit and/or explicit support of the governments concerned.

### **1.2 THE PROBLEM STATEMENT**

Since the publication of the final constitution and further legislation concerning land restitution, valuers, state officials, legal advisors, the press and broadcast media, the intended beneficiaries and the farmers involved all had problems in interpreting how compensation for the properties required for land restitution should be calculated.

In order to clarify the position, the Department of Land Affairs [the DLA] arranged for a committee to set the guidelines to be applied. The committee agreed on a formula. This formula was in use for some years and is discussed in Case Study No. 1. However there were errors in this formula and in May 2000 the DLA introduced a revised formula.

In addition to or instead of land restitution, those forcibly removed from their land could claim “equitable redress”, i.e. financial compensation, either instead of the land being returned to them or land plus undercompensation for improvements etc. This type of financial compensation is the subject of Case Study No. 2.

Shortly after the revised restitution valuation formula was introduced, the state retained Adv G Grobler in a restitution case. After an in depth study of the matter his opinion was that that one could not use historical sales. Both the “before”, i.e. the property as it was at the time of dispossession and the “after” i.e. the property as on the date of valuation have to be done in the present. An example of this approach is given in Case Study No. 3.

Another area of confusion is the expropriation/confiscation controversy and this is dealt with in Chapter 3.

### **1.3 PURPOSE OF DISSERTATION**

The main purpose of the study is to clarify some of the confusion in respect of the valuation of land to be purchased by the state to be returned to the black communities who were moved from their properties in terms of racial legislation.

Even legally trained people had difficulty interpreting the provisions of the property clauses in the Constitution of the Republic of South Africa and the subsequent legislation dealing with land restitution. The result is that the officially recommended method of valuing these properties changed over time.

Three valuation cases done at various times in accordance with the differing official interpretations of the legislation are discussed in Chapters 4, 5 and 6. These cases document the evolution of the interpretations of the relevant provisions, concluding with the latest interpretation.

The highly emotional subject of expropriation and confiscation is discussed in Chapter 3.

#### **1.4 DELINEATION AND LIMITATIONS**

The point of departure of this study is the practice of restitution valuation in South Africa. As a result legal issues are not explored comprehensively.

It is important to note that not only is South Africa not alone in its quest for access to land for its deprived populations, it is endeavouring to meet the needs of the landless in an orderly and legal manner. This in spite of the strong emotions and even hostility from both sides. While references will also be made to compensation practices in other countries, the subject of this study is the changing interpretations of the Constitution of the Republic South Africa of how to:

- (a) estimate the quantum and present value of any under compensation paid to those forcibly removed from their legally acquired properties in terms of racial policies;
- (b) determine the amount to be paid to present owners for land originally expropriated, that are now to be purchased by the state for restitution purposes.

#### **1.5 BRIEF CHAPTER OVERVIEWS**

In Chapter 2 land restitution in other countries is briefly discussed.

In Chapter 3 an overview is given of the history of land dispossession by the white colonialists and the legislation introduced by the first democratically elected government of South Africa and some of the controversy regarding both the pace and results of land reform in South Africa. The problems landowners can experience

as a result of the gazetting of land claims and the expropriation/confiscation controversy is also discussed.

Three case studies of valuations in terms of the Land Restitution program, done at different times, follow. Each valuation was different. The format of the three case studies will therefore also be different.

Chapter 4 is a case study of a valuation done in terms of the first valuation formula designed by a committee appointed by the Minister of Land Affairs to provide valuers with what was considered to be correct way to undertake restitution valuations.

Chapter 5 is a case study in the determination of the undercompensation paid to a community who were forced to move from their property in a white group area. The historical amount of undercompensation was escalated to arrive at the present value of this amount.

Chapter 6 is a valuation done in terms of the latest interpretation of restitution legislation—valuing in the present only.

Chapter 7 is a brief summary of this study, with the author's conclusions.

## **CHAPTER 2**

### **LAND RESTITUTION AND REDISTRIBUTION IN OTHER COUNTRIES**

#### **2.1 INTRODUCTION**

Because of our history, the majority of South Africans tend to think of property dispossession in terms of black/white racial discrimination, that it is only whites who deprived non-whites of their property rights, and that restitution is to some extent a racial re-balancing exercise. However, land restitution and redistribution has become a world wide phenomenon. Land claims have also been made and upheld in Europe, the Middle East, the Americas and the Pacific Rim.

To show that discrimination and property dispossession also occurs between similar racial groups in other countries, more attention is given in this chapter to Eastern Europe. Fewer examples are given in other regions in which, like the Americas and Southern Africa, colonialism and racial discrimination seemed to have been the major factor in the deprivation of property rights.

From the many countries investigated representative examples are given of the major different approaches to the restitution and redistribution of property in the former Eastern European bloc (Hungary, Poland, Romania, East Germany, Bulgaria and Russia). Restitution in the aftermath of recent civil wars (Bosnia Herzegovina and Kosovo) illustrate the international community's support for property restitution, rejection of ethnic cleansing and their desire for people of different national, cultural and religious persuasions to live together. A similar policy was followed in Iraq where the occupying powers and the new Iraqi government reversed Saddam Hussein's Arabisation program and encouraged the formerly dispossessed (of different ethnic groups) to regain their properties.

The recognition of the rights of the indigenous inhabitants of conquered countries is gaining ground. Examples are given of property restitution to indigenous peoples in the Americas. Here again representative examples are given of the approaches different countries use to

resolve the claims of indigenous people. In Canada and the United States the Native Americans are obtaining property rights in semi self governing territories. In other countries such as Guatemala (after the end of the civil war) the original inhabitants are regaining property rights, but their property rights are being given to them as citizens of multi-ethnic societies.

In Hawaii, after peaceful representations, the aboriginal inhabitants have been gaining rights, but as in the mainland United States, now there are moves to establish semi self governing enclaves for the original inhabitants of Hawaii.

This chapter provides a synopsis of land restitution in some of these other countries. For each country discussed, the historical events that gave rise to the need for land restitution and/or redistribution is sketched along with the measures taken to deal with the situation. As this is not the topic of this dissertation, each discussion is not necessarily comprehensive. The purpose is simply to show that Land Restitution in South Africa is happening within the context of similar events in many countries in the world, including the so-called first world, with representative examples of the different ways countries are handling their land claims.

## **2.2 EASTERN EUROPE AND THE MIDDLE EAST**

### **2.2.1 Post Communism and the aftermath of war**

With the replacement of communism with various forms of democracy in Eastern Europe there was a swing to western political and economic standards. This included the concept of private ownership of property. Programs for the return of confiscated properties or the payment of compensation to their former owners or their heirs were instituted.

Brada (1996:67-86) suggests that the difference between socialism (which is how most of the former communist bloc preferred to describe their system) and capitalism is the method of property ownership. In a socialist society property is mainly owned by the state, whereas in a capitalist society (which we tend to refer to as democratic) property is mostly owned by private individuals. In most capitalist countries there are laws protecting private property rights. In socialist countries these rights tend to be progressively diluted.

Brada (1996:67-86, referring to Lipton and Sachs, 1990) and Comisso (1991), say that privatisation of property can create an effective system of property rights so establishing a middle class and market economy which would allow the private sector to flourish.

Bogaerts, Williamson and Fendel (2001:1-2) state that the establishment of a market economy is important as countries in the former communist bloc seeking to join the European Union have to comply with the conditions set out in the *Acquis Communautaire*:

- the applicant country must have achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities:
- it must have a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the EU; and
- it must have the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

Mathijs and Noev (2002:21) provides the Gross Domestic Income (GNI) per capita, 2000, of some Eastern European Countries and that of the European Monetary Union. (See Exhibit 2.1)

### Exhibit 2.1

#### GNI of selected European countries compared with the GNI of the EU in 2000

COUNTRY	GNI per capita in US \$ (Atlas Methodology)
Albania	1 100
Bulgaria	1 510
Hungary	4 710
Romania	1 670
European Monetary Union	22 000

Source: Mathijs and Noev (2002), quoting World Bank (2001)

Mathijs and Noev (2002:23) further divided the populations into households with not enough income to buy food (column A), households with income enough only for food (column B), households with income enough for food and necessities, but not for other expenses (column C), and households with income to meet all their needs (column D). These categories are shown in Exhibit 2.2.

## Exhibit 2.2

### Household financial situation in selected European countries

HOUSEHOLD FINANCIAL SITUATION (%)				
COUNTRY	A	B	C	D
Albania	45,3	39,1	14,9	0,7
Bulgaria	26,5	31,3	37,1	5,1
Hungary	6,7	30,1	46,5	16,7
Romania	40,9	45,3	11,3	2,5

Source: Mathijs and Noev (2002), quoting World Bank (2001)

This table clearly shows why the people in these former communist countries would like to be part of the European Union.

The countries in the former Eastern European Bloc are now independent and although restitution and/or compensation policies and programs were put in place in all of them, different approaches were used. Although cognisance was taken of the various methods used by different countries, the major differences in their approaches are reasonably represented by the three countries discussed at greater length. In Romania, as far as was possible, the actual parcels "collectivised" were returned to the owners. This led to fragmentation of the agricultural land. In Hungary landowners whose small farms had been collectivised were given negotiable vouchers with which they could either repurchase their original farms, sell, or use to purchase a home or apartment. The other former Eastern Bloc countries used variations on these themes. Different approaches were also needed as the establishment of state farms and collectives were not the same in all countries in Eastern Europe.

At the break up of communism in Eastern Europe approximately 68% of agricultural in Yugoslavia and 76% in Poland was owned privately, whereas about 86% of the arable land in East Germany and 70% in Hungary was part of collective or state farms (Ho and Spoor, 2006:580-587).

A different reason for property restitution was the endeavour (by the international community) to counter the effects of ethnic cleansing in Bosnia and Herzegovina and Kosovo. Because of the interethnic civil war, millions of people fled, or were evicted, from their



homes. After the end of hostilities, the international community helped to set up mechanisms for the restitution of the properties and homes of the people who were displaced.

### **2.2.2 Hungary**

Historically a significant percentage of farming land in Hungary had been in the hands of relatively few large land owners, and the majority did not want this to happen again.

In the communist state, the large estates were broken up and/or confiscated. Collective farms (also called cooperatives) were formed and these cooperatives had property rights. The collective farms were formed from land that small holding members "contributed" to the collective, and were not consolidated and nationalised. The members retained some form of nominal ownership to the land they contributed, but the collective had all the use rights.

After the downfall of communism the Smallholders Party pushed for privatisation and the return of the (smaller) farms to those who had owned them before the amalgamation into the collectives. At first the other parties were opposed to restitution, but in the course of time, and after extensive negotiations, the Smallholders who were part of the ruling coalition, prevailed. On 26 June 1991 the Hungarian Parliament passed the first version of the Compensation Law, Law XXV of 1991. This Act provided for partial compensation to people who lost their land and buildings after 8 June 1948 because of communism. (Comisso, 1995:184; Fleming, 1995:71-78)

The law was referred to their Constitutional Court who found many of the provisions in this statute unacceptable. Among other aspects "the court noted that the constitution guaranteed security of property rights to all owners. While the state could privatise or re-privatise its own assets it could not transfer assets among non-state owners (like the cooperatives) arbitrarily and without full compensation" (Comisso, 1995:196). In 1989 approximately 60 percent of farming land in Hungary was owned by the cooperatives and this was the land the Smallholders wanted to privatise, but that the Constitutional Court said had constitutional protection, thereby effectively ending outright re-privatisation of land.

In time a method to deal with privatisation was found. There would be no direct privatisation, but instead twelve year bonds, which could be used to purchase land (at market prices), would be issued to the former owners. This provided former landowners with compensation for their previous loss. The bonds were negotiable securities that could be used to buy back their farms from the cooperatives. As they received negotiable securities in exchange for the land, it covered the interests of the cooperatives.

The compensation to be paid would be calculated by determining the value of the farms at the time of nationalisation and escalating by the inflation rate to the present. Dating back to the Austro-Hungarian Empire the value of agricultural land was calculated according to a fertility standard called 'gold crown points'. The compensation to be paid to the individual farm owners was calculated according to this measure. (Fleming 1995:5; Comisso, 1995:200)

However, compensation was to be made in such a manner as to prevent the recurrence of the large estates that existed before communism. Only the owners of the smaller farms were to be paid full value. Full compensation would be paid for those whose loss was 200 000 florints or less. A severely regressive scale was applied, the larger and more valuable the farm, the smaller the percentage of the value the former owners would receive. For claims of more than 500 000 florints (equivalent to about £3 300 in 1995) the compensation percentage was reduced to 10%. The maximum amount any individual person could get was set at five million florints. Only individuals were to be compensated. Corporations, churches etc were excluded from the arrangement and would receive no compensation for their former holdings. (Fleming, 1995:71-78; Comisso, 1995:200)

The compensation vouchers were bearer and negotiable in the same way as currency and also included the right of the former owner to purchase their original piece of land from the cooperative. As seems to happen in so many places in the world when this type of bill goes before parliament, it ran into opposition. The Smallholders in particular felt that for practical purposes their properties were stolen and should therefore simply be returned to them directly. Others felt that either all should receive compensation or none should. Eventually a compromise was found and with a few amendments the bill was passed. Once again the matter was brought before the Constitutional Court. The Court broadly supported the bill, but some parts were questioned and the bill once again had to be passed by parliament in an amended form.

There remained the question of how to ensure that the former landowners received enough compensation to be able to purchase their land at what had to be the market price. The solution was that only those living in the area or who had previously owned the land could participate in the auctions in which the land would be sold. As these farms were being sold at an auction the result could be considered to be the market price.

To ensure that the claimants were able to acquire a farm equivalent to what they had before, if their vouchers were insufficient they could receive a free credit from the state to cover the shortfall. Thus the re-privatisation of these relatively small farms (300 to 400 hectares in extent) was made possible. By this roundabout method the small farmers received full restitution and were able to reacquire their former farms, or the equivalent thereof.

According to Fleming by April 1993 only 70 000 people had acquired land at the auctions. Instead some used the vouchers to purchase local authority flats while others sold their vouchers for cash. In November 1992 these compensation vouchers were listed on the Budapest Stock Exchange, at a discount of 20% on the face value of the vouchers (a price of 800 florints for 1 000 florints face value). Many of the proposed farming beneficiaries opted for compensation rather than restitution (1995:71-78).

In South Africa some restitution beneficiaries also opted for compensation rather than restitution. These claimants say it is their right to choose financial compensation which enables them to survive better. Some have said "Money now and development later" (Gwana, 2003:6). Gwana said that people who had taken financial compensation, instead of restitution of properties in St Lucia and Pietermaritzburg (approved land restitution claims), spent the money and after it was gone came back to the Department of Land Affairs demanding restitution of their land (Mthethwa, 2007:9). Financial compensation is now being actively discouraged as the South African government's policy is to increase the percentage of land owned by and worked by blacks.. The KwaZulu-Natal land claims commissioner said that giving money instead of land restitution could lead to Zimbabwe style land grabs (Mthethwa, 2007:9).

### **2.2.3 Poland**

For a long time most of the farming land in Poland was held in large estates by what was referred to as the "nobility". Between the two world wars Poland instituted land transformation policies. On 10 July 1919 their parliament passed a land reform law designed to break up the large private estates and redistribute the land. The maximum farm size was set at between 60 and 180 ha in industrial areas and 300 ha in the more rural eastern provinces. The pace of reform was slow and on 28 December 1925 a new Land Reform law was passed by their parliament. The compensation paid for the land taken for redistribution land was limited to 50% of the free market value (Zawojnska, 2004:6).

After the invasion of Poland by Russia and Germany the breaking up of the large private estates was completed. In the part of Poland controlled by Germany, the German authorities gradually removed the Polish landowners and replaced them with Germans. In the area controlled by Russia private estates were taken over by the Soviet authorities and the landowners were arrested and deported. In time the large agricultural estates in Poland were confiscated, but the smaller farms owned by peasants were basically unaffected. Some six million hectares were distributed to 1070 families (Zawojnska, 2004:6). Approximately one fifth of this land came from estates expropriated in the "old" Polish territories and close to five million hectares from former German holdings in the "regained" territories. No compensation was paid to the previous German owners. Collective farms were established on these confiscated properties.

Land ownership in Poland differed from most of the Communist Bloc because of the large percentage of private ownership of agricultural land. The resistance of the peasants, who owned small farms as a result of the previous land redistribution, forced collectivisation to move slowly. This was because peasant owners had been the beneficiaries of land reform both before and during the Communist era.

Throughout Poland's time under communist rule, at least seventy-five percent of the agricultural land in Poland was privately held in family farms. After 1992, the former state farms, comprising 19% of the agricultural land in Poland, was liquidated by the Agricultural Property Agency and broken into smaller farms. Some of these smaller farms were sold,

mostly to small farmers to increase the size of their holdings, some leased and some farms were transferred free of charge (Prosterman and Rolfes, 1999:12-13).

In the post-Communist era Poland became one of the leaders in undoing socialist institutions. Because of the amount of privately owned land Polish agriculture was well placed to adapt to having individual farms freed from collectivisation. However, the farmers had been operating in a state controlled economy for a long time with the resultant dependent type of behaviour such controls tend to encourage. The average Polish peasant did not want to purchase farms - like most relatively poor people they wanted the land to be given to them as a free gift.

An important factor slowing transformation was the inefficiency and reluctance of state officials to finalise transfers. Many wanted to retain their jobs on the large collective farms and/or work to acquire land and wealth for themselves. Another factor was that restitution was not considered as an option because the majority of Poles did not want any of the land confiscated from the Germans returned to them. (After the second World War a part of Germany was taken and incorporated into Poland as compensation for the Polish territory taken by Russia). Although the Poles did not want the displaced Germans to be compensated, it was different when they were affected. The Polish landowners whose properties now lay in regions lost by Poland after World War II wanted the Polish government to compensate them for the land they had lost. As country borders had been moved and the land in question now lay in other countries such as the Ukraine, the Polish government had no jurisdiction over the land.

Zawojka (2004:12) mentions that privatisation by the sale of land is generally less effective for de-collectivisation and breaking up of the large state farms than restitution. This is logical as it is easier to find people to acquire land free of charge than it is to find people who are both willing and able to pay for a property.

In cases where people themselves have to pay for the land, the economic return on invested capital becomes important. Without a financial boost from farm subsidies, world wide the return on invested capital in the agricultural sector is extremely low. Added to the low return is the problem that farming, subject as it is to the influence of weather, pests and diseases is a risky profession, and higher risks usually require higher returns. Unless potential purchasers are in an acquisition phase or have already built up a largish holding to support new

purchases, they don't easily buy additional farms. Only the fairly wealthy, farmers or non-farmers, have the financial strength to buy into something giving a sub-optimal return on investment.

Those who farm at a subsistence rather than a commercial level are often condemned to a low standard of living. This can be seen in the example of Zimbabwe that with its policy of allowing untrained "war veterans" to take productive farms from knowledgeable commercial farmers, resulted in Zimbabwe being changed from a major agricultural exporting country to one with food shortages. Although not attributed to this reason in any of the literature I saw, researchers said that agricultural production in Eastern Europe fell after the break up of the large collective farms. Zawojka states "Production decreases in state and collective farms during the de-collectivisation process agricultural production is less affected on private farms. A large private sector acts as a buffer for food security" (2004:17).

#### **2.2.4 Romania**

During a research project conducted between September 1993 and June 1994, the preceding three summers and the following two summers, Verdery (1994, 1997 & 2001) undertook a study of the local implementation of the Romanian Restitution process based on the Transylvanian village of Aurel Vlaicu located in the commune of Geoagiu in Hunedoara county. During this extended period she was able to witness the results of the new policies as they were actually implemented.

Her research methods included reading newspapers and archival material, interviews with a wide range of people including villagers, local and government officials, lawyers, judges, etc. She regularly attended court cases and worked with the local village Land Commission (Verdery, 1997:120). Verdery selected a village as the focus of her researches as she believes that although policies are made in national capitals, it is in these small rural communities that the consequences of these policies can be seen. This is where the conflicts occur, and where one can learn things unavailable in any other research sites (Verdery, 1997:124-125).

Before the First World War Transylvania was part of Austria-Hungary, but after the war it was transferred to Romania. After serfdom was abolished in Transylvania in 1854 the

Austro-Hungarian Land Register was instituted for tax purposes. It was based on cadastral surveys done under the control of state notaries. However when the communists took over they tended to ignore the register and did not record the expropriations or collectivisation of agricultural land. So although these records have validity, they were no longer complete. (Verdery, 2001:380).

Shortly after the second world war, in 1945, the (socialist) Romanian government instituted a drastic land reform. Properties larger than 50 ha, or properties belonging to anyone considered to be an enemy of the people, were expropriated. Some of this land was given to war veterans and poor villagers. The rest, including large holdings in compact blocks, were used to form state farms. After the communists took control in 1948 they not only continued to create state farms, but started to collectivise the smaller holdings of the villagers.

When forced to "donate" their properties these Smallholders were often not truthful and often gave incorrect sizes for their properties. Also many peasants had not registered their property transfers in the land register as this cost money. The records therefore became progressively less complete, and could not be used as the only authoritative record for land restitution after communism. Compounding the problem was that both collectives (referred to as CAP's) and state farms (referred to as IAS's) swapped parcels of land between themselves and/or other villages to create integrated blocks of land.

The enabling act to restore land to private owners passed by the Romanian Parliament in February 1991 was Law 18/1991, the Law on Agricultural Land Resources. This law liquidated collective farms to those that "donated" them during collectivisation between 1959 and 1962. However, this only applied to the collectives, not the state farms that, by the time of the new political order, possessed thirty percent of the agricultural land in Romania. The collectives were empowered to return the former donated farm portions and the house lots, and the gardens that the locals also considered important. People whose properties had been incorporated into state farms got shares, based on the amount of land they had "contributed" in the state farms (Verdery, 1994:1071-1074 & 1081; 2001:374).

The law attempted to recreate the property owning situation that existed before collectivisation, but with a few provisos:

1. No owner would receive more than ten hectares. This ten hectare limit included inheritances. If for example a father who had "donated" twenty hectares died, his estate was limited to ten hectares that the heirs had to share between them. If for example he had four heirs, each be entitled to a maximum of two and a half hectares.
2. The minimum holding to be regained would be a half hectare.
3. People with land in the area of state farms would not get their former farms but dividends from the income generated by the state farm.
4. Although the former owners were to receive the parcels of land in their original location, if construction or other changes prevented this, they would get equivalent parcels elsewhere.

Because of the popular antagonism to communism, there was widespread support for undoing collectivism, and in Romania Land Reform was primarily founded on restitution rather than redistribution and/or payment of compensation.

After receiving their land, the beneficiaries were allowed to purchase additional land, but only up to owning a maximum of 100 hectares. The Romanians did not want a return to the historical period of "land barons".

The law also made provision for people who had been working for the collectives. If there was more land than that being claimed, these workers could receive up to a half hectare. The law gave land commissioners the right to consolidate parcels instead of the fragmented structure existing before the communist takeover. It also encouraged them to create excess land by applying a reduction coefficient (a fixed percentage reduction) to land parcels in order to accommodate non property owning workers in the collectives.

Identifying the land parcels owned by the "donors" to the collectives was difficult. To create the larger and more economic blocks of land from the collection of small fields boundary markers were removed. Some of these distinguishing signs were stones, trees, roads, paths, ditches and even ploughed furrows. Trees and boundary stones were removed, ditches re-dug. The narrow strips that had been ploughed lengthwise were now ploughed crosswise. As the former references no longer existed identifying the former land parcels was problematic and caused conflicts.



Claims were supposed to be based on two records--the 1959 Agricultural Register and that given on the date of joining the collective. In both records the areas stated were based on self declarations of the former owners. Quite apart from the desire of some to make it seem as if they were contributing a larger area of land, was the confusion between their old measurement of yokes and the newer one of hectares. A yoke equals 0.575 of a hectare (Gluckstein 1952:11).

Another problem was that claimants were only given thirty days, later extended to forty five, to lodge claims. If they did not lodge in time their claims became invalid. This was considered to be unreasonable by those who did not act in time. (The South African government was much more realistic and gave much more time, both initially and for the extension granted. For example the original period allowed for lodging claims in South Africa was three years from 1 May 1995 (South Africa, 1997:23). The closing date for the submission of land claims was then extended to the 31 December 1998).

In the implementation of the new dispensation, conflicts arose between different ethnic groups, family members, villagers and those who had or did not have land prior to 1959. There were heated arguments about the position of pre-existing boundary markers and who should inherit what piece of land. Many years later there were still ongoing disputes and outstanding court cases.

The breakup of the collectives and the retention of the state farm holdings led to Romanian agriculture being divided between large commercial style undertakings (the former state farms) and subsistence level farming on the small individually owned portions. Later some owners got together to work their farms as a more economic unit.

As a result of Romania's restitution policies private property became predominant in the agricultural sector. However, the average area operated by rural households is only 2,3 hectares which was usually not in one block, but fragmented into an average of 4,39 parcels of land. The length to width ratio of these plots range from 1:5 to 1:100 (Rusu, n.d.).

This fragmentation had a negative effect on agricultural output in Romania. Lacking modern equipment and/or sufficient money to replace the nutrients taken from the soil with each successive crop or to pay for needed pesticides on their small uneconomic plots, subsistence

farmers are usually condemned to poverty. According to Rusu the amount of chemical fertilisers used decreased more than three times between 1989 and 2000, organic fertilisers more than two and a half times and the amount of pesticides used in 1999 was about a fifth of that used ten years earlier in 1989 (n.d.).

Ablard, Ayouz and Colin attribute the excessive fragmentation to the land reforms of decollectivisation (2005:4-5). This type of small farmer can usually only produce enough for self consumption, i.e. subsistence level farming.

### **2.2.5 East Germany**

In Germany property confiscation measures began in 1933. Jews and other refugees who left Germany had to make forced sales. When the Russians took occupation of Eastern Germany, on 8 May, 1945, they confiscated all farms larger than 100 hectares. The Russians also ordered all land registers to be destroyed, but this was not done. The bulk of the records were stored in Castle Barby (Southern, 1993:690-692).

On 7 October, 1949, the Russian Occupation Zone became the German Democratic Republic. Almost all industry and agriculture, property and businesses together with all their assets such as equipment, patents etc. were converted into "social property". Between 1945 and 1989 more than three million Germans left the East to settle in the West. A condition of being able to leave was that they had to sell their house at a price set by the state. If they just fled, their properties were just taken over by the state (Southern, 1993:690-692).

The principles of property restitution and compensation were incorporated into the Unification Treaty. The categories under which restitution could be claimed were where:

- the property was converted into 'social property' after 7 October, 1949
- the property was acquired in bad faith after 7 October, 1949
- people were deprived of their property because of religious, racial or political persecution after 7 October, 1949

Restitution could not be claimed if:

- ❑ the property was confiscated between 8 May 1945 and 6 October 1949, the period of Russian occupation from the end of the war to the establishment of the German Democratic Republic. However, they could qualify for compensation.
- ❑ The property was acquired in bona fide transactions between 7 October 1949 and 18 October 1949.
- ❑ Restitution claims were not submitted before the cut off date of 31 December, 1992. Southern (1993:693). Born (1997:374) says that the cut off date was extended to 30 June 1993, but only for movable items.

It was recognised that investment which would create jobs, improve the infrastructure, reduce subsidies, meet housing needs etc, was important and where an investor obtained approval for "special investment purpose" in terms of the Investment Priority Law, 1992, the former owners would have to accept compensation instead of restitution.

A levy of 30 to 50 percent of the market value of the land returned to former owners would be paid into the compensation fund. The compensation paid was based on 1.3 times 1935 rateable value. Payments over DM100 000 were reduced on a sliding scale up to a maximum payout of DM250 000.

Claims were made on more than a third of the land area of East Germany with multiple claims lodged on some properties. Conflicts also arose between claimants and occupiers who have lived in some of these houses for forty years (Southern, 1993:693-696).

Born (1997:383-384) says there were 1 039 939 restitution claims on 2 474 136 separate properties. As has been the case in other countries a lot of properties became the subject of multiple claims and just to solve these problems takes a lot of time. The large number of claims also has widespread social and economic consequences. People who had been living in houses and apartments for many years may have to find alternative accommodation. However, Born thinks that the return of properties to people from the west has caused them to become involved with those from the east (what he refers to as the new *Länder*). This he considers is beneficial.

### 2.2.6 Estonia

For several centuries Estonia had been ruled by foreigners and as result many of Estonia's upper classes were ethnic Germans (called Baltic-Germans), Russians, Swedes and some Estonians (Feldman,1999:174). Around the middle of the nineteenth century Estonian peasants were allowed to buy farms from the Baltic-Germans, who at the time were considered to be nobility. After the end of the First World War Estonia gained independence from Russia, and in 1919 Estonia introduced land reform. The land owned by the German "nobles" was confiscated and redistributed to those who had fought in their war of independence and also as to other landless Estonians (Hedin, 2005:38).

Feldman says that on 21 June 1940 the Soviet military helped a "peoples government" to take control of Estonia and on 6 August 1940 the Soviet Union annexed Estonia as its sixteenth republic. Private property was nationalised and the state became the sole owner of property. After the break of the Molotov-Ribbentrop pact, the Germans overran and occupied Estonia until the Russians retook Estonia in 1944 (1999:167).

During the fifty years of what ethnic Estonians considered to be Soviet occupation of their country, large numbers of Russians, Ukrainians and Byelorussians were settled in Estonia. Many of these immigrants were given apartments in the best parts of Tallinn, the capital of Estonia.

As a result of this Russian sponsored immigration, by the late 1980's half of the population of Tallinn was Russian speaking. When Estonia regained independence in 1991 "desovietization" was a major goal. The "Fatherland" political coalition, whose slogan was "wipe the slate clean" won the elections held the following year. The Estonian Parliament passed the Law on the Fundamentals of Ownership Reform on 13 June 1991 (their major property restitution statute) (Feldman, 1999:168).

In order to avoid allowing restitution to the former Baltic-Germans, Estonia decided to return to the ownership structures of the immediate post World War Two period, before the Russian annexation. By doing this the property restitution would be for the benefit of ethnic Estonians and Estonian minorities, including Estonian Swedes, most of whom had left the country

during the war, but excluding both the previous Baltic-German landowners and the Russian sponsored immigrants (Hedin, 2005:36)

The aim of property privatisation in Estonia was the return of property to the former Estonian owners. However, many years had passed since the Soviets had confiscated Estonian property rights and their agricultural developments had changed the countryside. The result was that people became owners of land and forest that they had no interest in cultivating. Some of the new landowners who had fled Estonia during the war, sold their regained properties for whatever they could get. The result was that property prices were low.

By consistently implementing their reform program Estonia became a front runner for accession to membership of the European Union (Swinnen, 2002:160). The prices being fetched in the relatively few sales taking place at the time this article was written meant that the land values in Estonia were well below that of European Union countries. With their rapid change to the required capitalist type economy to be able to join the European Union, the Estonian municipalities needed a viable land tax base, and these low values were a problem. However, they expected land prices to rise when Estonia was allowed to join the European Union (Trasberg, 2004:109).

### **2.2.7 Bulgaria**

The Turks were expelled from Bulgaria in the national uprising of 1878. This was the end of feudalism as the Bulgarian serfs took ownership of the land they had been working. Later the Agrarian Union Government (1920-1923) fixed a maximum of 30 hectare per household. Although not fully implemented, nevertheless Bulgaria was a country of mostly small farms with very few "estates" of more than 30 hectares, but after the second World War the communist government reduced the maximum area to 20 hectares (Gluckstein, 1952:2-3).

At the socialisation of Bulgaria, not all the farms were collectivised and even then the land itself was not nationalised when the large Co-operatives and Agro-Industrial Complexes were formed. The authorities also allowed private farming on small plots, but these small farmers were dependant on the co-operatives for their agricultural inputs and disposal of their produce (Penov, 2002:4).

De Arriba Bueno (2005:4-5) states that in terms of the Bulgarian land law of February 1991 the collective farms were liquidated and the land restored to the 1940's owners. However, the law also allowed the collective farms to be changed to co-operatives to prevent the breakup of these large farms. These co-operatives had to pay rent and dividends to the landowner members. Penov (2002:4-5) says that from the legal aspect land reform was relatively easy as the ownership of the parcels of land had not been changed from the former owners to the collectives. The land therefore only had to be restored to the owners or their heirs. The majority of the farms created with the breakup of the collectives, those that were not included in the new co-operatives, were too small for commercial farming. Over 50% of these privatised farms were less than 0,2 hectare.

As in some of the other former European communist countries, the redistribution of the land of the former co-operatives has had unintended side effects. One of the results of the extreme fragmentation of farms in Bulgaria was that the large scale irrigation systems in much of the country fell into disuse, and in 1999 and 2001 water acts were introduced to try to remedy the situation (Penov, 2002:1-6). Too many small subsistence level commercially uneconomic farms can have an adverse effect on a country's agricultural industry.

### **2.2.8 Russia**

Soon after the Bolshevik revolution of October 1917, Lenin's Decree on Land abolished private ownership of land and the State became the sole owner of all the land. The full implementation of this law and the forceful collectivisation of the many small farms only occurred in 1929. However, small scale farming on household plots was allowed. These small plots comprising only 2% of the agricultural land were an important part of Russian agriculture as they were responsible for 20% of the total agricultural output (Lerman and Shagaida, 2005:3-4).

Ownership of the land remained vested in the state until 1989 when the Principles of Land Legislation of the USSR introduced lifetime inheritable possession for rural households, followed by the Land Reform Law in October 1990 and the Russian Law on Peasant Farms in December 1990 that allowed private land ownership. Paper shares were allocated to members of the collective farms. The owners of these shares could exchange these shares for land and start their own independent farms (Lerman and Shagaida, 2005:4-5)

Swinnen states that the pace of farming land redistribution in Russia was much slower than in the other former communist countries of Eastern European. The reasons given for this are the long time that had elapsed since private ownership of farms was abolished and all property in Russia was owned by the state. Private property ownership was almost forgotten (Swinnen, 2002:159).

A problem was that to be able to acquire rights on a specific piece of land involved significant transaction costs. In addition the managers of these collectives were reluctant to assist or inform the peasants of their rights and choices because it was not in their interest as they were managing and using the land now owned by the citizens. Swinnen suggested that new legislation should be introduced which would change the share system to property titles on specific land areas. This would pave the way to provide clear property rights which would enable a framework for a functioning land leasing, and if desired, a land sales market (2002:161).

### **2.2.9 Bosnia and Herzegovina**

As a result of the ethnic/religious war in Bosnia and Herzegovina approximately 2,3 million of a total population of 4, 4 million were forced to abandon their homes during the conflict (Garlick, 2000:64-67). After the war ended the international community wanted to return these displaced persons to their former homes. They did not want to compensate these refugees financially as they wanted to reverse, not perpetuate "ethnic cleansing" and re-establish the multiethnic society that previously existed in Bosnia and Herzegovina.

The operating guidelines were set out in The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Annex 7 of The General Framework Agreement for Peace in Bosnia and Herzegovina, (generally referred to as the 'Dayton Peace Agreement') which was signed in December 1995. However, forced removals continued for quite some time after the end of the war. There were fears that the peace process could threaten the interests of those who had brought about the violence in the first place, and might foreseeably do so again.

Philpott (2006: 30-80) also discusses the problems of implementing the Dayton Peace Agreement. In the months following the signing of the Dayton Agreement forced evictions of ethnic minorities continued, and international pressure was exerted on the Bosnian authorities for just and equitable settlements. Eventually in 1998 they established an administrative procedure for property restitution based upon the Annex 7 right to return of the Dayton Peace Agreement. The procedure was successful and five years later was almost completed. Philpott considers the Dayton Peace Agreement to be a workable guide to the resolution of other conflicts in which land becomes a major issue.

Financial compensation for the deprivation of property was not being approved because it was felt that if people were paid out they might cluster into ethnic and/or religious groups, thereby furthering the aims of "ethnic cleansing". The international community wanted the different ethnic groups to live together and so did not provide funds for monetary compensation.

#### **2.2.10 Kosovo**

As was the case in Bosnia and Herzegovina, the conflict in Kosovo had an "ethnic cleansing" aspect, and it is estimated that some 800 000 Kosovars had been driven out, or had fled from, their homes during the hostilities. After the end of the war most Albanian Kosovars returned to their former homes and in their turn now evicted Serbs.

There followed a new round of lawlessness and property violations. This led to Serbs and other minorities now fleeing Kosovo. Albanian Kosovars were allocated or took possession of these abandoned properties.

The UN Security Council resolution 1244 of 1999 established the United Nations Interim Administration Mission in Kosovo and emphasised the right of refugees and displaced persons to return to their homes. In turn the United Nations Interim Administration Mission established the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) to handle the problem. The HPD set up offices in Kosovo and Serbia to receive, register and resolve the claims made (Das, 2004:433-443).

Das said that those that lost property because of the armed conflict only had a right to return to their properties or to sell it, they were not entitled to claim compensation. Only if they lost



apartments as a result of discrimination in the nineties could they claim monetary compensation. However, Kosovo could not afford to pay everyone, even if they only paid a fraction of the market value.

The problem was solved by giving the Commission the right to award restitution in kind, and where feasible to find ways of providing compensation *inter partes*. Where this was not feasible a certificate would be issued to the claimant showing the value of the loss. This gave the claimant the right to a share from funds from sources such as the privatising of state owned apartments. However the compensation would not be for the full value of the certificate, but a lesser percentage to be determined later (Das, 2004:442).

The Kosovo model combined aspects of the Bosnian and South African approaches to handling restitution. Although it had some judicial elements, the restitution process in Kosovo was basically an administrative procedure (Das, 2004:436). According to Gwana (2003) South Africa found that administrative models worked better and quicker than adversarial court-driven models in resolving mass claims.

Das argues that administrative models are better equipped to handle and resolve large numbers of claims. He says that although judicial models offer more elaborate procedural rights, the judicial method is time consuming and in trying to settle many different claims, speed is important as the sooner the restitution claims are settled the sooner life in the affected areas can return to normal. However, to be effective the administrative approach needs to be backed up by some form of enforcement. A judicial framework to enforce administrative decisions is also required (2004:437).

(In South Africa we are now also using the administrative approach, that is well backed up by clauses in our constitution and various statutes dealing with restitution, redistribution and security of land tenure. These acts can be enforced in various courts, and in particular the Land Claims Court. The result is that administrative procedure has proved effective in speeding up land restitution in South Africa).

### **2.2.11 Iraq**

Das (2004:429) says that during his reign Saddam Hussein instituted an Arabisation program. The effects of this program were particularly felt in Northern Iraq with its mixed population. Several hundred thousand Kurds and Turkomans were forced from their homes, sometimes with and sometimes without compensation. Iraqi Arabs were encouraged to resettle in their place.

After Saddam Hussein was removed from power, many of these displaced people returned to the area wanting to reclaim their properties. However, many had been deprived of their title deeds and identity documents and as there was no orderly mechanism in place to regulate and process claims, some of the displaced people took matters into their own hands and evicted Arabs who had been occupying their former homes (Das, 2004:429).

In 2003 the International Crises Group recommended that the UN Security Council set up an impartial organisation to adjudicate property claims. The Human Rights Watch wrote to General Garner, who had been appointed to oversee Iraq's post-war administration, of the need for a property dispute framework such as the Dayton Peace Agreement in Bosnia to be put into place in Iraq. General Garner agreed to their call but at the time of Das' study details of the proposed commission were still vague (Das, 2004:429 & 430).

What can however be said is that the previous concept of "winner takes all" is no longer valid. Sooner or later the international community gets involved and their present perception is that to resolve these conflicts previous property owners should be returned to their homes and that different ethnic groups should be encouraged to live together in harmony.

## **2.3. THE AMERICAS**

### **2.3.1 Canada**

As has been the experience of many other lands colonised by expansionist Europeans, the indigenous inhabitants of Canada were relegated to a secondary citizen status usually confined to designated reserves, and subject to different laws to that of the other Canadians.

However, after the second World War, discrimination became anathema to most civilized nations. Although the movement was slow, progressively the more liberal people and some of the dispossessed and/or discriminated against, started wanting to rectify the past injustices. In time progress towards restitution and the adoption of laws against discrimination were implemented.

Smith (1995:1) starts with the following quotation from Prime Minister Trudeau, who in 1969 said *"We can go on treating Indians as having a special status ... adding bricks of discrimination around the ghetto in which they live. ... Or we can say you're at a crossroads- the time is now to decide whether the Indians will be a race apart in Canada or whether {they} will be Canadians of full status"*.

The 1969 White Paper proposed a major change in Canada's Indian Policy. Indian leaders were invited to the presentation of this White Paper in the Canadian House of Commons on 25 June, 1969 (Smith, 1995:1).

(Smith, 1995:2-4) said the major proposals were:

- ❑ Legislation that separated Indians apart from other Canadians must be removed (or as a South African would express it, end Apartheid).
- ❑ However, all Canadians should acknowledge that Indian culture is now a unique part of Canada's culture.
- ❑ All Canadians should be treated the same and get the same services from the same government agencies.
- ❑ Ownership of the land in the present Indian reserves must be transferred from the federal government to the Indian people of each reserve.
- ❑ All lawful obligations should be recognised and the disadvantaged should receive the most assistance.

Prime Minister Trudeau said that it beggars the imagination that a group of Canadian citizens should have an existing treaty with another group of Canadian citizens. All are citizens of the same country and all should be equal under the same laws. This was said during the universally condemned South African Apartheid regime with its policy of separate homelands for separate (non-white) ethnic groups. The proposed new dispensation for Canadian Indians

therefore was in agreement with the prevailing international sentiment and the ANC who wanted all racially discriminating laws in South Africa removed in order to create a unified "Rainbow Nation" in which all citizens are equal.

The White Paper stated that the then existing land claims were so general and undefined that they could not be considered to be realistic. The government proposed a policy that would end injustice to Indians. The intention was that all should be part of one nation and that Indians should no longer be considered as a race apart, there should be no thought of treaties, as all were Canadians. The official opposition, the Conservative Party, supported the general goals of the White Paper's proposals (Smith1995:4-5).

However, as time went by the Canadian governments, both Central and Provincial, changed their minds. The former Indian reserves were not disbanded and land claims were recognised. By 1995, Smith said that ten claims settlements had already been concluded in three different Canadian provinces (1995:11).

Discussions and negotiations with various "First Nations" continued. The most recently finalised claim that could be traced is the treaty, concluded in July 2007, termed the Tsawwassen Final Agreement, negotiated between the Government of Canada, the Government of British Columbia and Tsawwassen First Nation (Bill 40 - 2007 Tsawwassen First Nation Final Agreement Act).

The General Overview of this Act states the benefits of the treaty as bringing certainty to Tsawwassen First Nation's Aboriginal rights claims on territory covering approximately 279 600 hectares, including the waters of the southern Strait of Georgia. The package also consists of approximately 724 hectares of treaty settlement land, made up of some 290 hectares of former reserves, 372 hectares of former Provincial Crown land and an additional 62 hectares that the Tsawwassen First Nation will also own in fee simple (full dominium). The Tsawwassen also get the right to harvest fish and aquatic plants for food plus some commercial fishing and crab licences. In addition they get a capital transfer of approximately \$13.9 million over ten years, plus a one time amount of \$15.8 million to fund the programs and services the Tsawwassen agreed to administer through the Fiscal Financing Agreement and an ongoing funding of \$2.8 million per year. (General Overview, Tsawwassen Final Agreement, 2007)

The land would be held by the community. No individual, Tsawwassen or ordinary Canadian can own land in this self governing territory, they can only enter into long term leases. The Final Agreement will operate within the framework of the Constitution of Canada, but the Indian Act will no longer apply to the Tsawwassen, its lands or its members. Instead the Tsawwassen First Nation will be able to make its own decisions on the operation of its government, its cultural matters, treaty rights and taxation matters. The provisions of the Indian Act tax will be phased out after eight years for sales tax and twelve years for other taxes including income tax ( General Overview, Tsawwassen Final Agreement)

In the Tsawwassen Final Agreement it is said that the Tsawwassen First Nation lists its membership as 358 people, about half of whom live on the reserve. (In South Africa, such a small community would not even be considered to be a tribe, never a Nation, as the Zulu's numbering several million, found out after the first democratic election, when they tried to be considered as an independent nation).

It is clear that the Tsawwassen First Nation members have benefits other non-First Nation Canadians do not enjoy. As the First Nation Indians suffered discrimination in the past, possibly their enhanced status is regarded as an exercise in Affirmative Action and therefore acceptable. This in spite of the international community wanting different ethnic groups to live together as they did in the resolution of the Bosnia Herzegovina and Kosovo conflicts.

Hosios and Smith (2006:43-52) say that valuing historical First Nation claims involve determining the present value of historical deficiency payments and the cumulative loss of use value of these lands. As the escalation periods are usually 75 to 100 years or longer, an escalation rate such as the geometric average of the Canadian Government Bond rate over that time could give an inappropriate answer.

They also say that using a re-investment strategy that cannot be implemented in reality is problematic unless it approximates what could have actually been achieved. They propose a generic approach that can be used in Canada and also to value land claims in other countries. In Canada a laddered bond portfolio approach based on actual Government of Canada bonds from time to time should be used.

Hosios and Smith (2006) suggest a way to arrive at a realistic result, when required to value property at some time in the past time when the contracts were negotiated, or in the case of inappropriate takings, to estimate the present value of the annual incomes that could have been made from these assets over the period involved.

A problem in using this method, is the timing of the differing maturing dates and changing interest rates. At any given time, the portfolio would contain a mix of long term bonds with different times to maturity, that except for the initial start up period, all bonds would have the same length of time to maturity. They suggest a laddered portfolio of fifteen year government bonds made up in the following manner. Initially 1/15<sup>th</sup> of the portfolio is invested in bonds with one year to maturity, 1/15<sup>th</sup> of two years etc. As each bond matures its proceeds are invested in 15 year bonds (the yield on longer term bonds are higher than on the shorter term bonds). The investments are made in the same one or two week period each year. However, the problem is that in practice it is unlikely that bonds that mature exactly 15 years later can be purchased at the exact beginning of an escalation period. Potential capital gains and losses must also be taken into account.

### **2.3.2 United States of America**

Archaeological studies suggest that members of the Oneida Indian Nation had been living in Oneida County for about 10 000 years (Oneida Indian Nation, n.d.:1-3). Centuries ago, long before European colonists arrived in America, the Haudenosaunee Confederacy (also known as the Iroquois Confederacy) was formed from the Oneida, Mohawk, Cayuga, Onondaga, Seneca, and Tuscarora nations.

In the 1600's when the European settlers first penetrated Oneida land the Oneida, in terms of the Great Law of the Haudenosaunee Confederacy, wanted peaceful co-existence with the colonists and began trading with them. Some historians believe that the principles of the Confederacy, which respected it's members independence and promoted equal rights and justice for all, had a profound influence on people such as Thomas Jefferson and Benjamin Franklin, and the founding fathers of the United States (Oneida Indian Nation, n.d.:1-3).

In the 1794 Treaty of Canandaigua, the Oneidas got special protection for their land and recognition of the Oneida Nation's sovereignty. Because the Oneidas were the first to ally themselves with the colonists cause and fought with them against the British from the inception of the revolution, the Oneida's agreement with the United States differed from those concluded with other Indian nations.

In what the Oneida consider were a series of "unscrupulous treaties" by New York State after the end of the revolutionary war against the British, the rights of the Oneida to their ancestral lands were ignored. Years of poverty followed, but a group of persistent people kept working for the restitution of the Oneida's land (Oneida Indian Nation, n.d.).

Everingham, Janneke and Palmer (2007:435) say that unlike in South Africa land restitution for indigenous peoples of the United States is not a constitutional right. It is submitted that this is not quite correct, as the Constitutional right to restitution in South Africa is limited to those dispossessed of property in terms of racial legislation that occurred after 19 June 1913 - not before. Persons or racial groups, such as the Khoi and the San, who were dispossessed before that date do not enjoy Constitutional protection.

In 1970 the Oneida Indians filed a case in the United States Supreme Court in respect of federal jurisdiction over land cessions in two New York counties. The Supreme Court ruled that the cessions did not end the Oneida's right to possession. This was an important judgement as it also recognised the applicability of past federal treaties with indigenous peoples and the acceptance of tribal sovereignty (Everingham, Janneke and Palmer, 2007:436).

By the late 1980's some Indian Nations had achieved territorial sovereignty over some of their former reservations. These Indian tribal governments became law makers as their land rights denoted political territory recognising their political citizenship in a tribal nation. Indian tribes are now considered both the oldest and youngest governments in the United States (Everingham, Janneke and Palmer, 2007:444-445).

It seems as if the self governing territories being granted to "First Nations" by the Americans and the Canadians within the borders of their countries are establishing something similar to the homelands of pre-democracy South Africa.

### **2.3.3 Guatemala**

As in other parts of what is often referred to as "Latin America", when the Spaniards invaded and colonised Guatemala they occupied and privatised indigenous communal land (Leon, 2005:8-9)

The indigenous people were progressively deprived of property until 4% of the producers owned 80% of the land area of Guatemala while 96% of the population farmed the remaining 20%. Leon says key events that deprived the indigenous people of their land were the Liberal Reform of 1870 and the Dictatorial Military Governments that came into power after 1954. The result of these takings was a guerrilla war that lasted 36 years. In 1996 the United Nations brokered a peace agreement, entitled "Agreement on identity and rights of indigenous peoples" (Leon, 2005:8).

Leon says that the agreement provided for restitution and regularisation of tenure of the indigenous people who were displaced during the civil war. An organisation was set up to handle the restitution of the land taken from indigenous people during the civil war. This organisation was also to provide credit to assist the indigenous people to purchase land on the open market (a redistribution exercise) and to provide technical aid to help them to make the land they acquired productive (Leon, 2005:9).

Leon says land restitution has to do with rectifying past injustices by returning land unfairly taken to the dispossessed former owners. He says the driving force in many Latin American countries with multiethnic societies, is the restitution of indigenous rights to property ownership. This is one of the Human rights stated in the Universal Declaration of Human Rights in Article 17 (UN, 1948; Leon, 2005:21-22).

As seems to be the case in so many of these restitution initiatives, the pace of restoration was very slow. In 1999 a group of some 12 000 peasants marched to Guatemala City to protest against the lack of progress in the implementation of the peace accord. However, by the middle of 2001 only some 100 cases out of 1400 applications had been processed, and even these 100 cases had not all been finalised (Leon, 2005:9).



The lack of progress in land reform, considered to be an essential catalyst for economic growth and the alleviation of rural poverty, is seen as a growing problem. The tardy pace of restitution, if not corrected, could even be the cause of another civil war (Leon, 2005:10-17).

#### **2.3.4 Hawaii**

In 1848 King Kamehameha III changed Hawaii's land tenure system to a westernised recorded title system. However, the rights granted were subject to the rights of the native tenants. The fee titles were recorded in the *Mahele* book. In 1850 a law was passed allowing these native tenants to claim fee simple title to the lands they worked. Those who claimed these parcels acquired what is known as *Kuleana* (Garavoy, 2005:526).

However, of the 29 221 adult males eligible to make land claims, only 8205 actually received a *kuleana* award. It is said that so few claims were made was because private land ownership was misunderstood by the native Hawaiians and most did not appreciate the importance of submitting a claim (Garavoy, 2005:527-529). Some rural Africans in South Africa had a similar cultural mind set, and in spite of information initiatives by state officials, many did not submit their claims before the final extended cut off date, 31 December 1998.

Because so many of those who had the right to, did not claim their share of the available land, in time more and more of the land in Hawaii moved from indigenous to foreign control.

Garavoy says that nowadays many native Hawaiians feel that they were the victims of commercial land grabs and US imperialism. Another factor is that native Hawaiians believe in the inherent sacredness of the natural world and that humans have an obligation to care for their land. They also believe that the native Hawaiians are best suited to own and care for land in Hawaii. In addition to the desire of almost all the people on planet earth for their own bit of land, in Hawaii (and in several other countries) there is an additional spiritual aspect (nd:529).

Possibly in response to a growing demand by native Hawaiians for more rights in land, in 1978 a clause was added to the State Constitution. This clause reads: "The State reaffirms and shall protect all rights customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights" (Garavoy, 2005:531).

Although Garavoy's research focussed on how to integrate *Kuleana* rights into Land Trusts, it highlights the problem of indigenous rights, and the growing pressure of native Hawaiians for more control and ownership of property in their native land. As has happened in other countries with similar problems, this pressure has been having an effect.

According to Kanner and Kanner, the Hawaii Land Reform Act was devised to transfer to lessees the fee interest (known as full title ownership in South Africa) in large parcels of leased land. The need and desirability for land redistribution was discussed in depth by the legislature. Land ownership in Hawaii was concentrated in the hands of relatively few landowners who refused to sell their properties, preferring to enter into long term lease agreements. This concentration of land in the hands of the few was no longer considered desirable or appropriate and the Act was designed to change this (1980:129-130).

This was a redistribution rather than a restitution procedure, and unlike in South Africa, the beneficiaries have to buy the property, they are not given the land in a free transfer. However, like in South Africa, the Hawaiian legislature wants land to be redistributed from the few to the many.

The Hawaii Land Reform Act authorised the Hawaii Housing Authority to acquire leased land either by negotiated purchase or by condemnation (expropriation) and then sell the land to the long-term tenants who had been using the land.

(Kanner and Kanner, 1980:130) state that "the act contains a curious provision that equates current fair market value with something called the 'owner's basis'. The basis is to be determined by either adding the present value of the future rental income stream and the present value of the lessor's reversionary interest (the capitalisation rate to be used is the prevailing savings and loan passbook rate, plus 3¾%), alternatively the current market value,

valued by the undivided fee method, minus some six factors ... Another problematic aspect is that the act specifies that of these two methods, the one is to be used which "gives the greater consideration to the lessee's interest".

In 1997 the Native Hawaiian Recognition Bill came before the US Senate. This (controversial) bill is intended to give Native Hawaiians self-governing rights similar to those given to the Native American nations. The debate on this bill was said to be heated. Democratic Senator Dan Akaka, the sponsor of the bill, says Native Hawaiians should be given the same rights as the indigenous people in the mainland United States. Opponents of the bill said it was a racial and divisive measure and called it a dangerous precedent that could encourage racial divisions in Hawaii and elsewhere and herald the disintegration of the United States into different racial enclaves.

The bill was backed by organisations such as the Office of Hawaiian Affairs, the Council for Native Hawaiian Advancement, the National Congress of American Indians and the American Bar Association. However, members of Hui Pu, a native Hawaiian group, protested against the bill as they believe it could prevent Hawaiian land and sovereignty claims (Indigenous Issues in the Pacific Rim, 2007:7-8).

## **2.4 SOUTHERN AFRICA**

### **2.4.1 Namibia**

When Namibia became independent in 1990, 4500 white commercial farmers owned 43% of the agricultural land. However, the lands on these farms, in the southern part of Namibia, are marginal with lower rainfall than the northern part. 150 000 Indigenous households owned 42% (very close to the total of the 13% held by non-whites in 1994 plus the additional 30% targeted to be transferred to blacks in South Africa by 2014) in the north and north east, the balance (about 15%) was land owned by the state. Unlike other parts of Africa where the colonialists settled on the better and more fertile lands, here the area occupied by the indigenous people at independence not only had the better lands but enjoyed higher rainfall than the part of Namibia settled by the colonialists (Werner, 1997:1)

This unequal land ownership was considered to be the main cause of rural poverty. The matter of land reform was raised in the first sitting of the first Independent Assembly, and received wholehearted support from the Prime Minister. The National Conference on Land Reform and the Land Question was held in Windhoek from 1 June to 1 July 1991. Five hundred Namibians, from both the (wealthy) commercial farmers and the (poor) communal farmers were invited to attend the conference (Werner, 1997:1-3).

According to Adams the central issue in Namibia is the restitution of the land taken by European settlers to the majority black inhabitants of these countries. In the run up to the 1991 land reform conference in Windhoek, ethnic groups such as the Herero, Damara and Nama pressed for ancestral restitution as their land had been taken by German colonists at the turn of the century (2000:1-2)

After the debates that followed, it was decided that "given the complexities in redressing ancestral land claims, restitution of such claims in full is impossible" (Werner, 1997:3). However, Melber states that long before the whites came, Southern Africa experienced many changes in occupation as a result of migration and conquest by other people. The acknowledgement of ancestral claims could lead to the land being given back to the descendants of the Khoisan (better known as Hottentots and Bushmen) who were the original indigenous inhabitants of Southern Africa. Colonisation and conquest did not start with the arrival of the Europeans (Melber, 2002:4).

As in South Africa going back too far in the past could result in conflicting claims by different ethnic groups which at various times had occupied the same territory. It could be very difficult to resolve these types of early aboriginal claims peacefully (Melber, 2002:4). It is submitted that it is most unlikely that the present majority population would be willing to acknowledge these prior claims with the risk of also being classified as invading settlers and so depriving themselves of the possibility of claiming land in their country of birth.

There is also the problem that land distribution could affect farming productivity as the existing (colonialist) commercial farmers in Southern Africa are relatively efficient and contribute to the national incomes. Giving the producing "settler" farms in Namibia to what would likely be untrained "herdsmen" who do not have the necessary farming and management skills to farm profitably may not make good economic sense (Melber, 2002:5)

Werner states that the 4500 commercial farmers employed between thirty and forty thousand workers. Many of these farm workers, and their families, would have to leave to make way for the new land beneficiaries. These displaced farm workers may end up being both homeless and unemployed, creating another problem (1997:15).

The Agricultural (Commercial) Land Reform Act (Act 6 of 1995) provided for the acquisition of freehold land for land reform and resettlement. However, it did not have an integrated land policy and at the time of writing (1997) a draft White Paper to remedy this was still under consideration (Werner 1997:1, 4, 6).

Despite broad acceptance of the Agricultural (Commercial) Land Reform Act some political parties objected to the "willing seller willing buyer" principle as they said that buying back land from settlers who had stolen the land from indigenous people was immoral and illegal. However, restitution of ancestral rights was ruled out (Werner, 1997:7 - 9).

Melber argued that land restitution as such was a non-issue for most of the population, the main issue was the alleviation of poverty. Thousands of ex SWAPO combatants wanted employment (preferably in the public sector) and financial compensation, rather than land (2002:6).

However, since Melber wrote the foregoing in 2002 attitudes seemed to have changed. IRIN reports that although the Namibian government acquired nearly 200 farms totalling 1,2 million hectares and resettled 1616 families, the political temperature had been rising. A group claiming to represent thousands of former freedom fighters were demanding cash and equity in the fishing and mining industries. The situation is considered to be similar to that when the Zimbabwean war veterans demanded compensation. This led first to financial concessions, and then the farm invasions that had a disastrous effect on Zimbabwe's economy (IRIN, 2006).

Melber (2002:7) points out that land is an emotional issue that can easily be used to inflame and create conflicts. Unless a solution to the land issue is found it will remain something that could be, and often is, exploited and manipulated by political parties. The land issue can even be used by the government that failed to address the issue satisfactorily (as in the case of

Zimbabwe). Melber quoting Palmer (2000:286) says that long term answers to the future for people in Southern Africa must lie outside the land issue, because that would result in impoverishment if no sustainable alternatives to a dependency on land is found. Although agriculture provides a livelihood for more than two thirds of Namibians, among the landless, there is no way those beneficiaries could escape the poverty trap by being given small, uneconomic parcels of land. Unfortunately as long as land ownership is associated with wealth, land reform will remain a problem which can be exploited by politicians trading on people's emotions, that unless addressed, might have similar destructive consequences at that which occurred in Zimbabwe (Melber, 2002:5-9).

Werner states that at the start the pace of land reform was very slow. Only 17 farms had been purchased by the beginning of 1996, but the acquisitions were then speeded up so that 39 farms had been bought by mid 1997 (1997:10).

The BBC reported that Namibia's prime minister would be putting pressure on white farmers to sell their land as land reform and the eradication of poverty were major government concerns. The report stated that some 4 000 mainly white farmers owned almost half the arable land (which would indicate that about 500 white farmers had sold their land to the state since 1990). Although more than 20 million Namibian dollars were spent annually buying farms, white farmers were not offering enough land for sale. Namibia's president said that "arrogant white farmers must embrace the government's land reform program" and that 192 farms owned by "foreign absentee landlords" would be repossessed (2002:1-2).

Nevin says that in recent times land redistribution had become a burning issue in Namibia and that the government announced that they would expropriate a number of white owned farms to accelerate land reform. Namibia's Prime Minister blamed white farmers for the government abandoning the "willing seller, willing buyer" policy in favour of expropriation as they had been inflating land prices and so slowing down land reform. He said Namibia's program would not descend into the Zimbabwe chaos. Farmers would be compensated fairly but the government intends to accelerate the pace of land reform to resettle landless blacks (2004:1).

## 2.4.2 Zimbabwe

According to the "Land Reform in Zimbabwe" entry in Wikipedia, whites came to the Zimbabwe in the 1890's and in 1918 England's Privy Council decided that the country known as Southern Rhodesia belonged to the Crown (Wikipedia, 2007).

Southern Rhodesia attained self government in 1923 and in 1930 the country was divided into three areas. One where only whites could own property, one where only blacks could own property and the one where the land was to be held in trust on a collective basis for the indigenous people.

The result of this division was that at the time of Ian Smith's declaration of Independence in the 1960s, whites, representing less than 1% of the population, owned 70% of the arable land. (At the time these white commercial farms were so productive that Rhodesia was considered to be the breadbasket of Southern Africa. In addition these commercial farms produced world class tobacco that earned valuable foreign currency).

One of the terms of the Lancaster House agreement which ended white only rule, was that Britain agreed to fund land reform on a "willing buyer/willing seller" basis. However, in terms of the "willing buyer/willing seller" agreement, the white farmers could not be forced to sell. By 1990 only 71 000 out of the targeted 162 000 families were resettled. To speed up land reform, the Land Acquisition Act that allowed expropriation was passed in 1992.

Although some of the expropriated farms were used to settle poor blacks, hundreds of these farms were taken by cabinet ministers, state officials and wealthy black businessmen. Britain therefore stopped the financial aid they were giving Zimbabwe to pay for land reform.

In 1998 the Zimbabwean government held a donor's conference in Harare looking for aid to implement their Land Reform and Resettlement Programme Phase II, which they said was essential for poverty reduction. Although the Commercial Farmers Union offered to sell some 15 000 million km<sup>2</sup>, it is said the landowners dragged their feet, and in 2000 the Zimbabwean government drafted a new constitution in which they could acquire land without paying compensation. The referendum held for the adoption of the new constitution was

defeated. A few days later Mugabe supporters, referred to as "war veterans" started seizing white owned farms.

In evicting the white farmers, the "war veterans" executed serious acts of violence against both landowners and farmer workers. The invaders have beaten up and even killed some farmers and workers. Several hundred thousand farm workers, who were generally denied access to land, were therefore put out of work and swelled the ranks of the unemployed.

Most of those who took occupation of these formerly productive farms did not have the necessary farming skills and agricultural production suffered (Human Rights Watch, 2002:1)

The seizures of the white farms destroyed the previously thriving Zimbabwean agricultural industry, changing it from a food exporter to one needing food aid. The collapse of the important exporting agricultural sector had a knock on effect on the rest of the economy. Agricultural supply, support manufacturing and distribution organisations were affected and as a result the banking sector collapsed (Tupy, 2006:1). The Zimbabwean currency started falling rapidly and inflation went out of control. In December 2007 the official inflation estimate was given as about 8 000 per cent. However, independent estimates say that inflation is closer to 40 000%. The International Monetary Fund warns that inflation could reach 100 000% by the end of the year (Shaw, 2008:6).

On a flight to Zimbabwe from the air one can see thousands of hectares of formerly productive farmland returning to veld. Although the government is predicting a good agricultural season, around Harare there are almost endless unworked and barren fields. Around Bulawayo there are similar sights of abandoned farms with broken, rusting agricultural machines and gutted farm buildings. The shops in the towns experience continual shortages, but although the empty shelves show the result of the economic meltdown, they are compelled to remain open and to keep paying their staff, whether they are trading profitably or not (Fletcher, 2007:17).

Zimbabwe's handling of land restitution and redistribution is considered to be a cautionary tale of what can happen if the situation is allowed to get out of hand. Neither Namibia or South Africa want Zimbabwe type land invasions (which would almost certainly have a



negative impact on their economies) to start happening in their countries (Melber, 2002:7; Barron, 2007:9).

## 2.5 CONCLUSIONS

In the modern world the restitution of property rights and the return of ancestral land is being addressed in many countries in different parts of the world. There seems to be a universal hunger for land among the poorer citizens of the world, particularly when they believe, or are persuaded to believe, that it was taken from them unfairly and that it should rightfully be theirs. There is a fairly general perception that giving land to the very poor will solve their financial problems and combat poverty.

Although this may have been true in the feudal era, when most of the wealthy were large landowners this is no longer the case. In the modern world industry has replaced agriculture as the main wealth generator for individuals and countries. Although they own property, it is not the income generated from land that made people like Gates, Buffet, Allen, Mittal, Oppenheimer and Rupert so wealthy, and it is not the agricultural nations that are counted among the wealthiest. However, the land = wealth = dignity perception is widespread and this outdated feudal paradigm is often exploited for political gain. When people have very little it is easy to persuade them that having some land will change their lives. The poor tend to believe it, even when experience has shown that giving land to the unskilled not only does not make them wealthy, but too often leads to the breakdown of the farms and a drop in the national agricultural output.

However, nowadays most governments in the world are aware of the desire for land among the poor and its potential to cause problems, and so are endeavouring to satisfy the formerly dispossessed by various forms of property restitution and/or redistribution.

Different countries used, or are using, different approaches to solve their land problems. During the communist era most privately held property in Eastern Europe was either confiscated without compensation, or the properties were incorporated into state run collectives. Since the fall of European communism, major land restitution and redistribution

projects, with varying degrees of success, were instituted in the former communist countries of Eastern Europe.

Originally many in Hungary were against property restitution, but as a result of lobbying by the Smallholders Party it became an accepted policy. However, the Hungarian Constitutional Court found many of the provisions of the earlier land restitution statutes to be unacceptable. Eventually, instead of the actual restitution of the properties, a financial compensation solution was used. However, limits were placed on the compensation that could be claimed. In addition compensation could only be claimed by individuals; churches and corporations were excluded. The claimants were given negotiable vouchers that they could use either to purchase their dispossessed land, or apartments in the cities, or could trade these vouchers on their stock exchange. This seemed to work well and satisfy the Hungarians, and whether for this or for some other reason, in 2001 the average income of Hungarians was considerably higher than that of most other Eastern European countries where the dispossessed were given small uneconomic pieces of land.

Land restitution and redistribution in Poland was easier than in most of the rest of the former communist countries. Poland had already instituted a land re-distribution program between the two world wars and the large estates had been broken up and the majority of the farms were owned by the "peasants", a favoured class of communism, considered to be representative of the masses. Throughout the communist era three quarters of the agricultural land in Poland was privately owned. After communism, the large state farms were subdivided and sold, not given away.

Land restitution in Romania was a much longer and more difficult process. After the second world war, the Romanian government confiscated all properties larger than 50 hectares and the properties of anyone considered to be an enemy of the state. These were consolidated into large state farms. The smaller peasant farmers had to "donate" their land and become members of cooperatives. After the fall of communism the cooperatives were broken up and the land was to be returned to the original owners. However, regardless of the size of the "donated" farm, the maximum size farm that could be claimed was limited to ten hectares. The result was that farms in Romania became fragmented. After the re-distribution the average sized farm was only 2,3 hectares, far too small to farm economically, and only good

for subsistence purposes. In 2001, according to the records of the World Bank, the per capita GNI of Romania was a third of Hungary's.

In East Germany the land restitution exercise was not only for the return of property and businesses confiscated by the Communist German government, but included Jews and other races who had been dispossessed by the Nazis. To finance the project a levy of 30 to 50 percent of the value of the land returned to owners had to be paid into the compensation fund. The compensation offered was based on the 1935 rateable value of these properties. A sliding scale of the amount of compensation for properties whose compensation worked out to be over DM 100 000 was introduced and the maximum compensation was set at DM 250 000. Because of reuniting with Western Germany this large and expensive program went relatively smoothly.

Estonia is aggressive in its land reform program in order to meet the European Union's requirements to be accepted as a member, but their policy created antagonisms between Estonians and Russian immigrants, and between residents and Estonians living abroad.

The restitution land policy in Bulgaria resulted in too many people receiving small, uneconomic land parcels, particularly in irrigation schemes. The result was, because they did not work together to manage the irrigation scheme, it fell into disuse, which of course negatively affected the agricultural output. In other areas the owners of these small farms organised themselves into co-operative schemes.

Russia was the slowest to reform, and their land reform program is still lagging behind most of the other former communist countries. Part of the reason given is because it is so long since there was any private land ownership and partly because it was not in the interest of the managers of the large estates to assist in the breaking up of these large state farms.

In Bosnia/Herzegovina, Kosovo and Iraq, the main aim of property restitution was to counter the effects of ethnic separation.

In Canada and United States land reform policy has resulted in the establishment of semi-self governing territories for the various indigenous tribal nations. Those that oppose this say it is allowing and supporting ethnic separation.

In Guatemala the authorities resisted land restitution until forced to do so by the settlement terms to end the internal revolution.

In some respects it could be said that the native Hawaiians lost control of much of their land through not submitting claims in 1850. This was largely because they did not understand private ownership of property. However that has now changed and the Hawaiian legislature is taking steps to decrease the amount of land owned by non-Hawaiians. There are also moves to give Hawaii similar self governing status as had been given to the indigenous inhabitants (Native Americans) in the mainland United States.

Namibia is proceeding with land reform in an orderly manner. After a slow start the pace has been speeded up. Namibia now expropriates property so that landless blacks can be resettled as soon as possible. They do not intend to reach the stage where impatient citizens start a Zimbabwe like land invasion, with all the negative consequences that would entail. Land restitution and redistribution is restricted to restoring the land whites took away from blacks. The claims of the original indigenous inhabitants are not being recognised.

Land restitution in Zimbabwe was first implemented on the "willing buyer/willing seller" principle, but after the ruling government's referendum defeat, uncontrolled land invasions became the order of the day - with disastrous results for the economy.

Some anomalies are seen in how restitution is handled in different parts of the world. In most places, the aim is for various people to live together, regardless of race, religion or culture. Examples of this are the anti racial separation policies (referred to as "ethnic cleansing") instituted in Bosnia Herzegovina, Kosovo and Iraq. However, across the Atlantic Ocean in the United States, Canada and Hawaii there is another paradigm. The indigenous inhabitants in these countries are being given semi-self rule in their own territories. Opponents of this type of restoration argue that this is encouraging racism and creating racially separated enclaves which seem to be similar to the internationally condemned former South African Homelands.

The next chapter will discuss land restitution in South Africa.

## **CHAPTER 3**

### **LAND RESTITUTION IN SOUTH AFRICA**

#### **3.1 THE HISTORICAL DEPRIVATION OF PROPERTY RIGHTS**

##### **3.1.1 The period before 1948**

“White control over the ownership and occupation of land by black South Africans was a hallmark of the apartheid era and the colonial period which preceded it. Beginning with the arrival of the Dutch at the Cape in 1652, black South Africans’ rights to land were consistently ignored or legislated out of existence” (Patterson, 2003:2).

Although the first indigenous groups affected were the Khoi-Khoi and San (not usually counted among the black), Patterson, as do so many others, included them in the description "black".

According to Barry (2004:357), most of the country now known as South Africa was claimed by the Dutch East India Company for Holland in 1652 and that the Dutch traders drove the Khoi Khoi out of their former grazing lands. Over the course of the next few centuries the settlers spread out from the Cape and the Khoi Khoi, San and Africans lost their land to these settlers.

Camay and Gordon also state that the colonial period started in 1652, first under the Dutch and then the British occupation of the Cape. From the start the rights of indigenous people were ignored and they were progressively forced from their land by white settlers and their colonial authorities (nd:2). Although like many others, Camay and Gordon consider that the Native Land Act 27 of 1913 gave the impetus for the deliberate and systematic denial of black South Africans' birthright, the fact that they also mention 1652 as the effective start of white dominance is significant. (Bromley, n.d.:2) also gives 1652 as the time of the start of the European colonists domination of economic life in South Africa. It would therefore not be surprising if at some stage the Khoi-Khoi and San campaigned for 1652 rather than 1913 to be the date recognised as the start of racial discrimination so that their earlier claims can be recognised.

Greyling (2005:12) asks the question of where the black people were in 1652. He argues that we should also look at the other large colonisation – when black people moved into land occupied by San and Khoi-Khoi. This means the Khoi-San would have prior rights. Blacks were not the indigenous inhabitants of South Africa. However problems could arise if the effective starting land claim date of 1913 is changed to 1652, the year said to be the starting date of the suppression of indigenous Africans by European settlers. Although there were some whites in Southern Africa before that time, 1652 is given as the date that whites came in fairly great numbers to South Africa, and therefore the date some consider to be the beginning of colonialist suppression. However, Greyling submits that if we go back that far in time and take these other factors into consideration it could change the South African miracle into an enormous mess.

Patterson (2003:2) says the key event in the skewed distribution of land in South Africa was the passing of the Native Land Act 1913. The majority black population are also of the opinion that the watershed of land ownership discrimination was the passage into law of the Native Land Act. In terms of this act black people were forbidden from owning, purchasing or leasing land outside designated “native reserves” which at that time represented 8% of the country’s land area. In 1936 the area was increased to 13%. Zimmerman (2005:378-418) says more than 600 000 black, coloured and South Asian people were forcibly removed under the auspices of the Native Land Act, 1913.

### **3.1.2 The period 1948 to 1994**

Although existing before that date, racial discrimination was made an official policy by the Nationalist Party after they came into power in 1948. They passed the Group Areas Act in 1950 to further the aims of Apartheid (Separate Development). Most of the country was declared a “White Group Area” and any non-whites who owned property and/or lived in these “white” areas were expropriated and forced to move to their respective Group Areas. This policy was used to relocate both urban and rural non-whites.

Some areas of the country were made into ethnic and/or tribal “homelands” said by the Nationalist Party Government to be independent nations with their own governments. A significant part of the South African black population were segregated into “independent

homelands” as an implementation of the policy of separate development. Industrial areas on the borders of these homelands, referred to as “border industries” were encouraged and subsidised by the government to provide employment opportunities for the people moved into these homelands.

In spite of the provisions of the Native Land Act, even as late as the 1960's some blacks had full Deeds Office registered title to farms in white areas, and they lived on those farms. These were referred to as "black spots" and the Nationalist Party controlled government expropriated these farms and moved the black occupants to the homelands. The farms were then sold to selected white farmers at subsidised purchase prices and interest rates. An example of one such farm repurchased for Land Restitution is given in Case Study No.1.

Both the forced removals and the perception that white farmers acquired these farms below market value, with low interest government loans, plus various farming subsidies, none of which were available to black farmers, was a sore point. This led to the unusual new clauses in the Property sections of the Interim and final Constitution. Some of the ANC and their allies felt that these white farmers who replaced the dispossessed blacks should not be paid for benefits given to them by the former government. The principle of the taxpayer not having to pay for a benefit previously given through tax money can be considered to be reasonable.

The homeland policy of the "Apartheid" government was strongly opposed by the ANC and other black liberation groups, and in the new democracy these “homelands” were abolished. However, the land areas of these “homelands” remained under black control and ownership.

### **3.1.3 The period after 1994**

At the date of the transfer to full democracy, property ownership, and very specifically farms, was still predominately in the hands of the white minority. The new democratic government was determined to change this. They intend to have an additional 30% of the total agricultural land area in South Africa under black control by 2014, by using a combination of land restitution, redistribution and securing of land tenure for farm workers, i.e. by the return of the dispossessed to their original properties and the purchase of other farms from white owners to be resettled by blacks.

Although urban as well as rural properties were affected by the Native Land Act and the expropriation of black owned properties in designated "white areas", in South Africa (and the rest of the world) the main thrust of land reform seems to be centered on farms. Almost all the press reports about land restitution in South Africa and other countries are about rural properties and the effect of land restitution (and land invasions) on agricultural production.

The ANC government has made its position clear about not moving the land claim date to earlier than 1913, and their view is understandable. The Native Land Act of 1913 is generally considered to be a watershed act of White/Black discrimination (which the world generally equates with the universally condemned Apartheid). They definitely would not want to open the date to the first landings of whites in Southern Africa (or earlier) as this would open the way to claims of people conquered by various black groups (such as the Zulus who took over large areas during the reign of Shaka). They would not like to be seen as oppressors and have the earlier indigenous people's prior claims superseding theirs.

According to a White Paper (1997:27) the Constitution excludes restitution claims for land dispossessed before 19 June 1913. The government rejected the concept of indigenous title because these ancestral land claims could awaken destructive ethnic and racial politics. The problems and complexities that could result would be difficult if not impossible to unravel. Over many years some parts of South Africa had in turn been occupied by San, Khoi, Xhosa, Afrikaner Trekkers, and the British. The acknowledgement of such early property rights could awaken ethnic counter claims and racial conflicts. An aspect not mentioned in the White Paper, is that if the date is set back in time it could predate and therefore invalidate most, if not all, claims resulting from the Native Land Act, and this would be unacceptable to the majority population of South Africa. So although there were frequent calls for the 1913 cut off date to be scrapped (South Africa, 1997:5), and it is unlikely that this cut off date will be changed in the foreseeable future, not everyone considers the exclusion of indigenous rights to have been finalised.

Carey Miller and Pope (2000:178) say that although the White Paper expressly states that claims prior to 19 June 1913 will not be entertained, this decision is a rejection of African custom in favour of European land tenure methods.



Patterson (2003:13) considers that the *Richtersveld v Alexcor* case may have opened the door to earlier aboriginal claims. It would seem that the Khoi-San people have not abandoned their indigenous (aboriginal) claims either. During a twelve day visit to South Africa, Rodolfo Stavenhagen, United Nations expert on Human Rights for Indigenous People, met with government officials and leaders from the main Khoi-San groups. Among other complaints the indigenous leaders said government was ignoring Khoi-San land rights (*Indigenous Issues in the Pacific Rim*, n.d.:10). Although government policy is to ignore land dispossession claims that occurred before 19 June, 1913, the date set in the Constitution, it seems that in the minds of the Khoi-San, this matter has not yet been laid to rest.

The original *Richtersveld* claim was disputed by the state, and rejected by the Land Claims Court. The legal representatives of the *Richtersveld* Community took the matter to the Supreme Court of Appeal and finally the Constitutional Court. The Constitutional Court found that the *Richtersveld* Community had a valid claim and the community was able to proceed with their action. They claimed compensation for the diamonds taken from the land over some 80 years, for environmental damage caused by the mining, and for the act of dispossession itself. Litigation and negotiation continued thereafter for several years before the matter was finalised in October 2007 (Anon, 2007a:1)

### **3.2 RESTITUTION LEGISLATION**

Henrard, quoting du Plessis (1994:97), wrote "during the 1993 constitutional negotiations, the property clause of the Bill of Rights 'was a bone of contention from the outset'." Henrard also mentions that among the points of contention was the protection of property rights and the disproportionate ownership of land, particularly agricultural land, by the minority white population of South Africa. Different parties in the negotiations had strong views on the matter and the Property clause was changed several times as differing views gained acceptance. The then existing government wanted property rights to be entrenched and the method of the state to acquire land from the existing property owners to be in terms of the Expropriation Act, Act 63 of 1975. Intensive negotiations and compromise were needed before the parties eventually agreed and the method of acquiring the land from whites, and the need for restitution and redistribution to blacks was formulated (Henrard, 2002:33-34). The basis on which compensation is to be determined is in terms of the Expropriation Act.

Some of the other parties in the negotiations disagreed, saying that the land was originally stolen from them and should be confiscated. Others were prepared to follow the principle of purchase, whether based on market value or some other method such as productive value to determine the compensation payable to the present owners. The conditions to be taken into account in determining the compensation payable to the present landowners were first stated in the interim constitution and later amended in the final Constitution.

The Preamble to the Constitution of the Republic of South Africa 1996 (hereafter referred to as “The Constitution”), Act 108 of 1996, starts off with:

“We, the people of South Africa,  
Recognise the injustices of our past; - - -”

Many of those tasked with the drafting of the Constitution and the Bill of Rights, and in particular Section 25 of the Bill of Rights, the Property section, had been the victims of discrimination during the previous white only governments of South Africa. Being determined to rectify the past wrongs, they made this point clear in the preamble to the Constitution.

The property clause (Section 25) in the Bill of Rights of the Constitution of the Republic of South Africa 1996, Act 108 of 1996, as adopted by the Constitutional Assembly on 8 May 1996 is provided in Exhibit 3.1. The Property clause has to be read with Section 36, the Limitation of Rights (Exhibit 3.2).

### Exhibit 3.1

#### Section 25 of the Bill of Rights of the Constitution of the Republic of South Africa, Act 108 of 1996

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##### 25 Property

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application-
  - (a) for a public purpose or in the public interest; and
  - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-
  - (a) the current use of the property;
  - (b) the history of the acquisition and use of the property;
  - (c) the market value of the property;
  - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - (e) the purpose of the expropriation.
- (4) For the purposes of this section-
  - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
  - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
- (9) Parliament must enact the legislation referred to in subsection (6).

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Source: South Africa (1996)

### Exhibit 3.2

#### Section 36 of the Bill of Rights of the Constitution of the Republic of South Africa, Act 108 of 1996

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##### 36 Limitation of rights

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
  - (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

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Source: South Africa (1996)

After the first fully democratic election the majority ANC led government was determined to restore the land that was taken from blacks as a result of racial discrimination. One of the key acts to accomplish this was the Restitution of Land Rights Act, Act 22 of 1994. This Act also provided for a Commission on Restitution of Land Rights and a Land Claims Court. Section 33 stated the factors that the Land Claims Court had to take into account (Exhibit 3.3).

### **Exhibit 3.3**

Section 33 of the Restitution of Land Rights Act, Act 22 of 1994

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#### **33 Factors to be taken into account by Court**

In considering its decision in any particular matter the Court shall have regard to the following factors:

- (a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
- (b) the desirability of remedying past violations of human rights;
- (c) the requirements of equity and justice;
- (cA) if restoration of a right in land is claimed, the feasibility of such restoration;
- (d) the desirability of avoiding major social disruption;
- (e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;
- (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
- (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
- (eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
- (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution.

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Source: South Africa (1994)

In addition to the acquisition of property for redistribution, measures were to be taken to right possible wrongs in underpayment for those forcibly removed from their properties in what had been designated as white group areas.

Ghyoot (2007:5) in discussing the Restitution of Land Rights Act, 1994 (as amended), says that in addition to the factors specified in the Constitution the Restitution of Land Rights Act introduces some other important requirements. In determining compensation for the expropriated party (subclauses eA, eB and eC) factors such as the history of the dispossession, the amount of financial and/or other compensation received in respect of the dispossession, the hardship caused and the feasibility of restoring ownership and the avoidance of major social disruption must be taken into consideration. The Court must

also have regard to factors such the desirability of remedying past violations of human rights and the requirements of equity and justice.

Section 33(eA) of the Act says that the amount of compensation or other consideration (such as a replacement property) received in respect of the dispossession is also to be taken into account. However, at times the Department of Land Affairs not only restored the land to the community's concerned, but sometimes allowed them to keep the properties they had been given as replacement for the properties from which they had been removed. This may have been as a form of compensation in terms of (eB).

Something new in South African law regarding state property purchases is that in determining the amount of compensation the purpose of the expropriation has to be taken into account. Up until the passing of this Act, in terms of the provisions of the Expropriation Act, the state's use for the property had to be ignored and the property had to be valued only at its present or potential use to the present owner (Ghyoot, 2007:4-5).

The relevant sections, Sections 12(5)(a) to (h), of the Expropriation Act 63 of 1975, are shown in Exhibit 3.4.

### Exhibit 3.4

Sections 12(5)(a) to (h) of the Expropriation Act, Act 63 of 1975

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(5) In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely-

- (a) no allowance shall be made for the fact that the property or the right to use property has been taken without the consent of the owner in question;
  - (b) the special suitability or usefulness of the property in question for the purpose for which it is required by the State, shall not be taken into account if it is unlikely that the property would have been purchased for that purpose on the open market or that the right to use the property for that purpose would have been so purchased;
  - (c) if the value of the property has been enhanced in consequence of the use thereof in a manner which is unlawful, such enhancement shall not be taken into account;  
[Para. (c) substituted by s. 11 (f) of Act 45 of 1992.]
  - (d) improvements made after the date of notice on or to the property in question (except where they were necessary for the proper maintenance of existing improvements or where they were undertaken in pursuance of obligations entered into before that date) shall not be taken into account;
  - (e) no allowance shall be made for any unregistered right in respect of any other property or for any indirect damage or anything done with the object of obtaining compensation therefor;
  - (f) any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account;
  - (g) .....
- [Para. (g) substituted by s. 4 (1) (b) of Act 21 of 1982 and deleted by s. 11 (g) of Act 45 of 1992.]
- (h) account shall also be taken of-
    - (i) any benefit which will enure to the person to be compensated from any works which the State has built or constructed or has undertaken to build or construct on behalf of such person to compensate him in whole or in part for any financial loss which he will suffer in consequence of the expropriation or, as the case may be, the taking of the right in question;
    - (ii) any benefit which will enure to such person in consequence of the expropriation of the property or the use thereof for the purpose for which it was expropriated or, as the case may be, the right in question was taken;

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Source: South Africa (1975)

Terblanche (2004:2-29) discusses the legal and theoretical interaction between the Expropriation Act 63 of 1975, Section 28 (the property clause in the Interim Constitution), Section 25 “Property”, and Section 36, “Limitation of Rights” in the Constitution of the Republic of South Africa 1966 and the Restitution of Land Rights Act 22 of 1994. On page 5 he says that in terms of Section 29 of the Constitution, consideration can, and should, be taken of international laws when interpreting the Bill of Rights. Terblanche discusses expropriation legislation in the United States, Switzerland, Malaysia, Australia and Germany and how their legislation may relate to our determination of compensation (2004:14-15)

Terblanche deals with what is generally considered to be the most difficult and controversial parts of the property sections of both the interim and final constitution, the concept of 'just and equitable'. Terblanche also refers to the case *Hermanus v Department of Land Affairs: In R Erven 3535 and 3536 Goodwood 2001* (1) SA 1030 (LCC) at 1037-1038. He says "the court found that in determining compensation for purposes of equitable redress, a Court must have regard to the history of the dispossession and to the hardship caused by the dispossession. - - -Regard to them (these two factors) may well result in a higher award than if cognizance had to be taken only of the factors listed in the Constitution" (2004:22) The fact that in the Constitution it is expressly stated that the history of the dispossession has to be taken into account, implies that the well known emotional suffering of those dispossessed in terms of Apartheid legislation is a factor that requires some form of compensation. In his opinion a solatium could be added for this factor and could even be seen as an apology (Terblanche, 2004:23)

### **3.3 RESTITUTION VALUATION FORMULAE**

During the first few years of the new dispensation there was a lot of uncertainty about how the property clauses in the Interim and then the final Constitution of the Republic of South Africa should be interpreted. The members of the Public Works Land Affairs Board of the Department of Public Works on behalf of the Department of Land Affairs and officials of the Department of Land Affairs had different interpretations of how the provisions of the Constitution should be applied. Minister Derek Hanekom, the then Minister of Agriculture and Land Affairs, set up the Ministerial Committee on the Determination of Land Values to provide guidance on how to apply the provisions of the new legislation. They came up with a formula that became known and referred to as the "Gildenhuys Formula", because this was the formula that Doctor A Gildenhuys, later a Land Claims Court judge, presented at workshops arranged by the South African Institute of Valuers.

The formula was:  $(A / B \times C) + D - E$ , where:

- A is the actual price which was paid by the present owner at the time of acquisition;
- B The market value of the land including improvements at the time of acquisition;
- C The present day (current) market value of the land, including improvements, but

excluding improvements made by the owner;

- D The contributory value of beneficial improvements made to the property by the owner since time of acquisition (a "beneficial improvement" being an improvement which adds to the market value of the property); and
- E The value of any special benefits which the owner received from the State, e.g. low interest rates, subsidies, etc.

Valuers appointed by the Department of Public Works to undertake valuations for Land Reform purposes were expected to apply this formula in determining the compensation to be paid to the white property owners, who acquired farms previously owned by blacks that were expropriated in terms of racially discriminatory laws.

After the Kinde Estate project was finalised (Case Study number 1 in Chapter 4 of this dissertation) the flaws in this formula were corrected and the formula was changed. Lekala (2001:4 & 5) discussed the shortcomings of the "Gildenhuys" formula and proposed an alternative method developed by Michael Aliber.

Although Lekala gave the details of the new formula in his "Guidelines for calculating compensation to land owners", this new formula may be more easily understood in the form in which it appeared in the (DLA Handbook on Property Valuation, 2000:22):

The new formula is:

$$\text{Sum of subsidies} = (B - A) \times k_0 + E_1 + k_1 + E_2 + k_2 + E_3 + k_3 + \dots,$$

Where

B is the true market (or productive) value of the property at the time of acquisition;

A is the actual price paid at the time of acquisition;

$k_0$  is the inflation factor related to land acquisition, based on the cpi *or* on the land price index;

$E_1, E_2$  etc, are the historical values of interest rate subsidies and infrastructure subsidies received;

$k_1, k_2$ , etc are the corresponding inflation factors for these subsidies, based on the cpi.

The property clauses in the constitution regarding under compensation required historical investigations to determine whether the compensation originally paid to blacks who were expropriated in terms of racist laws was correct. If not, the underpayments had to be brought



into the present. This required an understanding of the time value of money and appropriate escalation rates, something not all valuers were able to do correctly.

### **3.4 GENERAL ACCURACY OF RESTITUTION VALUATIONS**

Newell (1997:93), in commenting on the quality and reliability of appraisal reports in Australia and the United Kingdom, says: “The level of analytical detail provided in appraisal reports continues to raise fundamental concerns among users. Only 68% of appraisal reports (in Australia) were considered to contain sufficient analytical detail to enable a reasoned judgement on how market value estimates were derived.” A similar problem has been seen in South Africa in the standard of the Land Reform valuations.

The Department of Land Affairs decided to stop using the Department of Public Works to manage their valuations as they seemed to think they could do it better and at lower cost. Instead of the valuers used and fees paid by Public Works, Land Affairs called for tenders and usually gave the work to the lowest tenderer. A problem with this approach is that the lowest tenderer will seldom do a thorough investigation and produce a fully motivated report.

This type of problem often occurs when valuers have bound themselves to a fixed price and find that a project is taking more time than they originally estimated. It becomes worse when they cut their fees drastically to get the work. People in that position are inclined to take short cuts, and knowing that litigation may result if the landowner is not satisfied, tend to err on the high side. Only a properly qualified adjudicator would have a reasonable chance to assess the validity of the valuation conclusion and have the knowledge to point out the shortcomings. Less knowledgeable people are inclined to accept the value estimate, and are therefore very likely to overpay for the property.

Among others, Professor N Maritz did reviews of some of these valuations and found that a very large percentage of the final values, on which farmers were paid for their properties, were well in excess of actual market value. The average overpayment was far more than the fee a competent valuer would have charged (Maritz, 2005). Undercutting seldom produces optimum work and when reviewed usually shows that this type of policy is not cost effective .

It is also important to note that in the initial stages of land being purchased for restitution purposes, the Department of Land Affairs, the government department tasked with the acquisition of this land, were aware of and in took into account the property clause in the Interim Constitution as well as that in the final Constitution. In particular they almost always try to negotiate the purchase price, and by so doing avoid the financial loss implications of the Expropriation Act.

### **3.5 THE EXPROPRIATION/CONFISCATION CONTROVERSY**

The governments of all countries have the right to acquire the land it requires for public use. Chan says that in countries like Australia, Canada and the UK [and South Africa] the state's compulsory right to acquire land is referred to as "expropriation". In the United States this right is referred to as "eminent domain" and the taking as "condemnation" (2008:2).

However, regardless of the term used, it means that the government has the right to acquire the land, subject only to payment of compensation in terms of that country's laws. The owner cannot refuse to sell, but they can dispute the amount of compensation offered.

One of the strangest perceptions in the ongoing press and public debate regarding the state's acquisition of farms for restitution purposes is the equating of expropriation with confiscation. Several items in the press have stated that talk of the state intending to expropriate means that we are going the way of Zimbabwe. This is far from the truth as the current government have demonstrated their adherence to the Constitution and the rule of law. True, they can, and have, made changes to the Constitution and have introduced new legislation, but since coming into power have followed the laws of the country in the acquisition of land for restitution and redistribution.

The basis on how compensation is to be determined in the event of expropriation is specified in Section 12(1) and (2) of the Expropriation Act 63 of 1975, shown in Exhibit 3.5

**Exhibit 3.5**  
**Section 12 (1) and (2) of the Expropriation Act, Act 63 of 1975**

V

**12 Basis on which compensation is to be determined**

(1) The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed-

- (a) in the case of any property other than a right, excepting a registered right to minerals, the aggregate of-
  - (i) the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and
  - (ii) an amount to make good any actual financial loss caused by the expropriation; and  
[Para. (a) amended by s. 11 (a) of Act 45 of 1992.]
- (b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right:  
[Para. (b) substituted by s. 11 (b) of Act 45 of 1992.]

Provided that where the property expropriated is of such nature that there is no open market therefor, compensation therefor may be determined-

- (aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or
- (bb) in any other suitable manner.

[Sub-s. (1) amended by s. 11 (c) of Act 45 of 1992.]

(2) Notwithstanding anything to the contrary contained in this Act there shall be added to the total amount payable in accordance with subsection (1), an amount equal to-

- (a) ten per cent of such total amount, if it does not exceed R100 000; plus
- (b) five per cent of the amount by which it exceeds R100 000, if it does not exceed R500 000; plus
- (c) three per cent of the amount by which it exceeds R500 000, if it does not exceed R1 000 000; plus
- (d) one per cent (but not amounting to more than R10 000) of the amount by which it exceeds R1 000 000.

[Sub-s. (2) substituted by s. 1 of Act 3 of 1978 and by s. 11 (d) of Act 45 of 1992.]

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Source: South Africa (1975)

As can be seen the Expropriation Act 63 of 1975 as amended provides for firstly the payment of market value for the property being acquired and then for the addition of actual financial loss. This includes such costs as transfer fees to buy another farm of the same value, plus the costs involved in finding such a farm and the cost of moving. Items such as the cost of new curtains and school uniforms for their children in changed schools are often also considered as consequential financial loss. In addition the property owner is paid a *solatium*, an amount added “as a solace”. Added together these amounts add up to a fair amount above market value. However, if these costs are not met by the state, it is doubtful whether the negotiated result can be considered to be “fair and equitable” to the property owner, as they will end up in a worse position than before. If they are not compensated for these additional costs they will either be out of pocket or would have to purchase an inferior farm to the one bought by the state.

During the purchase of the land required for the establishment of the former black homelands, the properties required were expropriated and compensation specified in the Expropriation Act was paid. At the time the purchasing department was Land Affairs and the department handling the appointment of valuers was the Department of Agricultural Credit and Land Tenure whose functions were later merged with that of the Department of Public Works. The valuation reports received were assessed by their Land Affairs Board, which consisted of knowledgeable people, mostly valuers with many years of experience. If and when approved the valuation reports were forwarded with the Board's recommendations to the Department of Land Affairs. This is no longer the case.

Already during Derek Hanekom's tenure as Minister, the Department of Land Affairs (hereafter referred to as DLA) had stopped using the expropriation route in order to reduce the costs of acquisition. DLA started to negotiate with the farmers on the "willing buyer, willing seller" approach. As the resulting agreement was considered to be a sale, not an expropriation, they did not have to pay the additional items specified in the Expropriation Act. They also stopped using Department of Public Works as their agents for appointing valuers and evaluating their work.

In the first version of the *DLA Handbook on property valuation*, May 2000 it is said that Act 126 (the provision of Land and Assistance Act 126 of 1993) lays down how the DLA's land redistribution program is to be implemented. The department was to work on the "willing seller/willing buyer" model. The author of this document adds:

"Expropriation of land is possible under Act 126, but according to current policy should be used as an option of last resort only. Section 12 of the Act provides that:

Without derogating from the powers that a Minister may exercise under the Expropriation Act, 1975 (Act 63 of 1975), the Minister (of Land Affairs) may for the purposes of this Act, exercise equivalent powers to the powers that such other Minister may exercise under the Expropriation Act, 1975."

Zimmerman states that land restitution in South Africa has been done in terms of market based land acquisition rather than an expropriation-driven process of redistribution. She says that, in the eleven years of operation, market based land reform has not worked well enough and should be speeded up (2005:380).

Gwana (2003:2) agrees that the pace of the transfer of land had been slow, but the reason was that initially they used the judicial approach, and all claims were referred to the Land Claims Court for adjudication. The court driven process was antagonistic and slow, with the result that only 41 claims were settled between 1995 and March 1999. In 1999 amendments to the Act were passed by Parliament allowing an administrative approach wherein the Minister (in practice the officials in his department) can negotiate settlements. As a result of this new approach the number of settled claims rose to more than 36 488 by 2003.

In the opinion of Boyle (2005:13), the Minister of Land Affairs, Thoko Didiza, wanted government to base farm prices on what a farm could produce rather than market value. He also reported that the July 2005 Land Summit recommended that the "willing seller, willing buyer" system should be changed to "aggressive expropriation". Tupy reports that in his 2006 state of the Nation address, President Thabo Mbeki also referred to reviewing the "willing-buyer willing-seller" principle for land restitution and redistribution (2006:1).

The problem is that there seems to be a general perception that the process of land reform is taking too long. For example Mthethwa says that South Africa's land reform is going so slowly that the country could be plunged into Zimbabwe-style land grabs (2007:9). Unless resolved one way or another, Werner suggests in discussing the land problem in Namibia, a political opportunist could use Land Reform to inflame the landless poor (2002:7).

In The Citizen of 28 July, 2005 under the headline "*Government urges whites to speed up land reform*", AFP reports that "in her opening address to the National Land Summit, Deputy President Phumzile Mlambo-Ngcuka asked white landowners to work with government, not to try to exploit them". She also said that although the "willing buyer willing seller" principle had been the centre of South Africa's land reform policy, it had negatively affected the pace of redistribution. She added that government wants to revisit (i.e. change) the "willing buyer willing seller" approach to land acquisition (AFP, 2005:24). On the same page under the headline "*PAC slams land conference*" PAC leader Motsoko Pheko is reported as saying "The present land reform policy of this government can only perpetuate land dispossession and landlessness of the African people". Like the Deputy President he was against the "willing buyer willing seller" principle, which he said would not solve the land question and that land

seized through colonialism should be confiscated and compensation only paid for the improvements (Sapa, 2005:24).

Mulder quotes the Deputy Minister commenting that the "willing buyer/willing seller" concept cannot be market related if the state is the only buyer (2005:1). This could well be the case after a claim is gazetted. Few, if any, rational people would want to purchase a farm knowing it is subject to a land claim. However, if after the gazetting of a land claim the state is the only purchaser, on the principle of "just and equitable", it would seem that the property owner's rights has been diminished and the owner should be compensated for the loss of value.

Boyle (2005:13) reports that the Minister of Land Affairs wants the Expropriation Act to be reviewed to make it easier to use for land reform, and wants government to find a way of pricing on what a farm could produce.

Coetzee reports that Dirk du Toit, the Deputy Minister of Agriculture, wanted the government to rewrite the Expropriation Act by replacing market value as the measure for compensation by productive value (2005:2). This would not be something new in South Africa as for many years the Land Bank used productive value as the basis for granting loans. These results were always less than the open market value of the property, so farmers who wanted to acquire the property, had to make up the shortfall with a larger deposit or a loan from the seller.

Far from saving money, unless the Expropriation Act is amended, expropriation would mean the government would have to pay the additional amounts specified in the Act. Unless the farmers are wanting far more than market value for their farms, they would benefit if their farms are expropriated rather than being acquired by the "willing buyer/willing seller" method. The state would benefit as the land reform process would be speeded up, and of course that would save administrative time and cost.

Du Plessis (2005:18) contends that the government and the farmers don't seem to be listening to each other. Government frequently says farm prices are too high and that farmers are asking too much for their land. Government spokespeople have also said that white farmers should be more willing to assist the Land Reform goals (presumably by being willing to sell their farms for less than the open market value). However, from a "fair and equitable" point of

view (a Constitutional condition in the Property clause in the Constitution) du Plessis' position has merit, in that all citizens, and not just farmers should contribute to the cost of the government's land policy goals, presumably through taxes.

If the previously disadvantaged should not be asked to contribute to the rectification of past wrongs, then maybe something like an additional "Redistribution" tax could be levied on whites and white controlled organizations only. However, this would require the introduction of racially discriminatory legislation, something the present government may prefer to avoid.

### **3.6 RESTRICTIONS ON AN OWNER'S RIGHTS AFTER A LAND CLAIM IS GAZETTED**

In terms of the Restitution of Land Rights Act, once a land claim has been gazetted the property owner loses, or seems to lose, many of the previously normal rights to deal with the property. Before exercising one of the actions mentioned in the Act, the property owner has to advise the Regional Land Claims Commissioner (giving one month's written notice) of the intention to do so.

The relevant section of Act 22 of 1994, Section 11 subsection (7)(aA) of the Restitution of Land Rights Act is given in Exhibit 3.6.

### Exhibit 3.6

#### Subsection (7)(aA) of Section 11 of the Restitution of Land Rights Act, Act 22 of 1994

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- (7) Once a notice has been published in respect of any land-
- (a) no person may in an improper manner obstruct the passage of the claim;
  - (aA) no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given in respect of-
    - (i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit;
    - (ii) any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit;
  - (b) no claimant who occupied the land in question at the date of commencement of this Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner;
  - (c) no person shall in any manner whatsoever remove or cause to be removed, destroy or cause to be destroyed or damage or cause to be damaged, any improvements upon the land without the written authority of the Chief Land Claims Commissioner;
  - (d) no claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier.

[Sub-s. (7) substituted by s. 5 (d) of Act 78 of 1996 and by s. 7 (b) of Act 63 of 1997.]

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Source: South Africa (1994)

Sub-section 11(7)(aA) of Act 22 of 1994 reads “no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month’s written notice of his or her intention to do so”. From statements made at a meeting at which the author was present to discuss the Sebele report (Case Study number 3) the internal legal advisors of the Department of Land Affairs said that the owner had to get their permission before effecting any further improvements to a gazetted farm.

Van der Merwe (2003:18-19) has a different view. He believes sub-section 11(7)(aA) does not prohibit the activities listed, but only requires notification to the Regional Claims Commissioner of the intention to do so. He concedes that sub-section 11(7)(c) requires the written permission of the Chief Land Claims Commissioner to remove, destroy or damage any improvements upon the land that is the subject of a land claim.

However, few realistic farmers would take chances with what most of them perceive as a hostile Department of Land Affairs, by merely complying with the letter of 11(7)(aA) as regards the notification aspect, but would rather wait for written authorisation. Otherwise there is the risk that the department may refuse to pay compensation for any improvements



made when the property is expropriated. There is the added risk of exposing themselves to the expense of going to court to claim compensation, and as usual there are no guarantees a litigant will win their case.

Of course if the Department does not expropriate and only uses negotiation to reach a price agreement, there is no way the owner can insist on compensation. In what they consider an open market willing seller willing buyer arrangement, if Land Affairs feel the owner's price is too high (which according to press reports, often seems to be the case) they just do not buy. The owner is then not only left in a kind of limbo waiting for Land Affairs to re-open negotiations, but during this period sometimes receives threats for delaying Land Reform. Hofstätter gives an example of a farmer, who was not marked for restitution, but who entered into negotiations with a group of blacks who wanted to purchase the farming operation. The transaction was stopped by Land Affairs who did not consider the purchasers worthy of State help (2007a:46-49).

In real life practical terms the gazetting of a land claim places restrictions on normal property rights. Few are willing to risk the consequences of contravention, so they are 'forced' to wait for Land Affairs to finalise the transfer of the property, and experience has shown that it may take years before the owner is finally paid for the property.

These uncertainties and delays are traumatic for farmers, who often have no other profession and therefore no other way of providing for themselves and their families. They want to carry on farming, not only because it is all they know, but because they believe food production is an essential activity. They not only have to negotiate about the price of their farms, but if they appoint valuers and legal advisors, they have to carry these costs themselves and the Department is not obliged to accept their advisors' estimate of value. Press reports such as that in the Farmer's Weekly of October 5, reported that officials of the Department of Land Affairs were told to "squeeze" the seller. Reports such as this adds to the feeling farmers have that they are not being treated fairly. The article starts "Government officials have now instructed to push farmers to accept offers below market value for their properties during land reform sale negotiations. This emerged in an internal document seen by Farmer's Weekly, sent to land affairs managers countrywide earlier this year" (Hofstätter, 2007b:15).

### 3.7 CONCLUSIONS

The South African press has frequent uncomplimentary articles about what is usually referred to as "land grabs" in Zimbabwe. In his article in the Sunday Times, Mthethwa says that as South Africa's land restitution is going so slowly some state officials are concerned that Zimbabwe style land grabs could start happening in South Africa. They therefore no longer want to accede to requests for cash instead of land because land restitution and redistribution must be seen to be working. Another problem is that after being paid out some beneficiaries spend the money and then could come back to the department now wanting "their" land. This had already happened in St Lucia and Pietermaritzburg (Mthethwa, 2007:9).

Both opponents and protagonists of Land Restitution and Reform in South Africa complain about the methods adopted and amount of time taken by the authorities. However, in comparison to the past and present procedures in other countries, the South African government is not only doing better than many other countries, but has treated its citizens, both landowners and claimants, with a greater degree of compassion and justice than most.

In spite of pressure from many of the formerly disadvantaged to confiscate properties, particularly farms, the South African government, like its neighbour Namibia, has resisted these calls and has been using the "willing buyer/willing seller" approach to compensate affected landowners on a market orientated basis.

Barron (2007:9) reports that Gwana now says that the success or failure of land redistribution should not be measured only by the amount of land transferred to blacks, but how that land is utilised. He said nearly half the land already transferred is unproductive, and that the main thrust now should be to assist these emerging farmers. Gwana does not want South Africa to end up the same way as Zimbabwe. It is common cause that as a result of unskilled people evicting productive farmers, the agricultural sector in Zimbabwe has become a disaster that has affected the entire economy. In his book, *The Great South African Land Scandal*, du Toit gives some examples of the consequences of handing profitable farms over to people who do not have the necessary skills and/or the willingness to work the farms given to them (2004).

It is now realised that the cost of training new owners to farm successfully is much more than the cost of buying the farms. According to an article in the Farmers Weekly the cost to acquire the targeted land for redistribution is R35 billion, whereas the costs of training and support to keep these farms productive is estimated to be R75 billion (Hofstätter, 2007b:15).

According to Theunissen the average return on invested capital on farms in the Free State, a region of good quality cropping farms, is only 6% - less than one can get from a commercial bank (2007:2). Farming is a high risk enterprise, requiring full time attention from knowledgeable management to succeed. The reason farmers are so interested in the weather is that adverse weather conditions can turn a potentially profitable crop to a failure in a matter of days. Farming risk and the required agricultural knowledge and skill is something that social planners in their haste to achieve restitution and redistribution targets too often fail to take into account.

It is submitted that the majority of the world's population are not landowners, and that many "landless" people in the developed world enjoy a far better standard of living than landowning subsistence farmers. Even the former workers employed on the farms acquired for redistribution often enjoyed a more secure standard of living than those granted small uneconomic pieces of land. Also the fate of the displaced farm workers is seldom mentioned, although the author has seen the way worker families who have lived on a farm for generations were displaced by the new landowners and their lives devastated.

Although of course there will always be the occasional mistakes and/or miscarriages of approved procedures, in South Africa the acquisition of property for restitution purposes is done in accordance with the rule of law with due regard to the Constitution of the Republic of South Africa. This in spite of frequent calls to either confiscate or pay less than the market value for the properties being acquired by the state (White Paper, 1997:2-3; Boyle, 2005:13; Coetzee, 2005:2).

South Africa has also given the dispossessed a much longer period in which lodge their land claims. The original period was three years starting 1 May 1995 (White Paper, 1997:23). This period was then extended until 31 December 1998. Three years to start with and an eight month extension in comparison to the initial period of 30 days later extended by fifteen days, given by the Romanian authorities (Verdery, 1994:1097).

Compared to how Land Restitution is handled in some other countries, the South African government has been true both to their ideal of an integrated non-racial population and the rule of law. They have done this even although many now in government were opposed to the Property clause in the Constitution as this was contrary to the ANC's Freedom Charter where it is said "the land belongs to those who work it".

However, the method of valuing farms, whether for restitution or redistribution, may be changed in the future. The expropriation act is presently being rewritten, and it can be expected that when it comes before parliament that those that are against paying white farmers full market value for their properties may very well have "productive value" replacing "market value" as the compensation norm for land reform acquisitions. As it can, and is, being said that restitution and redistribution is in the national interest, it could be said that the individual farm property owner's interest is not as important as the national interest. Farmers may have to accept less than market value for their farms, and the law may well be changed to enforce this. As is recorded earlier in this study, South Africa would not be the first country where the government either confiscates or acquires land at below market value when it wants to redistribute land from large relatively wealthy landowners to the landless poor.

Three case studies of valuations in terms of the Land Restitution program, done at different times follow. Each valuation was different.

The first, Case Study number 1, was done in the relatively early days of restitution valuation and involved both an historical and a present time property valuation. This project was to be done in terms of the so called "Gildenhuis formula" that had been worked out by a committee appointed by the Minister of Land Affairs to interpret the provisions of the new legislation.

Case Study number 2 was to determine the present value of the undercompensation for property expropriated from a black community in terms of racial discrimination.

Case Study number 3 was for a potential court case done some years later when current legal opinion on how to apply restitution legislation had been studied in depth and the method changed. The Bophutatswana government had leased this farm to Mr York with an option for him to purchase it. Several valuations had previously been done on this farm, some historical,

some in the present, both for acquisition by the lessee and by both the Bophutatswana and later the South African governments. Then a land claim on this farm was approved and it had to be valued in accordance with the latest legal opinion on how restitution valuations have to be done. In accordance with this opinion no account was to be taken of either the "Gildenhuis formula" or the later amended formula proposed by the Department of Land Affairs. The lessee's interest in the farm was to be calculated as the difference between the farm as it was when he took occupation, i.e. an unfenced, poorly developed farm with highly degraded grazing, and the farm as it was in 1963, i.e. a well developed, fully exempt game farm. Both valuations were to be done at the date of valuation, i.e. September, 2003.

As each of these cases were completely different, the format of the three case studies will therefore also be different.

## **CHAPTER 4**

### **CASE STUDY NUMBER 1.**

#### **THE REMAINING EXTENT OF THE FARM KINDE ESTATE 269 IN: VALUATION USING HISTORICAL AND CURRENT SALES DATA**

##### **4.1 INTRODUCTION**

Two farms, Doornbult 260 IN and Vergenoeg 258 IN, in the Stella region of the Cape Province were originally registered in the name of James Cindi on 31 October 1895 and later in undivided shares in the names of his descendants. People who knew the history of the area said that Mr Cindi came to the area with the original trekkers. The farms were given to him because he had fought with the Boers against the black tribes they displaced.

As these farms were considered to be a "Black Spot" in a white area, they were expropriated in 1963 in terms of Act 18 of 1936, transferred to the state, consolidated as the Farm Kinde Estate 269 IN, subdivided and sold to selected white farmers between 1968 and 1970.

The claim for the return of their dispossessed property to the descendants of James Cindi was approved and in 1998 the portions of Kinde Estate had to be valued for restitution purposes in terms of the relevant legislation (Belling, 1998). In 1998 there were five owners of portions of Kinde Estate. Two were original purchasers from the state, the other three bought their farm portions on the open market from previous owners. Only the original purchasers had the benefit of subsidised purchase prices and financing terms. The benefits received as a result of agricultural subsidies would have been common to all landowners in the areas in which these subsidies were granted. Therefore one of the original purchasers is being used as an example of the application of the legislation regulating the state's acquisition of land from farmers who had been allocated farms in former "black spot" areas at subsidised prices and interest.

At the time this assignment was undertaken, there were differing views on how the Section 25 of Act 108 of 1996 (the Property clause of the Constitution) should be applied. By 1998 almost all the former (White Nationalist Afrikaner) heads of government departments had been replaced with black ANC nominees, but many of the middle grade officials were still

whites Those sympathetic to the farmers seemed to want the price paid to be sufficient for them to be able to acquire a similar replacement property. Others, who thought these farmers had been the beneficiaries of both a subsidised purchase price and subsidised interest loan terms plus other subsidies at the state's expense thought these benefits should be deducted as the state should not have to pay for the benefits these farmers had received from the state.

Doctor (later Land Claims Court Judge) A Gildenhuis gave lectures on how to value in terms of the Constitution at workshops arranged by the S A Institute of Valuers. At these lectures he presented a formula approved by the Ministerial Committee on the Determination of Land Values set up by the then Minister of Agriculture and Land Affairs, Derek Hanekom. Valuers appointed to undertake restitution assignments were expected to use what became known and referred to as the "Gildenhuis Formula".

The formula was:  $(A / B \times C) + D - E$ , where:

- A is the actual price which was paid by the present owner at the time of acquisition;
- B The market value of the land including improvements at the time of acquisition;
- C The present day (current) market value of the land, including improvements, but excluding improvements made by the owner;
- D The contributory value of beneficial improvements made to the property by the owner since time of acquisition (a "beneficial improvement" being an improvement which adds to the market value of the property); and
- E The value of any special benefits which the owner received from the State, e.g. low interest rates, subsidies, etc.

When appointed to undertake the Kinde Estate valuation the valuer followed the assigning department's instructions in matters such as obtaining official subsidy details, dates and payment details for each farmer from the Department of Agriculture, and investigating present and historical sales.

However, before using the loan rate standard (the commercial bank rate) to determine the difference between the market interest and the interest actually paid, an investigation was undertaken to establish what the interest rate of the sources actually used by purchasers in the local market was. To ascertain the most likely re-investment rate that would and could be used by farmers in the subject area, academics, valuers and others who had knowledge of the financing of farm purchases and investment opportunities available to people in the area were

consulted. The rationale behind the payment of the farming subsidies received were investigated, and whether the subsidies were specific to these farmers or an industry wide government farming policy.

As far as is known this was the first time independent research was undertaken in respect of the various items in the "Gildenhuis formula" and the valuation guidelines given by the Department. These were considered in terms of basic valuation theory and compared to actual market behaviour in the subject area.

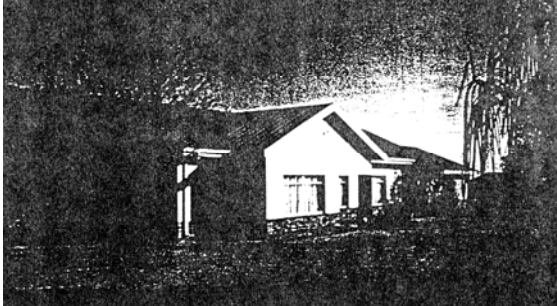
#### **4.2 HISTORICAL AND PRESENT MARKET VALUE OF THE SUBJECT PROPERTY**

The improvements to the remaining extent of the farm Kinde Estate are broadly reflected in the photographs of Exhibit 4.1. The farm had been well-developed by the time of the valuation.

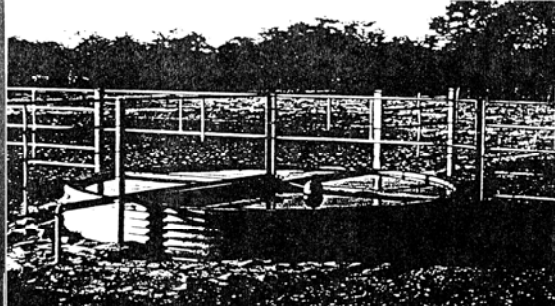
The recent and historical sales in the subject area were discussed and analysed individually in the report prepared for Department of Public Works on behalf of Land Affairs (Belling, 1998). Summaries of the then present and historical sales data are shown in Exhibits 4.2 and 4.3. Exhibit 4.4 is the map showing the location of the subject property in relation to the sales.



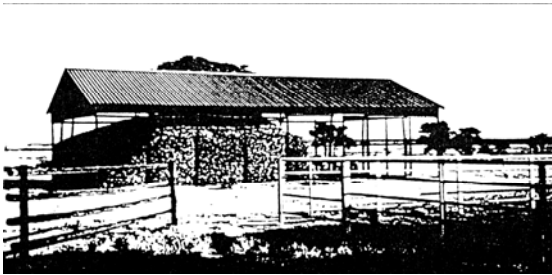
**Exhibit 4.1**  
**Photographs of subject property**



**Main dwelling**



**Cattle watering facility**



**Shed**



**Workers' housing**

Source: Belling (1998)

**Exhibit 4.2**

**Schedule of current sales**

SALE No	PROPERTY	DATE OF SALE	PURCHASE PRICE	AREA in ha	OVERALL PRICE/ha	BUILDINGS and GAME	LAND BREAKDOWN VALUES		
							LANDS	PASTURES	GRAZING
VAALBOSCHSPRUIT 245 IN									
1	Portion 7	06-08-1997	R 252 000	419.706	R 600	R 0			R 600
2	Portion 8	26-07-1997	R 270 000	419.709	R 643	R 20 000			R 596
BONT BOK 259 IN									
3	Portion 5 (Erfenis)	18-02-1998	R 395 000	407.1739	R 970	R 115 000	(Old) R700	R 800	R 662
EDWARDS DAM 242 IN									
	Portion 4			256.96					
	Remaining Extent			738.665					
4		13-03-1998	R 995 624	995.624	R 1 000	R 200 812		R 800	R 500
KADEBIS 261 IN									
5	Portion 8	April-98	R 310 992	376.875	R 825	R 50 000	750	R 700	R 239
BLAAUWKRANS 256 IN									
6	Portion 1	15-05-1998	R 585 000	487.502	R 1 200	R 210 000		R 800	R 503
KLIP PAN 257 IN									
7	Portion 3	01-06-1998	R 938 059	938.059	R 1 000	R 190 000		R 800	R 504
GROOTVERDRIET 310 IN									
8	Portion 4	02-06-1998	R 659 800	614.876	R 1 073	R 182 275	1000	R 800	R 600

Source: Belling (1998)

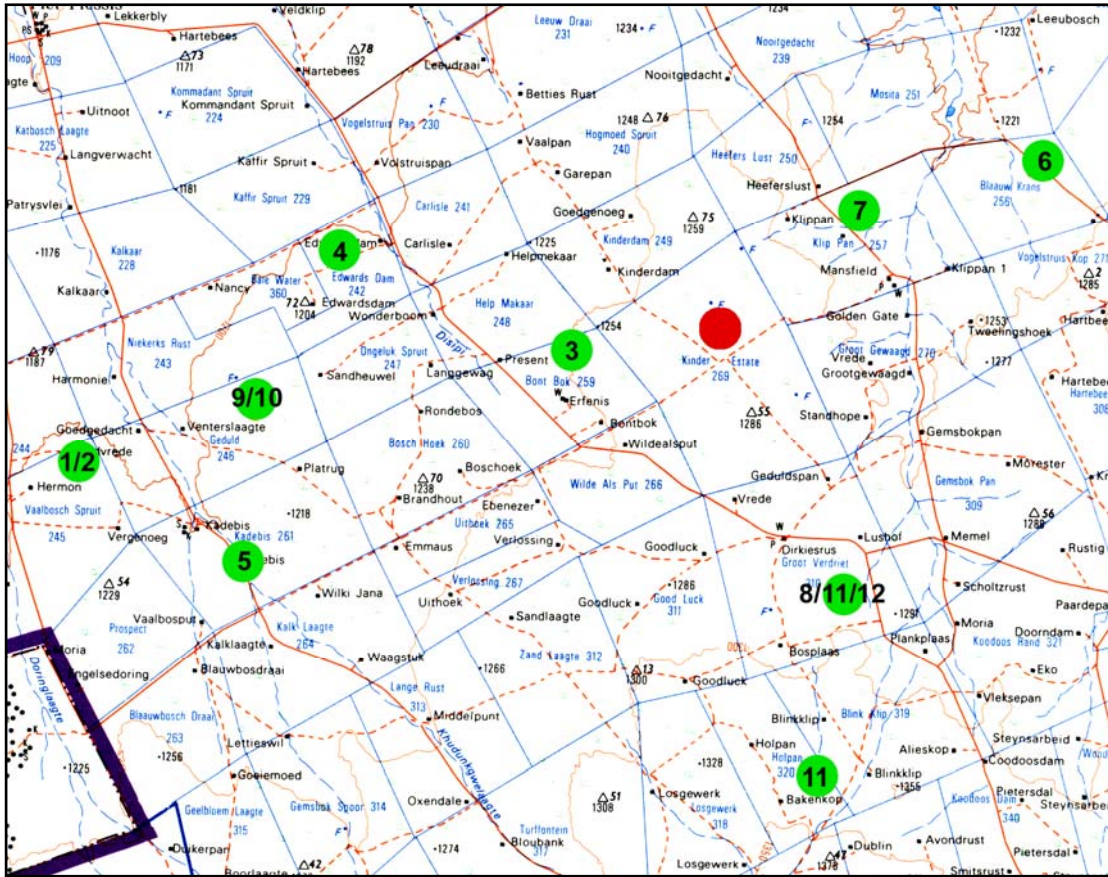
**Exhibit 4.3**  
**Schedule of historical sales**

SALE No	PROPERTY	DATE OF SALE	PURCHASE PRICE	AREA in ha	OVERALL PRICE/ha	BUILDINGS	LAND BREAKDOWN VALUES		
							LANDS	PASTURES	GRAZING
	GEDULD 246 IN								
9	Portion 4	29-04-1969	R 38 500	599.5724	R 64	R 14 000	R 60		R 35
10	R E Portion 1	05-09-1969	R 41 000	599.5749	R 68	R 14 000	R 60		R 39
	Ptn 3 Holpan 320 IN			85.6532					
	Ptn 1 Groot Verdriet 310 IN			307.4358					
	Ptn 8 Groot Verdriet 310 IN			307.4371					
11		05-05-1970	R 66 000	700.5261	R 94	R 25 000	R 70		R 40
	GROOT VERDRIET 310 IN								
	Remaining Extent			606.3147					
	Portion 9			8.5653					
12		25-09-1970	48500	614.8800	R 79	R 18 000	R 60		R 40

Source: Belling (1998)

## Exhibit 4.4

### Map showing the location of the subject property in relation to the sales



**Subject property : R E Kinde Estate 269 IN (marked in red)**

- Sales transaction number 1 : Ptn 7 Vaalboschspruit 245 IN
- Sales transaction number 2 : Ptn 8 Vaalboschspruit 245 IN
- Sales transaction number 3 : Ptn 5 (Erfenis) Bont Bok 259 IN
- Sales transaction number 4 : Ptn 4 Edwards Dam 242 IN
- Sales transaction number 5 : RE Edwards Dam 242 IN
- Sales transaction number 6 : Ptn 8 Kadebis 261 IN
- Sales transaction number 7 : Ptn 1 Blaauwkrans 256 IN
- Sales transaction number 8 : Ptn 3 Klip Pan 257 IN
- Sales transaction number 9 : Ptn 4 (Withak Pan) Groot Verdriet 310 IN
- Sales transaction number 10 : R E 1 (Lenies Villa) Geduld 246 IN
- Sales transaction number 11 : Ptn 3 Holpan 320 IN  
Ptn 1 and Ptn 8 Groot Verdriet 310 IN
- Sales transaction number 12 : R E and Ptn 9 Groot Verdriet 310 IN

Comparable sales, numbers 1 to 8 in Exhibit 4.2 are the recent sales used to determine the present market value of the subject property to be purchased for Land Restitution. Exhibit 4.3 lists the historical sales transactions, numbers 9 to 12, that took place in 1969 and 1970 and were used in the estimation of the historical market value at the time the subject property was purchased from the state.

In the investigation of the recent sales transactions (numbers 1 - 8) interviews were held with least a buyer or a seller, but in most cases, both buyers and sellers. For the 1969/1970 sales transactions (numbers 9 - 12) in only two of the cases were either of the parties still living in the area. For transaction 11 the purchaser was interviewed and the seller for Transaction number 12. In the case of Transactions 9 and 10, neither the sellers or the purchasers still lived in the area, but people were found who had knowledge of the condition of those farms at the time. As memories of thirty years ago are, to say the least, somewhat unreliable, the data and analysis of these transactions are more problematical than that of the recent sales transactions and all statements have to be treated with caution. However, a reasonable indication of farm values at that time were obtained.

In addition to speaking to the parties involved in the sales transactions, others who had local and/or expert knowledge of the subject area were interviewed. Among these were Mr Kobus Scholtz, who in his lifetime bought and still owned 42 farms in the vicinity; Mr van Tonder, had bought and sold several farms in the subject area, and Mr Roets, who used to own several farms in this area before he started moving his farming operations to a nearby irrigation scheme. Information was also sought from officials of the Department of Agriculture in Vryburg, Potchefstroom and Pretoria, as well as academics, valuers and others about local farming methods, costs and values, time value of money, etc.

Almost everyone spoke of the price of farms in terms of an overall price per hectare. However, when questioned about how they decided on what the overall price per hectare of a particular farm should be, it was apparent that they do place separate values on the different agricultural components, farming infrastructure and buildings in order to arrive at the stated all inclusive overall price per hectare.

The carrying capacity of the natural veld in this area is considered to be 8 hectare per large animal unit. According to Mr Olivier of the Department of Agriculture this is for a live mass of 450 kg. The carrying capacity of pastures is 4 hectare per large animal unit for Wool grass (*Anthephora Pubescens*), and the same in normal years for Blue Buffalo grass (*Cenchrus Ciliaris*). Blue Buffalo could be 3 hectare per large animal unit in the above average rainfall years that approach 600mm per annum (the annual average rainfall is 450 mm). However as Wool grass is more palatable, people here consider the value of both pasture grasses to be the same. Because the carrying capacity of pastures is about twice that of natural veld grazing, there is a perception that the price of pastures should be close to twice that of natural grazing. Interviewees say it can't be quite double, because there is more work and cost involved in establishing and maintaining pastures than there is for natural grazing. Almost everyone in the general area were of the opinion that the value of established pastures should be approximately R800 per hectare in terms of present day value.

These estimates of the market value of established pastures in this area was confirmed in the analysis of Transactions number 4 and 7. In Transaction 4, except for the service areas (the areas of the farm where the houses, shed, general farming and cattle handling facilities are located) representing roughly ½% of the farm, the entire farm was under cultivated pastures. Similarly, on Portion 3 of the farm Klip Pan (Transaction 7), almost the entire farm had established pastures, the remainder (less than 1% of the farm) was service areas. The breakdown values of Portion 8 Kadebis, Transaction number 5, shows lower values, but this farm was sold at a public auction, and it was said that as most people thought the seller was having cash flow problems the farm sold for less than its true market value.

Pastures are usually, but not always, planted on the poorer marginal lands, the better lands with the higher clay content are kept for dry land cropping. Although maize and other nominally cash crops are planted on these lands, in most cases the farmers do not market their production but use it as additional winter feed for their cattle. The general perception was that good dry lands are worth more than planted pastures.

Two transactions, numbers 1 and 2, were found of farms that comprised only natural veld grazing with no lands or pastures. In Transaction number 1, the price of R600 per hectare overall was for a farm without value adding improvements and therefore was a good

indicator of the market value of natural veld grazing. This value was confirmed by the price paid in Transaction number 2 at R643 per hectare. The additional R43 per hectare was attributed to the value of the improvements on the farm and the value of the grazing therefore also amounted to R600 per hectare.

The purchaser in Transaction number 8 was a member of the local agricultural study group who analysed the purchase of the farm he bought. He said he placed a price at R1 000 per hectare on what he considered to be among the best dry lands in the area, in his opinion better than the lands of the subject property. The pastures he valued at R800 per hectare and the grazing at R600 per hectare. His breakdown values were similar to the prices found in the analysis of the other sales transactions. The balance of the purchase price was allocated to the buildings on the property. The purchaser, Mr Cilliers, lives approximately 6 kilometres from the farm he bought and as he intends to keep living on his homestead farm, the buildings in this transaction did not have a high contributory value for him. In any case it is common cause that the contributory value of farm improvements is usually far less than the cost of construction.

The purchase price in Transaction number 3 included the value of the game. This is unusual, as game is considered to be livestock on which transfer duty need not be paid. However, both the purchaser and the seller confirmed that the game (valued at R45 000) was included. The price for this small farm at R350 000, i.e. ±R860 per hectare was a high overall price per hectare for what many said was basically only grazing. As it directly adjoined Kinde Estate the owners of the subject properties referred to this sale as a good indicator of the market value of natural grazing on the subject properties. However, in addition to the game this farm had buildings, a game camp, lands and pastures, which the seller said he definitely took into account in setting his price. The farm had 60 hectares established pastures and 60 hectares old lands. A premium above the value of grazing is justified for these old lands as the area had been debused. A price of R700 per hectare, less than either lands or pastures but higher than natural veld grazing would seem to be reasonable for this component. The grazing value would also be higher than that of a cattle farm because it had the benefit of a bushveld game camp, which both buyer and seller considered to add value. This was not, as the subject owners tried to aver, an ordinary relatively unimproved grazing only farm.

In summary, the indicated 1998 norm value of natural grazing of the subject properties would be R600 per hectare, the dry lands R900 per hectare, the pastures R800 per hectare, and old lands R700 per hectare.

When questioned about farm prices in 1969 and 1970, several people said that the overall price per hectare of farms at that time was between R50 and R80 per hectare, depending on buildings, lands, infrastructure etc. The general feeling was that the value of natural grazing was somewhere around R30 to R40 per hectare and that of dry lands were worth quite a bit more. Using the then present ratio of natural grazing with normal water, camps and handling facilities as being about 2/3rds the price of dry lands, in a breakdown analysis of the historical transactions, these agricultural components worked out at ±R60 per hectare for dry lands and ±R40 per hectare for grazing on farms with normal infrastructure.

However, at the time the state acquired the subject property from the Cindi family, it was completely unimproved natural grazing with an unequipped borehole. In addition to being used by the owners and occupants, grazing rights were rented out to surrounding farmers, and in keeping with the normal experience of hired farms, it was overgrazed.

As no historical sales transactions of completely unimproved grazing farms were found an adjustment had to be made for the absence of necessary farming infrastructure. Camping and water provision is a very real and necessary cost, as until camps are established and water provided one cannot utilise the farm properly. This has an adverse effect on the carrying capacity and therefore the value of the farm and such farms usually are sold for less than properly developed properties. However, as with buildings, the difference in value would be less than the cost of the provision of the necessary infrastructure. Partly because subsidies are sometimes given for this purpose, and partly because these costs can be written off against taxable income. None of the sources consulted were able to provide exact historical cost figures, but those that thought their memories were fairly reliable said that the cost of providing average infrastructure would have been about R10 per hectare in the late 1960's and early 1970's. The valuer accepted this figure as reasonable enough to be used.

After discussing the matter with others with extensive knowledge of farm sales and valuations and personal past experience of farm valuations, it was estimated that the most



likely purchase price of an overgrazed farm without water, camps or fences, would probably have been an overall price of ± R35 per hectare at the time the state sold the subject properties to the white farmers.

### **4.3 DETERMINATION OF JUST AND EQUITABLE COMPENSATION**

The term “just and equitable” is a subjective concept which tends to become an emotive issue, particularly when farmers and the dispossessed are involved and the interpretation of Section 25 of the Constitution differs according what seems to be the political orientation of the people concerned. Although taking note of these different views as well as the methods described in the "Gildenhuis formula", the valuer in addressing this problem, investigated local market behaviour and used this data and accepted valuation principles in applying Section 25 of the Constitution in the valuation of the subject property.

#### **4.3.1 Purchase price benefit**

Valuers appointed in restitution matters had to determine the quantum of the difference between the price paid by the white farmers for the farms they bought from the state and the price similar farms sold for in the open market. They were provided with the original purchase price and had to estimate the historical open market value to calculate the original purchase price benefit. The interest rate benefit should be the difference between the rate charged by the former Agricultural Credit Board to these white farmers and the standard mortgage rate. Some said the standard should be the interest rate charged by the Land Bank. Others said that only white farmers were able to get Land Bank loans, whereas the majority black citizens could not. As the majority could only get loans from the commercial banks, the state officials were adamant that the commercial bank lending rate should be used as the comparable standard to determine the interest subsidy. On the rather rare occasions that the time value of money was discussed the suggested escalation rate was the return on government bonds.

In calculating the present value of past benefits, the time value of money becomes a factor . To be "fair and equitable" as stated in the Constitution, according to the principle of substitution, the valuer contended that the compensation offered to prudent farmers should be

an amount that would enable them to buy a farm similar in value to the one being purchased by the state. The shortfall after allowance has been made for deductions in terms of the existing legislation should be capable of being covered by the proceeds of a risk free after tax investment of the subsidy benefit as and when it was received.

#### **4.3.2 Interest benefit**

In cash flow exercises one should use as the rate of return on invested capital in the industry concerned or alternative investment rates prevailing in the actual market being investigated. In the present case the subject industry is extensive cattle farming in the Vryburg-Stella region. In this area the overwhelming majority of farmers get mortgage finance from the Land and Agricultural Bank. The alternative form of finance is a loan from the seller, usually at an interest rate at or below that charged by the Land Bank. No examples were found of mortgages being obtained from commercial banks to purchase farms. In this particular market the valuer contended that the mortgage rate charged from time to time by the Land Bank should therefore be taken to be the market rate. The schedule of the rates charged from time to time by the Land Bank since the 1960's was obtained. The difference between these rates and that charged by the state was used to estimate the interest benefit.

#### **4.3.3 Escalation rate**

There were several differing views as to what, if any, compounding rate should be used. In this regard it is not accepted valuation practice to just add the monthly and/or annual totals. The time value of money received over a period should be taken into account. In deciding on the rate to be used one should first consider the basic principles, rather than settle for the arbitrary rate of 10% which is often used when a market derived rate cannot logically be motivated. Standard valuation practice is that one should use the rate found in the particular industry in the market being investigated. In this case it is cattle farms in the Stella region.

One of the assumptions in IRR cash flow calculations is that the party concerned can re-invest the proceeds of the cash flow at the rate being used. For example at the time this valuation was undertaken the discount rate used in the township development industry was

between 30% and 40%, depending on factors such as risk, uncertainty and the time frame of the project. The rates used were the returns which township developers expected in their projects and they can and do re-invest at those rates. In other fields, the rate used should be the expected return on capital in the industry concerned, in this case cattle farming in the Stella district.

Among those consulted in the endeavour to establish the return on invested capital in the cattle farming industry in this area, was Mr Kobus Cloete of the Department of Agriculture at Potchefstroom, a knowledgeable person who lectures to agricultural students and controlled the Stella Agricultural Study Group. He kindly made available the most recent results of his study group in the Stella area, which was for the period 1996/1997 (the years immediately preceding the valuation date of 1998). In that year the return on total capital of the four members of this study group was 5,90%. However, Mr Cloete said that it was a particularly good year and that the results are usually much lower. He said the long term return on invested capital for cattle farming in this region is between 3 and 4%. He also said that the type of person who joins a study group is usually above average, wants to learn, and benefits from the association with the other members and the officials of the department. Their results and return on invested capital therefore tend to be higher than the norm of the area. Trying to factor capital growth in money terms into the equation would be problematical, as one would then also have to consider changes in relative purchasing power, inflation etc. Factors such as paying for a particular lifestyle are no longer as relevant as they were in years gone by. At the time this valuation was undertaken the number of full time farmers living on their farms had dropped considerably. A growing number of full time farmers, such as Mr Scholtz who owned and worked 42 farms, live in nearby towns. For example Mr Scholtz lived in Stella where his wife runs a guest house. During the previous number of years, more and more farms had been bought by professional and business people, such as Dr Burger the purchaser in Transaction No. 3, who farm part time. Lifestyle therefore was no longer an important value determinant factor in farm prices.

The alternative approach is to use a risk free after tax investment method that is accessible to the party concerned. The rationale being that if the person concerned invests the amount of the special beneficial purchase price and loan interest as and when received, they should have a matured investment which should be equal to the escalated present value of the

benefits received. The principle of substitution would be met in that they should be able to acquire a property similar to that which they had before. If they cannot, it would not be "just and equitable" as stated in the Constitution.

In determining the compounding rate the implications of tax on such income must be considered as well as the normal investment capabilities and circumstances of the affected parties. The investment medium should be easily available and not require unusual expertise and management skills. A mistake which is often made is to use the rate of something risk free like Gilts or Treasury bills without considering whether this is the type of investment medium a person such as a farmer would, or even could, use in reality. A second mistake is to ignore the time and cost of administration and the taxation aspect. When past amounts are to be compounded so as to have a certain sum in present time, the required return must be an after expenses and after tax return. Such additional income would be added to their normal income, and the tax rate on this income would not be at the party's average tax rate but their marginal tax rate. Ordinary citizens, including farmers, seldom, if ever, put their money in State investment instruments. The most likely and easily accessible tax free investment would have been the Post Office tax free savings, particularly as they accepted odd amounts as and when deposited, and for the exercise to be realistic, the whole amount of the benefit, including the odd cents, has to be re-invested.

There is a Post Office in Stella, the town closest to the subject properties. The parties concerned would therefore be able to use this risk free tax free investment facility. The Post Office provided details of their risk- and tax free saving investment rates for the period in question. The Post Office tax free savings rate was better than the probable 4% return on invested capital in the cattle farming industry during the period under review. This then would have been a better investment alternative, and one the affected party really could have used, and therefore is a realistic compound rate to use for the purpose of escalating historical advantageous purchase prices and interest rate benefits to the present.

#### **4.3.4 Subsidies**

Another matter which had to be considered was the agricultural subsidies granted to the subject farmers. These subsidies are given to encourage the farmers to co-operate with government in its socio-economic and/or land conservation aims. In some areas, including

that in which the subject properties are located, farmers had been making lands on soils that were unsuitable for cultivation. These new lands often caused sheet erosion and dust storms and were considered to be harmful to the long term agricultural potential of the country. To encourage farmers to stop this practice, Government subsidised the conversion of these lands to pastures, which in time would revert to natural veld grazing. These were industry wide subsidies given to achieve national agricultural goals, not to enrich any particular farmer. It would therefore be incorrect to penalise the relatively few who were subject to land claims by deducting this type of subsidy. Although mentioned in the report, the agricultural subsidies were not deducted from the estimated market value.

#### **4.3.5 Beneficial improvements made by the present landowners.**

Questions arose as to whether the actual cost of construction at the time should be used and compounded to the present, or whether it should be the actual contributory value of the improvements to present market value of the farm as a whole. The market contributory value of improvements is almost always less than the cost, and if compounded to the present the magnitude of the difference could be higher. In the opinion of the valuer the contributory value of these improvements would already have been included in the estimated market value of the farm. Additional calculations would almost certainly result in double counting, and therefore this "benefit" was not added to the market value as an additional item.

#### **4.3.6 Present value of purchase and interest benefits**

The indicated historical price of this farm was estimated at R35 per ha. The historical market value therefore could be calculated as follows:

1370.0562 hectare @ R35 per hectare = R47 952 , rounded off to R48 000.

The purchase price benefit was received about 30 years ago and the interest rate benefits were received over the same rather long time frame. It was felt that over such a long period annual periods should give a workable result, particularly if the final calculated offer amount is rounded off.

Using as inputs the interest charged, annual payments and balances given by the Department of Agriculture, the interest charged from time to time by the Land Bank, and

the rate of interest paid from time to time by the Post Office, the calculations of the present value of the benefits received as shown in Exhibit 4.5 was R109 648. This includes the purchase price benefit and the interest benefit over the period 1970 to 1998.

### Exhibit 4.5

#### Schedule of purchase and interest rate benefits received

Year	Purchase price		Interest			Compounded Benefit	Opportunity cost %	Year	Loan history		Interest rate	5.00%	Should have been		
	Paid	Market	Paid	Market	Benefit + -				Payment	Capital portion			Interest portion	Balance	Year
1970	28 970.76	48 000.00			19 029.24	19 029.24		1970	3 453.83			25 516.93	1970		
1971			1 275.85	1 531.02	255.17	20 045.58	4.00	1971	2 277.72	1 001.87	1 275.85	24 515.06	1971	6.00	1 531.02
1972			1 226.03	1 470.90	244.87	21 092.27	4.00	1972	2 265.52	1 039.49	1 226.03	23 475.57	1972	6.00	1 470.90
1973			1 178.34	1 408.53	230.19	22 166.16	4.00	1973	2 199.02	1 020.68	1 178.34	22 454.89	1973	6.00	1 408.53
1974			1 123.45	1 347.29	223.84	23 276.65	4.00	1974	2 144.13	1 020.68	1 123.45	21 434.21	1974	6.00	1 347.29
1975			1 071.85	1 393.22	321.37	24 529.09	4.00	1975	2 092.53	1 020.68	1 071.85	20 413.53	1975	6.50	1 393.22
1976			1 020.96	1 428.95	407.99	25 918.24	4.00	1976	2 041.78	1 020.82	1 020.96	19 392.71	1976	7.00	1 428.95
1977			969.64	1 357.49	387.85	27 342.82	4.00	1977	1 990.32	1 020.68	969.64	18 372.03	1977	7.00	1 357.49
1978			918.74	1 286.04	367.30	28 803.83	4.00	1978	1 939.42	1 020.68	918.74	17 351.35	1978	7.00	1 286.04
1979			868.41	1 214.59	346.18	30 302.17	4.00	1979	1 889.09	1 020.68	868.41	16 330.67	1979	7.00	1 214.59
1980			1 266.23	1 143.15	-123.08	31 391.17	4.00	1980	3 307.59	2 041.36	1 266.23	14 289.31	1980	7.00	1 143.15
1981			0.00	1 000.25	1 000.25	33 804.03	4.50	1981	0.00	0.00	0.00	14 289.31	1981	7.00	1 000.25
1982			718.52	1 428.93	710.41	36 458.17	5.75	1982	1 739.20	1 020.68	718.52	13 268.63	1982	10.00	1 428.93
1983			694.89	1 326.86	631.97	39 459.92	6.50	1983	1 715.57	1 020.68	694.89	12 247.95	1983	10.00	1 326.86
1984			1 222.20	1 388.92	166.72	42 191.54	6.50	1984	3 283.64	2 061.44	1 222.20	10 186.51	1984	11.34	1 388.92
1985			511.33	1 426.11	914.78	45 848.77	6.50	1985	1 532.01	1 020.68	511.33	9 165.83	1985	14.00	1 426.11
1986			459.83	1 272.22	812.39	49 641.32	6.50	1986	1 480.51	1 020.68	459.83	8 145.15	1986	13.88	1 272.22
1987			378.56	1 023.03	644.47	52 767.86	5.00	1987	1 433.39	1 054.83	378.56	7 090.32	1987	12.56	1 023.03
1988			0.00	923.16	923.16	56 382.18	5.10	1988	0.00	0.00	0.00	7 090.32	1988	13.02	923.16
1989			555.49	1 104.67	549.18	60 314.29	6.00	1989	2 596.85	2 041.36	555.49	5 048.96	1989	15.58	1 104.67
1990			252.59	858.32	605.73	64 538.89	6.00	1990	1 273.69	1 021.10	252.59	4 027.86	1990	17.00	858.32
1991			201.39	684.74	483.35	68 894.56	6.00	1991	1 222.07	1 020.68	201.39	3 007.18	1991	17.00	684.74
1992			150.78	511.22	360.44	73 388.68	6.00	1992	1 172.86	1 022.08	150.78	1 985.10	1992	17.00	511.22
1993			99.26	317.22	217.96	78 009.96	6.00	1993	1 119.94	1 020.68	99.26	964.42	1993	15.98	317.22
1994			49.06	137.04	87.98	82 115.46	5.15	1994	1 013.48	964.42	49.06	-0.00	1994	14.21	137.04
1995			0.00	0.00	0.00	86 763.19	5.66	1995							
1996			0.00	0.00	0.00	93 921.15	8.25	1996							
1997			0.00	0.00	0.00	103 275.70	9.96	1997							
1998			0.00	0.00	0.00	109 647.81	6.17	1998							

Source: Belling (1998)

#### 4.3.7 Current market valuation and suggested compensation

Land:

1185,0562 hectare Grazing	@ R600 per hectare	=	R711 034
50 hectare Dry lands	@ R900 per hectare	=	R 45 000
<u>135</u> hectare Pastures	@ R800 per hectare	=	<u>R108 000</u>
1370,0562			R864 034
Contributory value of improvements			<u>R210 000</u>
			R1 074 034

**Say R1 070 000 (± R781 per hectare overall)**

The suggested compensation therefore was:

Market value R1 070 000 less the present value of the purchase and interest benefit of R109 648 = R960 352

**Rounded off to R960 000**

#### 4.4 OUTCOMES AFTER VALUATION

The valuation was approved by the Land Affairs Board of the Department of Public Works and forwarded to the Department of Land Affairs, who then made copies of the report available to the owners of the Kinde Estate farm portions.

As often occurs when the state wants to purchase properties, the owners of the Kinde Estate farm said the valuations were too low and appointed a firm of attorneys from the nearest large town, Vryburg, to try to increase the amount of the compensation..

When the representations made by this firm of attorneys were unsuccessful, a specialist property and expropriation legal advisor from Pretoria was appointed to handle the case. The matter was brought before Judge Gildenhuys of the Land Claims Court. The parties were asked to find points of agreement before the case was heard again and a meeting was held on



1 April, 1999 at the State Attorney's office to try to settle the matter. Present were the landowner's legal advisor, an official from Department of Land Affairs, the state's legal team and the author of the valuation report.

As the valuer was able to satisfactorily answer the claimant's legal advisor's questions regarding the valuation of the subject properties, the valuations were accepted as representing fair market value. The calculations of the present value of the purchase and interest subsidies were not contested.

The claimant's attorney discussed his client's financial loss in terms of the Expropriation Act and amounts were calculated and agreed upon. The owners of the portions of Kinde Estate finally accepted the valuations and the matter was settled.

Subsequent to the meeting in April the valuer was asked by the State Attorney to comment on the valuations of the original farms Doornbult and Vergenoeg (consolidated to form Kinde Estate) done by state officials in March 1962. The State Attorney was advised that no (rational) white farmer would have sold these properties for the prices set on these farms by the state officials. It was estimated that the values placed were approximately three quarters of the estimated open market value at the time. In most cases no allowance was made for financial loss either. Accordingly the conclusion was that the Cindi family had not been adequately compensated for the loss of their farms.

On 25 January, 2001 (a few years after the 1988 Kinde Estate valuation was done) M J Lekala of the Chief Land Claims Commissioner's Office issued the "CURRENT VALUATIONS: Guidelines for calculating compensation to land owners" with an attachment entitled "RESTITUTION IMPLEMENTERS GUIDE TO THE COMMISSIONING OF CURRENT RURAL VALUATIONS AND THE COMPENSATION FORMULA". Some of the items in this guide are (Lekala, 2001):

- 1.5 "Following information received from the Department of Agriculture on a legion of diverse direct subsidies offered by the erstwhile Agricultural Credit Board to white farmers, it was decided that only the acquisition subsidies and the subsidised interest rates should be taken into account when calculating compensation due to an affected farmer in a restitution claim.

- 1.6 The rationale behind this decision is to avoid unfair consequences that would follow if all the direct subsidies were to be taken into account during the calculation of the compensation due

To date, the Commission on Restitution of Land Rights and the Department of Land Affairs had applied the formula (generally referred to as the Gildenhuis formula) derived and refined from the Ministerial Committee on the Determination of Land Values set up by the former Minister of Agriculture and Land Affairs Derek Hanekom.

The first formula was as follows:

Compensation amount = (A divide by B multiply by C) + D - E, where

- A is the actual price which was paid by the present owner at the time of acquisition;
- B The market value of the land including improvements at the time of acquisition;
- C The present day market value of the land, including improvements, but excluding improvements made by the owner;
- D The contributory value of beneficial improvements made to the property by the owner since time of acquisition (a "beneficial improvement" being an improvement which adds to the market value of the property); and
- E The value of any special benefits which the owner received from the State, e.g. low interest rates, subsidies, etc."

In this guide it was said that factor D is double counting in that the market value of the improvements are included in factor B and that the formula does not take the time value of money into account. The formula developed by Michael Aliber, approved by the Departmental Policy Committee that corrects the shortcomings of the "Gildenhuis formula" should be used instead (Lekala, 2001)

The new formula is also given in the more comprehensive DLA Handbook on Property Valuation (South Africa, 2000:22), and is:

Sum of subsidies = (B - A) x  $k_0 + E_1 + k_1 + E_2 + k_2 + E_3 + k_3 + \dots$ ,

Where

- B is the true market (or productive) value of the property at the time of acquisition;
- A is the actual price paid at the time of acquisition;

$k_0$  is the inflation factor related to land acquisition, based on the cpi or on the land price index;

$E_1, E_2$  etc, are the historical values of interest rate subsidies and infrastructure subsidies received;

$k_1, k_2$ , etc are the corresponding inflation factors for these subsidies, based on the cpi.

However on page 15 of the handbook an example is given which shows how using the CPI (the Consumer Price Index) to escalate an acquisition subsidy over an extended period of time could lead to a strange result.

*"Suppose for example a property acquired in 1970, for which the owner only paid R600 000, although it was in fact worth R1 million. If the value of the property rose more or less in line with the general appreciation of land prices, it would today be worth around R8.5 million. However, if the acquisition subsidy of R400 000 were translated into today's terms using the cpi, then it would amount to R8.6 million - the expropriatee would then be owing the state R100 000. This would not widely be considered consistent with the idea of just and equitable compensation."*

The handbook says that the DLA therefore allows the use of either the cpi or the lpi (Land Price Index) to escalate the acquisition subsidy DLA (South Africa, 2000:15). It is submitted that neither index would always give a just and equitable result. Expropriatees would be unable to acquire substitute properties similar to that expropriated, because there is no way they could find a risk free after tax investment giving a high enough return to be able to make up such a large shortfall. They would therefore end up in a worse position than they were before, and that could hardly be considered to be just and equitable.

#### **4.5 CONCLUSIONS**

In spite of not directly applying the "Gildenhuis" formula, and using market data instead of the suggested interest rate standard, as well as the motivation for not deducting the amount of the agricultural subsidies or adding the value of the owner's beneficial improvements, the valuation was accepted by the Land Affairs Board of the Department of Public Works and the

Department of Land Affairs. After a meeting with the legal representative of the former landowners they also accepted the value as being correct.

The results of the research in the Kinde Estate valuation assisted in changing the Department's interpretation of the relevant legislation leading to the new "Michael Aliber" formula. However although the new formula was better than the first one, as can be seen in the example given in the DLA handbook, it cannot be applied without due consideration. Each valuation case should be considered individually and the various factors judged on their merits. Very few formulae can cover all cases, and should be used with discretion.

As a result of this analysis the valuer was asked to undertake the Schildpadnest valuation. The Department had unsuccessfully been trying to finalise the Schilpadnest project, and because of the manner in which the Kinde Estate valuation had been done they wanted the researcher to undertake this project. This case is discussed in the following chapter.

## **CHAPTER 5**

### **CASE STUDY NUMBER 2.**

#### **PORTION 1 OF THE FARM SCHILDPADNEST 385 KQ: ESTIMATION OF THE PRESENT VALUE OF AN HISTORICAL UNDER-COMPENSATION.**

##### **5.1 INTRODUCTION**

There is a general perception that the historic prices paid to non-whites when their properties were expropriated was below market value, and this injustice also had to be addressed and remedied. One such case is dealt with in this study. The Farm Schildpadnest was expropriated from the Baphalane tribe, a black community, and they were then moved to the farm Varkensvlei 403 KQ, ± 25 km south west of Schilpadnest. This replacement farm was just within the borders of what was then known as the Bophuthatswana Homeland.

The community claimed that they had not been adequately compensated for their improvements. They specifically contended that -

- a) they did not receive adequate compensation for the farm land, and
- b) that the state only paid for brick buildings and not for their pole and dagha homes which were considered to be informal structures with no commercial value.

By 1999 this claim had been dragging on unresolved for several years. In order to finalise this matter, the Department of Land Affairs commissioned a properly researched valuation (Belling and Ghyoot, 1999). A study to assess the validity and merit of the claim and the amount of compensation to be paid to the community was made.

In this valuation exercise the historical value of the land and the improvements on Portion 1 had to be estimated and it had to be established whether the community had received fair and equitable compensation for both the land and the buildings. If not, the amount of under-compensation was to be escalated to the present.

For valuation assignments commissioned by state departments, one has to value according to the brief received. This does not mean that valuers should blindly follow instructions, they should also use their knowledge to advise the client if it seems necessary. In this case the use of the CPI seemed realistic, based as it is on consumer purchasing power. Using this factor would result in the beneficiaries having the same purchasing power in the present as they lost at the time of dispossession.

## **5.2 EXTRACTS FROM THE VALUATION OF PORTION 1 SCHILPADNEST AND THE IMPROVEMENTS ON THE ENTIRE FARM.**

### **5.2.1 Valuation brief**

In terms of their brief, the valuers were to determine the historical market value of the surface rights of Portion 1 of the Farm Schildpadnest 385 KQ and the present value (in 1999) of the under-compensation for houses and other improvements.

In this assignment they were specifically asked to consider and comment on the following elements:

- the historic value of the land
- the actual compensation paid to the community
- the present value of any under-compensation due to the community

### **5.2.2 Historical background including highest and best use**

The first of the items in the list in the brief was the determination of the historical freehold title land value of Portion 1 at the time of dispossession (December 1962), excluding the mineral rights which had already been separated before the community bought the property from Transvaal Lands Company Ltd (Registered per Title Deed T6719/17). Only the surface right was sold, the seller retained the mineral rights.

If one excludes mining operations, the highest and best use of the surface of the subject portion at the time of the original expropriation was the actual use of the farm at the time, i.e.

as a home for a large community who practice mixed grazing and dry land farming.

Until such time as mining operations recommence on Portion 1, the most likely use of the undermined portion would be for farming purposes. On the western portion, where a fairly large informal settlement had been established at the date of this valuation, some form of township development may be possible. However the cost of providing bulk and internal services in this area may be too expensive to be economically viable and it is more likely that new residential townships would be established at Northam and/or Thabazimbi. It is also doubtful if there were sufficient local employment opportunities for the number of people who had (illegally) erected houses on Schildpadnest.

In a letter from the Native Commissioner, Pilanesberg to the Native Commissioner, Potchefstroom dated 15/5/1950 the statement was made that Zwartkop Chrome Mine were willing to purchase the surface rights of Schildpadnest at any reasonable price, but the community, the surface right owners, were not prepared to sell. Had the state not dispossessed the community of this farm, the mining company would almost certainly have purchased this property from the community. In the records in the National Archives it is clear that there was both prospecting and mining activities on the property many years before the dispossession. As mining activities increased the community would have had to let go of at least parts of the farm and/or sell the surface rights to the mining company. However, from statements made in recorded meetings at the time the community submitted their land claim, at least some of them mistakenly thought that they also owned the mineral rights.

Even in those early years, it seems that a significant percentage of the people of this community wanted to retain possession of this property and continue farming here. In other documentation it is also said that the state had been trying to get this community to accept other farms in exchange for Schildpadnest, but each time the community refused to move.

Many of the community always wanted to live on Schildpadnest, and by the time the valuers were appointed, part of the original community had returned to the Schildpadnest and established an (illegal) informal settlement. Exhibit 5.1 contains photographs of this informal settlement in 1999.

**Exhibit 5.1:  
Informal settlements on Schilpadnest 385 KQ in 1999**



Source: Belling and Ghyoot (1999)

### **5.2.3 Assessing the amount and validity of the original compensation**

At the time of dispossession the Farm Schildpadnest 385 KQ had not yet been subdivided. As no records existed of where the improvements at the time were situated on the farm, the valuers were unable to determine the value of the land and improvements on Portion 1, which at that time had not yet been subdivided, and therefore neither the amount of compensation or under-compensation. To answer these crucial questions they had to look at the value of the farm as a whole as it was at the date of dispossession (1962), and after making adjustments, apply the values found to Portion 1.

During the course of the investigation the valuers were given access to some of the documentation of the person or persons who determined the compensation payable in this expropriation. In addition they looked at old records at the National Archives. In more than



one place reference was made to valuation reports, but they were unable to find a complete copy of any valuation report. At other places in the files detailed lists of buildings with sizes and the values placed on them were found. This was important information which was used in the estimation of the realistic compensation for these structures.

Two handwritten lists of names of owners detailing the amount of compensation for their improvements were found. One of these lists was used to record the actual payment made for the improvements. Either a signature or a thumb print appeared opposite each individual item, or else the reason or alternative action was mentioned. It therefore seems that these individuals were paid for their improvements - whether built of brick or poles and dagha. However, not all the improvements shown in the value sheets are listed in the payment sheets.

Another page found in the archival records, headed "waardeering", summarised the values placed on worked and unworked dry lands, grazing, fencing and improvements plus the 20% allowance for loss and inconvenience which was standard at the time. By then the South African currency had already been changed from Pounds to Rand, but South Africa had not yet changed to metric measurements. Prices were therefore shown in Rand and farm area measurements in morgen. The componental breakdown given on this page were as follows:

Dry lands - 800 morgen @ R30 per morgen	R 24 000,00
(no distinction was made between worked and fallow lands)	
Grazing - 1400 morgen @ R25 per morgen	R 35 000,00
Fencing	R 800,00
20% loss and inconvenience	<u>R 11 960,00</u>
	R 71 760,00
Improvements (including 20%)	<u>R 36 882,00</u>
Total compensation due	R108 642,00

The 20% loss and inconvenience was added in terms of Act 18 of 1936 in which it is stated that a maximum of 1/5th may be added to the fair market value of the land and useful improvements for loss and inconvenience. In the compensation table the maximum 20% was allowed as the valuers felt that this was appropriate.

However, the amounts shown in the archival summary were not all paid to the community. In

place of the payment for the land component, the community were given the Farm Varkensvlei. Mr Durandt, of the Department of Bantu Administration and Development, wrote a letter on 31 July 1963 in which he stated that he was enclosing an amount of R28 860 for the payment for the improvements but this amount did not (his underlining) include the suggested 20% for loss and inconvenience). The improvement payment schedules confirmed that the 20% was not included in the amounts paid to the individuals. This was an administrative decision which was contrary to the spirit of the existing legislation.

In a copy of documentation by Themba Maluleke of the Transvaal Rural Action Committee it is stated that "At Schildpadnest we had 8 acres each and everyone had land. At Varkensvlei only 1/2 the people got land, and then only 3 morgen each" (Maluleke, 1994:2) Presumably this statement refers to cultivated land as it is stated in several other documents that the community had joint ownership of Schildpadnest with common access to the property. In documentation about the removal in the Archives, on page 10 of Report No. 55/1955 of Department of Land Affairs, it is stated that some 305 families were transported to Varkensvlei (South Africa, 1955:10). If the statement "each person" was intended to mean "each family" it would mean that the cultivated lands area would have been  $305 \times 8 = 2440$  acres or  $\pm 1230$  morgen, ie  $\pm 56\%$  of the total area of the farm. The state valuer estimated there were 800 morgen worked and old lands on the property, i.e.  $\pm 36\%$  of the farm.

As there was disagreement between the previous owners of Schildpadnest and the state valuer, and in the absence of other impartial data of the amount of cultivated lands on the property, the contact prints of the 1963 aerial photos of Schildpadnest and surrounding areas (Job 478/1963) were ordered. Enlargements of the 1963 and 1948 flights ( Job 218 of 1948, Strip 12, Photo 97987, and Job 478 of 1963, strip 8, Photo 0347) showing Portion 1 and part of the Remainder of Schildpadnest were also obtained. The lands could be clearly seen on these aerial photos and a planimeter was used to determine the area of the worked dry lands. The 1963 aerial photograph is given in Exhibit 5.2.

**Exhibit 5.2:  
Current and old lands on Schilpadnest 385KQ in 1963**



Source: South Africa (1963)

From these aerial photos it seems as if the actual area of the cultivated lands and recently worked old lands was closer to midway between the  $\pm 1\ 230$  morgen of the claimants and the  $\pm 800$  morgen of the state valuer. A more realistic estimate therefore would be 1 000 morgen cultivated and old lands (which, following the practice when estimating the area of lands of white farmers, would include headlands). However most of these lands were on what is now the Remainder of the Farm, and it seemed as if only about 20 % of Portion 1 was being cultivated in December 1962. In the nearly 50 years the community had been on the farm, they would have found where the arable lands were, and would use the rest of the farm for their buildings or as grazing for their animals.

The probable open market value of the land component could be reasonably estimated by analysing sales transactions of farms in the vicinity of Schildpadnest in the early 1960's. As the improvements on the farm at the time no longer existed, estimating either the contributory market value or even the depreciated replacement cost of the type and number of improvements on the farm at the time was a different matter, which required a different approach.

The improvements were mostly self-built dagha and pole houses, of the few brick houses, some had cement floors, some did not. There were three schools, three churches, one new and one an old damaged church. It is unlikely that the average purchaser of a farm in this area would have placed a positive value on the improvements. It is more likely that at the time the majority of purchasers (ordinary farmers) would have considered these improvements to have a negative effect on the price they would have been willing to pay for the farm as these improvements would be demolished, and that costs time and money.

However, it would be unrealistic to suppose that if unforced, the owners of this property would be willing to dispose of their property for the price that an ordinary farmer would be willing to pay for this farm. In all such situations one has to postulate both rational sellers and purchasers. Such sellers, for whom these improvements would have value in use, would look for a purchaser who would be willing to compensate them for the improvements on this farm, so that after the sale they would be in a reasonably similar position to what they were before. However, even a purchaser (who we must also assume to be rational), who would be willing to pay for the improvements, would not pay replacement cost new as this too would be unreasonable. This point of view was upheld in the Badenhorst case (Supreme Court, Transvaal Provincial Division, Case number I.1892/1971), a landmark judgement on the compensation which should be paid for buildings which are needed and used by the present registered owner. By applying these principles the owners are reasonably compensated for their improvements, but of course taking into account the utility which the owners have already received from the buildings, and aspects such as age and physical deterioration. Such a purchaser, who should have been willing to pay a realistic price for the buildings in order to acquire the community's surface rights, did exist in the mining company who wanted to extract the minerals. In the correspondence it is also stated that the mining company concerned wanted to acquire the surface rights to this farm and in an expropriation this type of potential purchaser should therefore be taken into account.

In various documents on file the claimants and/or their representatives said that some compensation was paid for brick houses, but not for pole and dagha houses or for community structures, but they were allowed to take removable materials such as corrugated iron. The claimants said that the compensation paid was for material only and no provision was made for the cost of the labour required to re-erect their improvements.



In state documents it was said that in total there were five existing classrooms on Schildpadnest plus a partly built structure which would have included a store room and office. An amount of R6 600 was recommended to erect a new building to provide the same utility as that which was on Schildpadnest at the time. However this recommendation was not accepted and authority was given to erect a school building which should not (their underlining) exceed R6 000. As far as could be ascertained from the inspection of the archival records no compensation was paid for the other community buildings.

After the state acquired the Farm Schildpadnest it was divided into Portion 1 and the Remainder. The state retained ownership of the Remaining Extent and sold Portion 1 to Chrome Mines of S A Ltd for R10 000. After some changes of ownership Portion 1 Schildpadnest, at the date of valuation was registered in the name of Billiton Properties Pty Ltd. Exhibit 5.3 is an aerial photograph of the property in 1999.

### Exhibit 5.3:

#### Aerial photograph of informal settlements on Schilpadnest 385KQ in 1999



Source: Billiton Properties and Aircraft Operating Company (1999)

#### **5.2.4 Escalation Factor**

In the brief to the valuers it was suggested that the Consumer Price Index (CPI) should be used to determine the factor by which any under-compensation found should be escalated to the present. The valuers agreed with this suggestion as this was the index of the purchasing power of consumers at various times and in their opinion the compensation for any historical under-compensation should give the community the equivalent present day purchasing power of the historical amount they lost. The CPI table obtained from Statistics South Africa was used in the calculation of the multiplication factor from December 1962 to July 1999. The multiplication factor worked out as 30,66, and this factor was used to calculate the present value of the under-compensation as at July 1999.

#### **5.2.5 Valuation Approach**

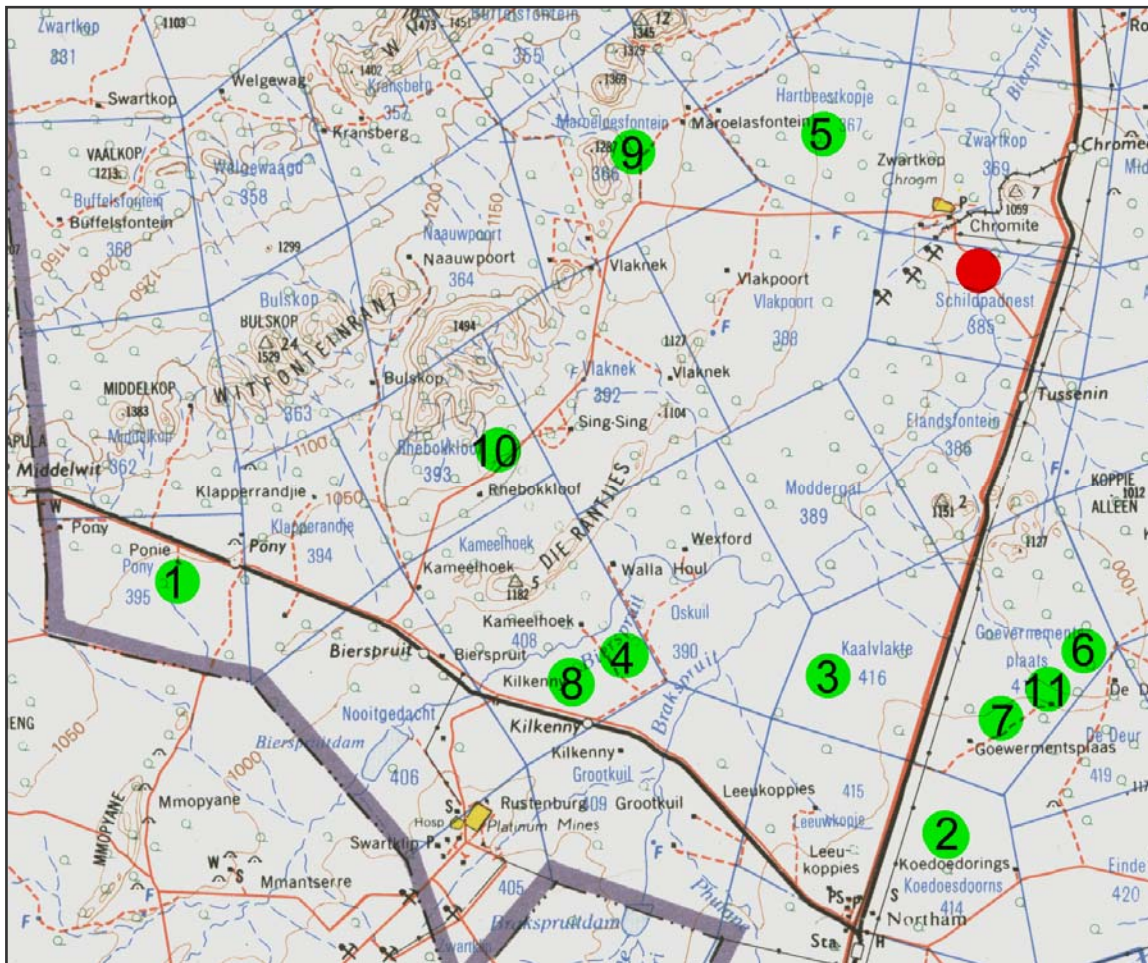
The valuation method used to determine the probable open market price of the land component was that of the comparable sales approach. As the initial research suggested that no official building costs at the time of dispossession existed, to determine the probable value of the improvements a cost approach largely based on the authors' and other valuers' past experiences was used. As these buildings no longer existed, there was necessarily a large degree of uncertainty in regard to the value of the improvements at that time.

In the course of the market research the following sources of information were used:

- a) Records of the Department of Land Affairs
- b) The Deeds and Surveyor Generals offices in Pretoria,
- c) National Archives
- d) State Library
- e) Statistics South Africa
- f) Agromet
- g) Local farmers and people such as Mr Ockert Venter, from the Northam Co-op, who grew up in this area, and because of his position has extensive knowledge of farms and farming results in the general area, and
- h) People who were farming in other areas at the time, state officials, estate agents, valuers, quantity surveyors and others who had expert and/or local knowledge of the particular market being investigated.

Sales that had occurred in the early 1960s are shown on the map in Exhibit 5.4. The sales used are listed in schedules in Exhibits 5.5 and 5.6 on the following pages. On the first of these schedules they were sorted in date order and on the next in size order. The small graph in Exhibit 5.6 was used to interpret the prices per hectare that were observed.

**Exhibit 5.4:  
Map showing the location of the subject property and comparable sales**



**Subject property**

- Sales transaction number 1
- Sales transaction number 2
- Sales transaction number 3
- Sales transaction number 4
- Sales transaction number 5
- Sales transaction number 6
- Sales transaction number 7
- Sales transaction number 8
- Sales transaction number 9
- Sales transaction number 10
- Sales transaction number 11

**: Schilpadnest 385 KQ (marked in red)**

- : Portion 2 Pony 395 KQ
- : R E Koedoedoorns 414 KQ
- : R E 1 & R E 3 Kaalvlakte 416 KQ
- : Portion 2 Kameelhoek 408 KQ
- : R E Hartbeeskopje 367KQ
- : Portion 3 Goewernmentsplaats 417 KQ
- : Portion 2 Goewernmentsplaats 417KQ
- : Portion 7 Kameelhoek 408 KQ
- : Portion 10 Maroeloesfontein 366 KQ
- : R E Rhebokkloof 393 KQ
- : R E Goewernmentsplaats 417 KQ

Source: Belling & Ghyoot (1999)





### Exhibit 5.5

#### Historical comparable sales listed in date order

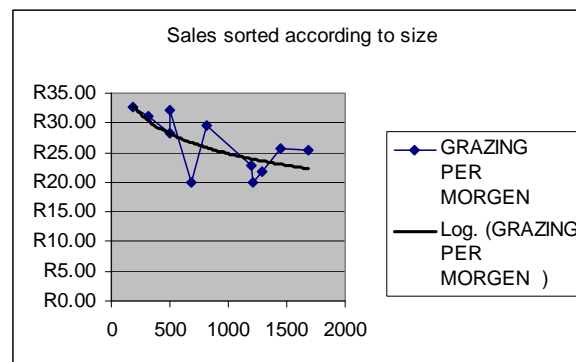
SALE NO	PROPERTY	DATE OF SALE	PURCHASE PRICE	AREA IN MORGEN	AREA IN HA	OVERALL PRICE PER MORGEN	OVERALL PRICE PER HA	IMPROVEMENTS CONTRIBUTION	LAND LESS BUILDINGS PER MORGEN	DRY LANDS PER MORGEN	GRAZING PER MORGEN
1	Ptn 2 Pony 395 KQ	11/01/60	R13 642	682.1095	584.2486	R20.00	R23.35	R0	R20.00	-	R20.00
2	RE Koedoesdoorns 414 KQ	19/08/60	R47 994	1683.9955	1442.3960	R28.50	R33.27	R4 000	R26.12	R50.00	R25.39
3	RE 1 & 3 Kaalvlakte 416 KQ	05/06/61	R40 000	1447.1173	1239.5023	R27.64	R32.27	R3 000	R25.57	-	R25.57
4	Ptn 2 Kameelhoek 408 KQ	15/12/61	R33 600	1199.9997	1027.8381	R28.00	R32.69	R5 000	R23.83	R45.00	R22.72
5	RE Hartbeestkopje 367 KQ	05/07/62	R24 200	1210.3983	1036.7449	R19.99	R23.34	R0	R19.99	-	R19.99
6	Ptn 3 Goewernementsplaats 417 KQ	14/07/62	R24 200	820.6367	702.9016	R29.49	R34.43	R0	R29.49	-	R29.49
7	Ptn 2 Goewernementsplaats 417 KQ	02/10/62	R20 000	496.6683	425.4123	R40.27	R47.01	R3 000	R34.23	R50.00	R32.06
8	Ptn 7 Kameelhoek 408 KQ	07/12/62	R6 000	184.2674	157.8309	R32.56	R38.02	R0	R32.56	-	R32.56
9	Ptn 10 Maroeloesfontein 366 KQ	02/05/63	R10 000	321.7372	275.5782	R31.08	R36.29	R0	R31.08	-	R31.08
10	RE Rhebokkloof 393 KQ	14/06/63	R28 000	1288.5660	1103.6980	R21.73	R25.37	R0	R21.73	-	R21.73
11	RE Goewernementsplaats 417 KQ	13/04/64	R14 000	496.6617	425.4067	R28.19	R32.91	R0	R28.19	-	R28.19

Source: Belling & Ghyoot (1999)

### Exhibit 5.6

#### Historical comparable sales listed in size order

SALE NO	PROPERTY	DATE OF SALE	PURCHASE PRICE	AREA IN MORGEN	AREA IN HA	OVERALL PRICE PER MORGEN	OVERALL PRICE PER HA	IMPROVEMENTS CONTRIBUTION	LAND LESS BUILDINGS PER MORGEN	DRY LANDS PER MORGEN	GRAZING PER MORGEN
8	Ptn 7 Kameelhoek 408 KQ	07/12/62	R6 000	184.2674	157.8309	R32.56	R38.02	R0	R32.56	-	R32.56
9	Ptn 10 Maroeloesfontein 366 KQ	02/05/63	R10 000	321.7372	275.5782	R31.08	R36.29	R0	R31.08	-	R31.08
11	RE Goewernementsplaats 417 KQ	13/04/64	R14 000	496.6617	425.4067	R28.19	R32.91	R0	R28.19	-	R28.19
7	Ptn 2 Goewernementsplaats 417 KQ	02/10/62	R20 000	496.6683	425.4123	R40.27	R47.01	R3 000	R34.23	R50.00	R32.06
1	Ptn 2 Pony 395 KQ	11/01/60	R13 642	682.1095	584.2486	R20.00	R23.35	R0	R20.00	-	R20.00
6	Ptn 3 Goewernementsplaats 417 KQ	14/07/62	R24 200	820.6367	702.9016	R29.49	R34.43	R0	R29.49	-	R29.49
4	Ptn 2 Kameelhoek 408 KQ	15/12/61	R33 600	1199.9997	1027.8381	R28.00	R32.69	R5 000	R23.83	R45.00	R22.72
5	RE Hartbeestkopje 367 KQ	05/07/62	R24 200	1210.3983	1036.7449	R19.99	R23.34	R0	R19.99	-	R19.99
10	RE Rhebokkloof 393 KQ	14/06/63	R28 000	1288.5660	1103.6980	R21.73	R25.37	R0	R21.73	-	R21.73
3	RE 1 & 3 Kaalvlakte 416 KQ	05/06/61	R40 000	1447.1173	1239.5023	R27.64	R32.27	R3 000	R25.57	-	R25.57
2	RE Koedoesdoorns 414 KQ	19/08/60	R47 994	1683.9955	1442.3960	R28.50	R33.27	R4 000	R26.12	R50.00	R25.39



Source: Belling & Ghyoot (1999)

## 5.2.6 The market research

In the valuation report each sale was individually listed and the components that add agricultural value were analysed. The data obtained for historical sales is of course always somewhat suspect and one has to accept that peoples' long-term memories are not necessarily correct. During the field investigation the researchers spoke to several people who were alive at the time. Some were sellers, some purchasers, some the children of buyers and sellers, some neighbours who knew the farms and the background of the transactions. Many more sales transactions than are listed in the report were investigated but those that were found to not be bona fide open market transactions were omitted. As far as could be determined, the sales used in the analysis were normal open market transactions between non-family members and were used as reasonable indicators of the open market value of farms in the general area at the time of the expropriation of the Farm Schildpadnest 385 KQ.

Several multiple sales which showed steady price increases over time were found. An example of this is the multiple sale of Portion 10 of the same farm, Maroeloesfontein. This sale of this farm in early 1963 was listed and used in the market analysis as this occurred between the date of dispossession and the date of removal. This unimproved farm consisted of grazing only and the overall price per morgen in the same time frame is therefore less than a farm portion with cultivated lands, but the price of this farm shows the normal increase over time. The sales history of Portion 10 in the early 1960's is indicative of the general price changes during this time.

04/12/1961	R 8 000	(±R25 per morgen overall)
02/05/1963	R10 000	(±R31 per morgen overall)
23/09/1964	R12 000	(±R37 per morgen overall)

Because of the number of different value determining elements such as the presence or absence of basic farming infrastructure of fencing, camping, provision and quality of water for humans and animals, as well as the quality of grazing and/or cultivated lands, topography, type and quality of buildings, distance from the nearest town etc., one cannot just work on an overall all inclusive price when valuing farms. Each sale has to be individually analysed. After allowing for normal price differences due to the differing negotiation abilities of the

parties to a transaction, it was nevertheless clear that:

- a) farm prices in this area were rising steadily during the evaluation period (Exhibit 5.5), and
- b) higher prices per morgen were paid for small farms (both for lands and grazing) than for larger farms (Exhibit 5.6).

A factor which also needed to be considered in the determination of the market value of this property was how this particular community regarded the ownership of the farm. In some such cases the owners consider themselves joint owners with common ownership of some buildings, individual ownership of their own houses and outbuildings with common right of access to the rest of the property. In other instances each owner of an undivided share in the property has a separately registered title indicating their percentage share in the whole.

In the present case there is only one title deed, the community has said that they have common ownership with common access to the property, and from the historical and present day market evidence of the joint ownership of other farms in this area, it is clear that in this case, although the families had their own houses, and had dry lands allocated to them, the farm itself was held jointly and should be valued as such.

This attitude to joint ownership in the general area was found in the market, both at the time of the dispossession of the subject property and closer to the present time. One example is found in Sales Transaction number 6 (see Exhibit 5.5). This property was held in undivided shares by seven people and the farm was sold as one unit to one purchaser in July 1962.

Closer to the present, in 1990, the Bakgatla-Ba-Kgafela community started buying farms approximately 55 km west of Schildpadnest. At the time they registered these farms in the names of different companies which they hold jointly. For example, on 10 September 1990, Pafos Farming (Pty) Ltd, owned by Mr S Englezakis, sold the Farm Winterveld 220 KP, in extent 2052,3977 hectare to Winterveld Beleggings (Pty) Ltd. This company, like Eslau Beleggings (Pty) Ltd, belongs to the Bakgatla-Ba-Kgafela community. After this they purchased other farms in the vicinity and now own five complete farms. The Bakgatla-Ba-Kgafela community holds these farms in undivided shares, and their pride of ownership and willingness to work hard to succeed in their endeavours was evident. This is an excellent example of co-operative effort by black farmers who pooled their resources, and are farming successfully.

In documentation in the National Archives it is stated that the farm Schildpadnest had been overgrazed. This can be accepted as it is true for most of the bushveld, and has been observed on several occasions. One also has to consider camping, fencing and the availability of water at various parts of a farm. The length of fencing stated in the 1962 valuation is 10 000 yards. This is less than the length of the perimeter of the Farm Schildpadnest of  $\pm 18\,000$  metres and the camping system therefore was obviously below par. Although in documents in the National Archives it was stated, and confirmed by Agricultural Official H du Preez, that the water here was better than at Varkensvlei, the availability of water on the subject property, at least in parts, seems to have been inadequate as there is also mention in documents in the National Archives of these farmers using water from the mines on the adjoining farm Zwartkop. However the presence of a stream with pools throughout the year increases the land values. These factors were taken into account in the estimation of the probable market value of the grazing component of the farm as at December 1962.

The lands on the subject property are a light turf, which people in this area consider to be better than sandier types of soil such as Avalon which does not have the same degree of water retention, an important attribute in an area of fairly high temperatures. Although the long term average rainfall in the general area, at  $\pm 600$  mm per annum, is fairly good, because of the generally high temperatures a heavier soil with better moisture retention, usually produces better crops.

There was a general perception that because the mostly poor non white farmers did not have the money and/or equipment to fertilise their lands on a regular basis, that their lands were exhausted and were not worth very much more than ordinary veld grazing. Although the lands of poor farmers are often far below par, this is not always true, and in the case of the subject property, because of the soil type, these lands cannot realistically be considered to have been exhausted and therefore to be much less valuable than other similar lands in the area. One also cannot ignore the attitude of the people who worked these lands. In the documentation in the National Archives it was said that the community were allowed to reap the crops of 1962/1963 season. The arable lands obviously were productive.

In his valuation of the different land components the original state valuer considered the value of grazing (which would include homestead areas) to be R25 per morgen and that of the

cultivated and old lands R30 per morgen, only 20% more than grazing. The relative value of lands and grazing was discussed with several people, both local and from other parts of the bushveld. The majority of the people, including Mr Venter of the local co-operative, say that good dry lands are worth about twice as much as natural grazing and the analysis of the sales confirmed this point of view

It can be accepted that the nutrient balance of these lands may not have been at the optimum level, and that some of the lands may have been marginal and/or old lands. Because of this and the fact that the lands were not in large integrated blocks, but in small patches, the premium above grazing value of these lands and old lands would therefore be somewhat less than double, but definitely not as much less as the valuer at the time placed on the lands.

### **5.2.7 Conclusions regarding the historical land value**

The indicated value of the grazing of the farm Schildpadnest as a whole as at December 1962 was R25 per morgen. As mentioned at other places in this report, the value of good turf lands is about double that of grazing, but some allowance should be made for the patchy nature of these lands and the probable nutrient imbalance. In the valuers' opinion the indicated value of these cultivated and old lands at the time was R45 per morgen. The value of the land component was calculated as follows:

1200 morgen grazing	@ R25 per morgen	R30 000
1000 morgen cultivated and old lands	@ R45 per morgen	<u>R45 000</u>
	TOTAL	R75 000

The basic land value ( including fencing but excluding improvements) of the Farm Schildpadnest 385 KQ as a whole as at December 1962 therefore was R75 000. The basic land value, including fencing, placed on the farm by the state valuer for the expropriation was R59 800. The amount of under-compensation for this item therefore was R15 200, which multiplied by the CPI factor from then to the present of 30,66 times equals R466 032. The valuers considered that the 20% allowance for loss and inconvenience in 1962 should also apply to the amount of under-compensation for the land component. The present value including 20%, was therefore R559 238.

The determination of the probable market value of that part of the farm that was to be divided

off a few years later and sold as Portion 1 presented them with a problem. Firstly, at the time it was an undivided part of the whole. Even valued as part of a whole one had to take into account that a relatively small part of this portion was cultivated, unlike the eastern part of the farm which, as could be seen on the aerial photos, was mostly cultivated lands. Also, judging from the aerial photos, less lands were being worked in 1963 than in 1948, probably because the soil here was too shallow and/or stony to produce good crops. At least some of the worked and old lands in this part of the farm were probably not as good as the lands on the eastern side of the farm - the indicated value of these lands should therefore be lower than the R45 per hectare for the farm as a whole.

From statements made by members of the community about their use of grazing on adjoining farms, comments about water etc. on file in the archives and the length of fencing stated by the state valuer at the time, it seems likely that this part of the farm was unfenced. When one then also takes into account that the Bierspruit does not run through this part of the farm, it was considered that this portion was unfenced and without adequate water, and that the grazing value therefore should also be less than that of the farm as a whole. However, if Portion 1 was to be considered and valued as an individual unfenced farm portion without water, 500 morgen in extent, which is to be divided off from the rest of the farm, it would be a different matter. It could then be directly compared with the similarly unfenced Portion 2 Pony 395 KQ (sale number 1 in Exhibit 5.5). This portion of Pony was also without water, and sold in January 1960 for R20 per morgen. Taking into account rising farm prices from January 1960 to December 1962, the grazing norm for a small unfenced farm of 500 morgen farm without water, would have been about R25 per morgen. This seems reasonable if one looks at the grazing values of just below and above R30 per morgen for small farms in 1962. The probable value of the area later to be known as Portion 1 as at December 1962 was calculated as follows:

400 morgen grazing	@ R 25 per morgen	R10 000
100 morgen lands and old lands	@ R 40 per morgen	<u>R 4 000</u>
	TOTAL	R14 000

If escalated to the present, the amount would be R429 240.

## **5.2.8 Conclusions regarding the historic value of the improvements and financial loss**

From the files provided and information obtained from other sources, an impression could be formed of what happened at the time. It was clear that -

- \* the community opposed the move;
- \* the original state valuer systematically recorded and valued all the improvements present on the land (noting, for example, the presence of water tanks and loose bricks, details about construction and materials, and even numbering and mentioning ruins that had no contributory value); and
- \* state officials meticulously recorded all payments and compensatory transactions (noting, for example, when beneficiaries were in jail or had relocated, and what was to be done with their compensation).

The buildings, other improvements and construction materials (326 reference items) present at the time of expropriation could not be inspected and no photographic records existed. The aerial photographs showed structures on the ground, but it was not possible to determine their nature or even to count them. However, in the interests of the community (who had been waiting a long time), it was possible to make recommendations on how to resolve this part of the restitution claim.

A list of the properties with full descriptions and sizes of the various buildings on the property as well as the values placed on these structures by the state valuer were found in the National Archives. The amounts of the compensation actually paid by the state to each individual for their improvements were shown. Those individuals for whom there is no record that they received compensation had been noted. The community were not paid for the school buildings, but were provided with a replacement school building. Dissatisfaction was expressed because no allowance was paid for the new classrooms that were under construction at the time. There is no record that payment was made for the teacher's house and the four churches.

The land value was not paid to the community. Instead of money they were given part of the Farm Varkensvlei situated in the nearby black homeland. The consultants then had to determine whether the compensation paid to these claimants was “fair and equitable”.



It was a fact of the local market that the buyers and sellers of farms, both at the time of dispossession and in 1999, did not consider that this type of informal structure had any contributory value to the property as a whole. In the absence of market data about the value of these buildings the valuers had to use another approach, basically labour plus cost of materials, to determine values for these buildings. The owners of these structures used material from the farm and built it themselves, with or without help from friends and neighbours. As the materials were gathered from the farm itself, only labour needed to be taken into account.

The time required to complete the buildings and the income that the people concerned could have expected to receive for the time needed to build these structures was used as a guide to estimate the value in use of these buildings to their owners.

Using data found in the archives and labour costs at the time values were then placed on each building and an estimate made of the amount of under-compensation for each owner and also for the community structures. The result was compiled in a tabular form detailing the calculations and the total due to each owner escalated using the multiplication factor derived from the CPI.

Exhibit 5.7 shown on the next page is an extract from the original compensation schedule in the valuation report. The schedule showed all the improvement values with the numbers placed on the homesteads and/or community buildings in the archival records were shown, with the valuers' suggestions of what was considered a realistic compensation. The improvements that did not appear on the payment list are also noted.

### Exhibit 5.7

#### Extract from the list of the suggested compensation for the improvements

	2	3	4	5	6	7	8	9	10
Comments	Reference No.	Original valuation	Proof of payment?	20% for loss and inconvenience	Proof of payment?	Suggested additional compensation	20% loss and inconvenience on additional	Suggested total additional compensation in 1962	Suggested total additional compensation in July 1999
	1	R 120	Y	R 24	No	R 20	R 4	R 48	R 1 472
	2	R 35	Y	R 7	No	R 20	R 4	R 31	R 950
	3	R 30	Y	R 6	No	R 20	R 4	R 30	R 920
	4	R 5	No	R 1	No	R 20	R 4	R 30	R 920
	5	R 165	Y	R 33	No	R 20	R 4	R 57	R 1 748
	66	R 675	Y	R 135	No	R 68	R 14	R 217	R 6 653
	67	R 520	Y	R 104	No	R 52	R 10	R 166	R 5 090
	68	R 30	Y	R 6	No	R 20	R 4	R 30	R 920
	69	R 615	Y	R 123	No	R 62	R 12	R 197	R 6 040
Ruin	110	R 0	--	R 0	--	R 0	R 0	R 0	R 0
	111	R 40	Y	R 8	No	R 20	R 4	R 32	R 981
	112	R 75	Y	R 15	No	R 20	R 4	R 39	R 1 196
	113	R 100	Y	R 20	No	R 20	R 4	R 44	R 1 349
	114	R 125	Y	R 25	No	R 20	R 4	R 49	R 1 502
Ruin	115	R 0	--	R 0	--	R 0	R 0	R 0	R 0
	116	R 75	Y	R 15	No	R 20	R 4	R 39	R 1 196
	117	R 55	Y	R 11	No	R 20	R 4	R 35	R 1 073
Material only	125	R 110	Y	R 22	No	R 20	R 4	R 46	R 1 410
	126	R 50	Y	R 10	No	R 0	R 0	R 10	R 307
	127	R 20	Y	R 4	No	R 20	R 4	R 28	R 858
Material only	129	R 0	--	R 0	--	R 0	R 0	R 0	R 0
	130	R 95	Y	R 19	No	R 20	R 4	R 43	R 1 318
	324	R 30	Y	R 6	No	R 20	R 4	R 30	R 920
	325	R 20	No	R 4	No	R 20	R 4	R 48	R 1 472
	326	R 5	Y	R 1	No	R 20	R 4	R 25	R 767
<b>INDIVIDUAL TOTALS</b>		<b>R 27 755</b>		<b>R 5 551</b>				<b>R 14 559</b>	<b>R 446 368</b>
School	57	R 900		R 180					
School	63	R 850	--	R 170	--	R 600	R 120	R 720	R 22 075
Teacher's house	60	R 125	No	R 25	No	R 20	R 4	R 174	R 5 335
Church	65	R 10	No	R 2	No	R 20	R 4	R 36	R 1 104
Material only (Church)	128	R 40	No	R 8	No	R 0	R 0	R 48	R 1 472
Church	185	R 705	No	R 141	No	R 71	R 14	R 931	R 28 544
Church	248	R 350	No	R 70	No	R 35	R 7	R 462	R 14 165
<b>COMMUNITY TOTALS</b>		<b>R 2 980</b>		<b>R 596</b>				<b>R 2 371</b>	<b>R 72 695</b>

<b>Suggested total additional compensation in 1962</b>	<b>Suggested total additional compensation in July 1999</b>
<b>R 16 930</b>	<b>R 519 063</b>

Source: Adapted from Belling and Ghyoot (1999)

Although the state's valuer, in line with expropriation policy at the time, allowed 20% for loss and inconvenience, over and above his valuation, there is no record that individuals or the community actually received this additional compensation. It was recommended that these amounts should be paid to the community and the individuals concerned.

From analysis of the 11 white-owned buildings and the more expensive of the black-owned houses, it appears that the valuer was unbiased in determining compensation, without regard to race. For example, the values set for Mr A Kubelin's shop, and the shop/storeroom and house belonging to Chromite Trading Company are equivalent to R1,67 to R1,71 per square foot. House 54, belonging to Mr O Moabi, was valued at the equivalent of R1,62 per square foot. Likewise, Mr Kubelin's house was valued at the equivalent of R1,14 per square foot, while black-owned houses numbers 58, 66, 81, 90 and 136 were valued respectively at the equivalent of R1,33, R1,13, R1,16, R1,13 and R1,25 per square foot.

However, in placing a value on the simplest clay and grass or clay and corrugated iron structures, the valuation seems inadequate. Some structures were valued as low as R5. Even if allowance is made for depreciation, it is unlikely that a house would be worth as little as R5 (number 4, a house with raw brick walls and corrugated iron roof), or R25 (number 6, a clay house with thatch roof), simply because this could not have incorporated an allowance for the cost of labour or the depreciated replacement cost.

A typical self-built house requires from three to four weeks for collection of materials and construction. Labour therefore is a significant component of the equity invested in such a structure, even exceeding the construction materials' value.

Farm labourers at the time were earning approximately R15 to R20 per month plus some food. In determining the equity invested in a person's house, it would therefore be fair to allow an additional amount of, say, R20 to the compensation paid per house. This would apply in the case of the lowest value buildings, and would compensate for the time and effort required to build structures such as pole and dagha houses, for which little or no compensation was awarded for the value of materials.

In considering the higher value buildings on the farm, the compensation paid was similar for

white-owned and black-owned improvements. However, because these individuals had to rebuild their houses, the precedent set in the Badenhorst judgement (Transvaal Supreme Court Case No. 1.1892/1971) should be applied. In that case, the owner also had to replace needed farm buildings and was awarded an amount which was higher than the contributory (market) value of the improvements (but not the full replacement cost of a new building), to compensate for having to rebuild them. In the case of Schildpadnest a similar depreciated replacement cost approach was considered to be appropriate, but as the structures could no longer be inspected to determine the construction cost or the amount of depreciation, the valuers recommended that an amount of 10% be added to the compensation originally determined. This additional 10% would apply to the higher value improvements, but should be subject to a minimum of R20 per owner, to allow for lower value buildings.

This suggested added value was applied to houses and other improvements owned by individuals, to the teacher's accommodation and to churches, but not ruins or materials only. This approach had the additional benefit of giving proportionally the greatest percentage of additional compensation to the poorest members of the community.

The school buildings were treated differently. The community's dissatisfaction with the fact that classrooms which were under construction were not compensated is noted in the official records. So also is the recommendation by a state official that the community be awarded a compensatory school to the value of R6 600. This R6 600 award was reduced to R6 000 by a more senior official. The valuers recommended that the additional R600 (escalated to today's money) be awarded to the community.

Another policy decision the valuers recommended concerned those improvements for which compensation was calculated, but no record of the payment of compensation was found in the official records. These cases include the churches, the teacher's accommodation and house reference numbers 4, 34a, 109, 170, 176, 187, 192, 201, 204, 209, 225, 236, 243, 244, 303, 311, 320 and 325. Although it was clear from the files that the state officials were careful to record all relevant facts and to ensure that beneficiaries were paid, there was no record of payment in these instances. It was recommended that the community (or the individuals concerned, as the Department may decide) be given the benefit of the doubt and that these amounts be paid as originally calculated. This was over and above the additional compensation payable under the revised compensation amounts recommended.

### **5.2.9 Explanation of the layout of the compensation table for improvements**

The compensation table in Exhibit 5.7 lists suggested additional compensation on an individual basis. The reference number is the same number that was used to record the valuations and payments to individuals at the time of expropriation and recorded in the State Archives. Individual persons were not identified in this list, because the reference number was sufficient. Schools and churches were listed separately at the bottom of the table.

The interpretation of the table is explained briefly:

- \* Column 1 provides comments about whether a reference item was, for example, a ruin, or materials only.
- \* Column 2 gives the reference number used in the historical documents.
- \* Columns 3 and 4 gives the original valuation, and whether there is proof of payment in the files examined. (The valuation for reference items such as item 4, where there is no proof of payment, was added to the suggested compensation payable to the affected individuals in columns 9 and 10.)
- \* Column 5 lists the 20% addition for loss and inconvenience recommended by the original valuer. As shown in column 6, these amounts were never paid. Accordingly, all these amounts were added to the suggested compensation payable to each individual in columns 9 and 10.
- \* Column 7 lists the recommended additional compensation for the fact that individuals had to rebuild their homes and, in the case of lower value houses, for a month's labour. Because the additional compensation was intended mainly for labour costs, the three items identified as material only have no additional suggested compensation.
- \* Column 8 gives the 20% allowance for loss and inconvenience on the additional compensation recommended in column 7.
- \* Column 9 gives the total amount of additional compensation that the valuers recommended should have been paid to the individual concerned in 1962.
- \* Column 10 gives the total amount of additional compensation that the valuers recommended should be paid to the individual in July 1999.

At the bottom of the table the same calculations were shown for schools, the teacher's house, and churches, respectively.

- \* For schools, columns 4 and 6 reflects the fact that compensation was not paid, but that a compensatory school was built. Columns 7 and 8 list the suggested R600 and its 20% addition for loss and inconvenience. In column 10, the present value of the total suggested additional compensation for school buildings is given as R22 075.
- \* For the teacher's house, there was no record of payment of the original valuation (columns 3 and 4) or of the 20% (columns 5 and 6). Columns 7 and 8 suggest additional compensation for labour and 20% for loss and inconvenience. In column 10, the present value of total additional compensation for the teacher's house is given as R5 335.
- \* For the churches, no record of payment of the valuation or the 20% allowance existed and an additional amount for labour and 20% is listed for three churches (the other consisted of materials only). The total additional compensation for each church is given in column 10.

The totals at the bottom of the table have the following interpretation:

- \* Column 3 lists the total original valuation for individual improvements, community improvements, and the farm as a whole.
- \* Column 5 lists the 20% loss and inconvenience allowance on these valuation totals. When added to the total for column 3, the result is the originally recommended compensation of R36 882, as reflected in the historical files.
- \* Column 9 lists the total additional recommended individual, community and grand total compensation in 1962
- \* Column 10 lists the total additional recommended individual (R446 368), community (R72 695) and grand total of (R519 063) compensation in July 1999.
- \* Note that other columns have not been totalled, because only certain amounts were added together horizontally. The table accordingly does not cross-balance.

The valuers recommended that individuals be paid the additional compensation reflected against each reference number in the table and that the community be paid the amount of R72 695.

It was also suggested that the Department, in consultation with the community, and in the interests of avoiding further delays, could decide to pay out any additional compensation for improvements to the community and not to individuals.

### **5.3 CONCLUSION**

After the community's representatives were presented with and considered the report, this matter was finally settled. This case demonstrated that it is possible to find the data required to perform a historical valuation. Even though the historical conditions were no longer present, various records exist, including those at the Deeds Office, Government files and the National Archives. The case also demonstrated that it is possible to escalate past amounts to present amounts of compensation in a rational manner. However, whether such an approach is correct, is debatable. This matter is addressed in the final case study—of the farm Sebele 931 KP.

## **CHAPTER 6**

### **CASE STUDY NUMBER 3.**

### **THE FARM SEBELE 931 KP: RESTITUTION VALUATION USING ONLY CURRENT SALES DATA**

#### **6.1 INTRODUCTION - PRESENT LEGAL OPINION ON THE RESTITUTION LEGISLATION**

For several years after the Kinde Estate valuation, some valuers still used the "Gildenhuyts" formula, referred to as the "Geldenhuyts" formula in the Notice of Expropriation for Boomplaats farm, Lydenburg district (South Africa, 2001:3).

After the state appointed Adv G Grobler SC on this restitution case he not only examined the existing formulae, but also obtained the original deeds of sale of the people who bought the subject farms at what was claimed to have been below market value. After examining the historical records of the agreements of sale, he found that the purchase conditions of these farms were unusual and onerous.

Some of the conditions were that the purchasers had to farm full time on that and only on that property and had to submit to inspections by state officials who had to approve their farming operations. They were not allowed to chop down any trees or demolish any improvements without permission, even improvements they erected themselves. In addition they were not allowed to sell the farm for ten years. Grobler asked the question of what the purchase price of a property would have been if exposed to the open market with these conditions. He said no one knows, as no one sells like this. He also said that in applying the recommended formula there is an assumption that value is an additive concept. However, market evidence has shown this assumption to be incorrect (Grobler (2001:4).

Adv. Grobler arranged a meeting with officials of Land Affairs to inform them of his findings. Because of the importance of property restitution and redistribution the Northern Branch of the Institute of Valuers arranged a workshop for Adv. Grobler to



inform its members of his findings. Grobler also wrote a series of articles on the subject, published under an alias in the Landbou Weekblad. A copy of his opinions on this matter was made available to the author.

Another important issue stated by Adv. Grobler at the Institute of Valuers meeting, was that under cross examination the opposing advocate would ask the valuer, appearing as an expert witness, if the valuer had been on the property at the historical time. If not, the valuer cannot testify on the value of the property at that time.

As a result of Advocate Grobler's research and analysis, historical valuations are no longer done, both the before and after valuations are done in the present.

Case Study Number 3, a restitution valuation prepared for litigation and a potential court case, was one of the first where the value of an unfenced badly overgrazed farm was to be compared with the same property that is now a well developed game safari farm. In this exercise previous and present photos of the improvements and the condition of the veld were also used in the estimation of the probable historical condition of the farm Sebele in order to compare it with present sales, both good and poor.

The lease with the option to purchase and the value of the farm Sebele at various times was the subject of controversy. Several others had valued this farm, both for the Bophuthatswana government to purchase his interest in the farm and at other times to sell the farm to Mr York, before the author was first appointed first in 1998 to value the farm for sale to Mr York. That assignment was to determine the market value of the farm Sebele as it was as at September 1992, i.e. an unfenced farm with some old buildings and without electricity. Even in 1998 the veld was in an extremely poor condition. Because of past sheet erosion, there were still some bare patches without grass cover and some parts were affected by bush encroachment.

During this first valuation, sight was had of the report of “The Commission of Inquiry into alleged irregularities or malpractices regarding the allocation, leasing, alienation and transfer of certain state land to the President of the Republic of South Africa”, known as the Budlender report (1996). G M Budlender, later Director General of

Department of Land Affairs, was the chairman of the Commission.

Pages 22 to 29 of the third of seven reports dealt with the history of the lease and purchase arrangements between the then Bophuthatswana Government and Mr York.

Extracts from this report:

- o 10 September, 1986 Mr B S York was informed that his application to be allocated a farm had been successful.
- o 26 July 1988 Mr York and the Secretary of Agriculture and Natural Resources (of Bophuthatswana) entered into a lease agreement in respect of this farm (Sebele) for a period of seven years.
- o During 1991 it was decided that the farm was to form part of the Madikwe National Park and recommended that Mr York be given other land in exchange for this farm
- o 24 September 1991 Mr York wrote to the Board requesting them to confirm that his farm is not to be incorporated in the Game Reserve.
- o 8 October 1991 the Agricultural State Lands Board resolved to recommend to the Minister that the farm be sold to Mr York in terms of the decision of the Executive Council.
- o 20 January 1992 the Secretary of the Agricultural Board advised Mr York in writing that the Minister had approved his application for the purchase of the Farm Sebele in principle. The Agricultural Bank determined the purchase price as R685 527-68. The farm measures 4087,2579 hectares and the price therefore fixed at R167,72 per hectare instead of the original guideline purchase price of R150 per hectare.
- o 17 September 1992 Mr York was presented with a formal agreement of sale. He signed it on the same day and paid the required 10% deposit which was accepted by the relevant official and banked. However, at the time of the Budlender Commission's investigation the agreement had not been signed by a state official.
- o 16 March 1993, the Chairman of the Agricultural State Lands Board advised Mr York that the farm was required to be integrated into the Madikwe Game Reserve. Two valuers were appointed to value the farm, and did so during April 1993. As Mr York had by then game fenced this farm the game now belonged to him and the values included the game. Each valuer handed in his

own report. Van der Merwe valued the property at R2 514 417 and Grobler at R2 724 110.

- o 22 June 1993. Mr York's attorney addressed a letter to the Minister calling upon him to sign the agreement of sale already signed by Mr York. The request was not acceded to and the letter was referred to the State Attorney. Mr York instituted proceedings in the Bophuthatswana Supreme Court to have the sales agreement accepted.
- o 1 November, 1993 the Directorate requested the Minister to give a mandate to settle the matter up to an amount of R3 million. The Minister did not give his approval.

The Chairman of the Administrative Council subsequently proposed an initial purchase offer to Mr York of R2 514 417 which could be upped to R2 619 263 if agreement could not be reached. A further amount of R612 900 was approved afterwards. (However, Mr York said that the official who brought the offer, said it was for R2 000 000, which Mr York refused as being too low. His attorney informed the Minister of Land Affairs that he preferred to exercise his right to purchase the farm).

In its report, the Budlender Commission expressed its sympathy with Mr York, who had improved the farm over the years. However, they also said that if the farm was to be sold to him at the price stated in the agreement of sale it would be below market value, which the state was not allowed to do.

The Commission was also not sure whether Mr York had a legal right to purchase the farm and suggested the matter be referred to the South African State Attorney. (As by then the homelands had already been dissolved).

## **6.2 VALUATIONS SUBSEQUENT TO THE BUDLENDER REPORT**

After the Budlender commission a certain van Rooyen was appointed to determine the market value of the farm Sebele as at September 1992 as it was then, i.e without fences, poor grazing etc. The Land Affairs Board of the Department of Public Works did not accept his conclusion of value and decided to appoint someone else to re-value

the farm Sebele.

When consulted about the matter, the Department of Land Affairs recommended the author be appointed to undertake the historical value of the farm in the condition it was in September, 1992. The re-valuation was approved by the Board of Public Works and by the Minister of Land Affairs. Mr York was informed that he could purchase the farm, but at the assessed market value. He thought this a breach of the original terms but after consulting his legal advisors he accepted and came up to Pretoria to sign the necessary papers. However, before he arrived in Pretoria, Parks Board representatives persuaded Land Affairs not to sell and Mr York was not able to purchase the farm.

In late 2000 the author was again asked to undertake a before and after valuation of Sebele as the state now intended to pay Mr York for his interest in the farm as the Parks Board wanted to incorporate Sebele into the Madikwe Game Reserve.

The one value was to be for the farm as it was at September 1992, excluding all improvements effected by Mr York. The other value was as at the present, January 2001. Here the value of the farm was to be determined as it was in 2001, i.e. a fully exempt game/cattle farm with cattle farming infrastructure, a well developed game camp and an informal tent game camp. The valuation was for the property only, the game would be valued by a game expert.

### **6.3 RESTITUTION VALUATION OF THE IMPROVEMENTS MADE BY THE LESSEE**

Once again the valuation was approved, but despite frequent requests from his legal advisors, no offer was made to Mr York. Two years went by and in that time a land restitution claim on the farm Sebele had been approved, and the farm now had to be valued for restitution purposes. By this time Mr York had become very upset and a court case seemed likely.

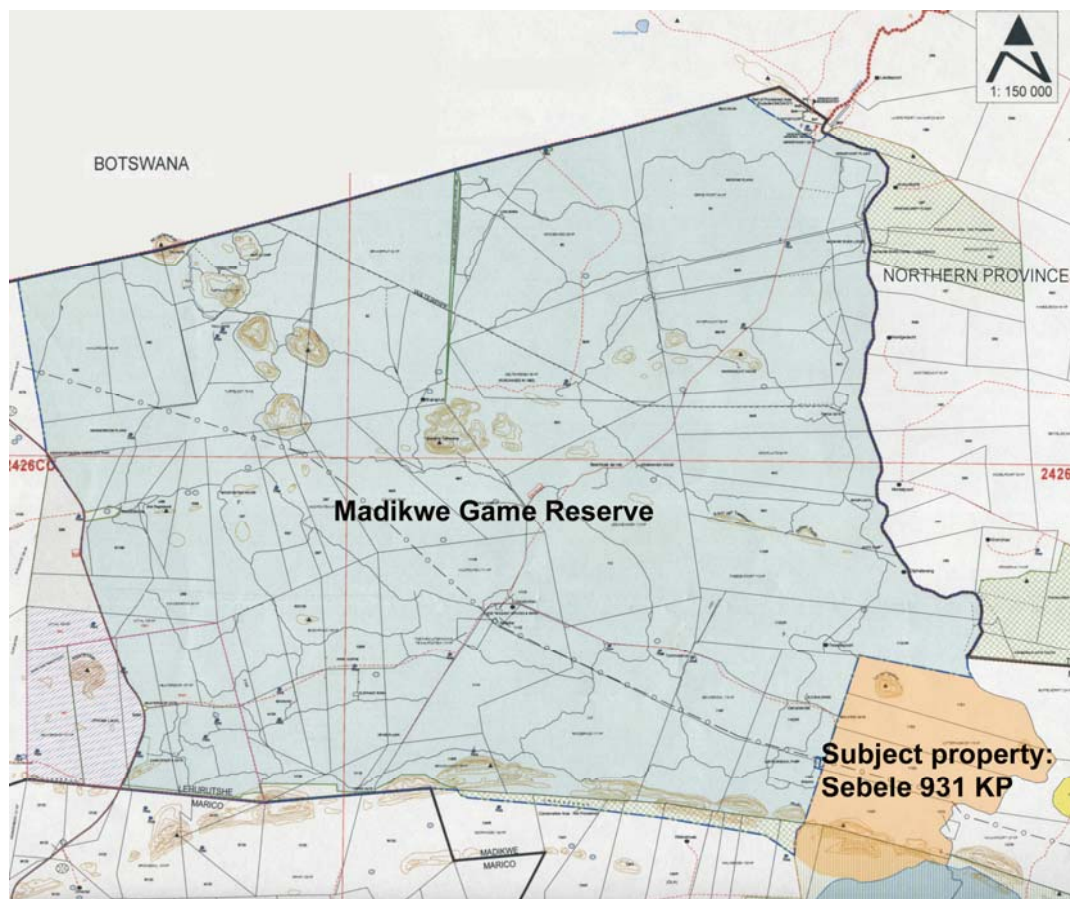
In June 2003 the State Attorney appointed the author to value the Farm Sebele for land restitution purposes, but to do it in accordance with the legal opinion obtained from Adv. Grobler. The terms of reference were:

Before Valuation. The property with all its potentialities as in 2003 but assuming none of the improvements made by Mr York had been made, and that the veld was in the condition it was when Mr York took occupation in 1988,

After Valuation. The property with all its potentialities in 2003 with the existing improvements and infrastructure and with the veld in its present, improved condition.

In both the before and after valuations, the fact that this farm adjoined the Madikwe Game Reserve (which had not existed when Mr York took occupation of Sebele) had to be taken into account. This proximity is shown in Exhibit 6.1.

**Exhibit 6.1:**  
**Location of the subject property in relation to the Madikwe game reserve**



Source: South Africa (2003)



The photographs in Exhibits 6.2, 6.3 and 6.4 contrast the condition of the farm before and after it was occupied by Mr York.

**Exhibit 6.2**



**Before and after photographs of the veld**

Veld in 1990 (before)



Veld in 1998 (after)

Source: Belling (2003)



**Exhibit 6.3**  
**Before and after photographs of the house**



Dwelling in 1990 (before)



Dwelling in 1998 (after)

Source: Belling (2003)



**Exhibit 6.4**  
**Lapa and pool at one of the lodges (after)**



Source: Belling (2003)



## **6.4 STATE OF THE FARM WHEN THE LESSEE TOOK OCCUPATION**

When Mr York took occupation of the farm, most of the veld on the northern part of the farm was seriously degraded. Parts were unusable because of the bush encroachment and parts were completely bare due to sheet erosion. Although the result of the veld restoration work was apparent, the areas of sheet erosion could still be seen still both at the time of the valuer's first inspection of the farm in 1998 and at the 2003 re-inspection . Mr York said that when the farm was allocated to him, the veld was in such a bad condition that he gave it a two year recovery period before he first introduced cattle, and then he only 50 head on this 4 000 hectare farm, a stocking rate of 80 hectare per large animal unit (LAU).

The state of the grazing on Sebele as it had been in the late 1980's was discussed with several knowledgeable local farmers as well as an experienced agricultural official in Mafikeng. All said that this farm was in an extremely poor state - one even said it was disgusting, confirming Mr York's description of the state of the grazing at the time he acquired the lease with the option to buy the farm.

Mr York, an animal scientist formerly employed of the Bophuthatswana government, estimated the carrying capacity of the farm by doing a game count in 1989. The game count in 1989 was 293 and in 2001 it was 1631, which Mr York said was equivalent to 499 LAU. Using the rate of increase between 1989 and 2001, and working backwards from 1989 to 1986 Mr York estimated the game on the farm as 164 when he took occupation in 1986. As there were no cattle on the farm at the time, Mr York said the game population showed that the total carrying capacity in 1986 was equivalent to only 32,7 LAU which works out to 125 hectare per LAU. Compared to 499 LAU in 2001 ( $\pm$  8 hectare per LAU) the carrying capacity of Sebele had increased fifteen times. Whether Mr York's game counts and calculations were accurate or not, there is no doubt that the condition and carrying capacity of Sebele had improved considerably under Mr York's management.

Mr York used various methods to gradually reclaim the bare areas and to improve the carrying capacity of the farm. He packed stones on the contours of the bare patches so that the ground would silt up over time. He chopped and placed thorn bushes on these areas to protect the young grass until it was established. He seeded other areas with *Cenchrus Ciliaris* (Blue Buffalo grass) and in places this grass is now well established. There was

still work to be done to reclaim the sheet erosion and reduce bush encroachment, but the grass cover on the farm as a whole had improved to the point where the veld on Sebele was better than most of the other farms in the area.

When Mr York first took occupation, there were three old homesteads on this property – none with electricity. He renovated and expanded the house he chose to live in and used some of the other old buildings for staff quarters. He brought electricity to the farm, erected internal cattle fences, a perimeter game fence, sunk new boreholes and expanded the water network on the farm. The end result was a completely different farm compared to the unfenced one he took over in 1986.

## **6.5 STATE OF THE FARM IN 2003**

In 2003 Sebele was a working game ranch with attractive architect designed secluded chalets and dining/bar building, an open braai area and a pool with covered lower and upper deck area, all with electricity. The rondawels at this site were not as good as the chalets, but were reasonably comparable to the accommodation at the nearby Camp Mosela Sela. The main lodge was built on the side of Lotteringskop hill, ensuring extended views of the bushveld. In addition there were two informal camp sites with drinking water, hot and cold water showers and flush toilets south of the Dwarsberge near the Molatedi Dam. The homestead comprised the main dwelling, outbuildings and pool set in a pleasant garden. Although considerably improved, the finishes of the house were still somewhat spartan. The homestead was enclosed in a security fence.

In order to calculate the amount of the compensation to be paid to Mr York for the improvements he made, the valuer had to determine the price of a degraded, unfenced cattle farm without electricity and poor improvements, and compare it to the value of the developed game farm.

In both cases the benefit of the Marico River, the Molatedi Dam, the Dwarsberge range on the farm, a couple of hills, and most importantly the undoubted potential of being integrated into the Big Five Madikwe Game Reserve had to be taken into account.

However, the subject farm, as part of a major big five game reserve, had some negative aspects. The eastern boundary of the farm Lotteringskop which represents the bulk of the subject property, is the mid stream of the Marico River. The other half of the river belonged to and was used by the inhabitants of Molatedi village and their animals for watering purposes. Thus although the subject property has the advantage of some 12 km of river frontage, the result of having to share it with many others who would want easy access for animal watering purposes, would complicate a give and take type of river boundary arrangement. The result could be both expensive and unsightly, and whichever way it was done it would reduce the value of the river frontage to this part of the farm. Those seeking a back to nature Big Five Game Reserve experience want to see game and bush, not a rural village development.

Another negative factor was the public road which ran from the Molatedi village on the eastern side of the Marico River, across the river, through the subject property to one of the entrances to the Madikwe Reserve and thereafter between the Madikwe and Sebele game fences to Nietverdiend village. A side road off this through road went to the Molatedi Dam wall. However, although the road was used by people entering the Madikwe through this gate, it was not often used by the residents of Molatedi village. If the farm was to be purchased and incorporated into the Madikwe Game Reserve, this road would have to be closed and this factor also had to be taken into consideration. A major powerline ran through the Lotteringskop part of the farm, and then through the Madikwe Game Reserve.

## **6.6 MARKET RESEARCH**

In any valuation study the highest and best and most probable economic use must be taken into consideration. It is generally accepted that no property can be treated as an entity apart from its environment which would include physical characteristics of the subject and adjoining properties, climate, rainfall, general infrastructure of roads, communications as well as the interplay of economic and government control factors. In determining the market value of a property, in addition to the physical attributes of the subject property, all the factors that influence the neighbourhood area identity have to be taken into consideration. These local aspects are sometimes the major positive or negative value determining factors as they define an area in which the same or similar economic thinking of buyers and sellers are to be found.

The subject property, lying as it does between the Madikwe Game Reserve and the Marico River and the Molatedi Dam, had immediate integration potential and this was the major value determining factor. The farm had the additional plus factors of the Marico River, the Molatedi Dam and the topographical benefit of the Dwarsberge range of hills in the south and the Lotteringskop hills to the north.

In the course of the market research interviews were held with members of the local Land Owner's Association, including the chairman, as well as with the other purchasers of properties in this area with Madikwe incorporation potential. Between them these landowners controlled approximately 19 000 hectares in and around the Madikwe. They gave background details of Madikwe operations, local construction costs, their purchasing considerations, and what they considered to be the most important value determining factors. Among those interviewed were:

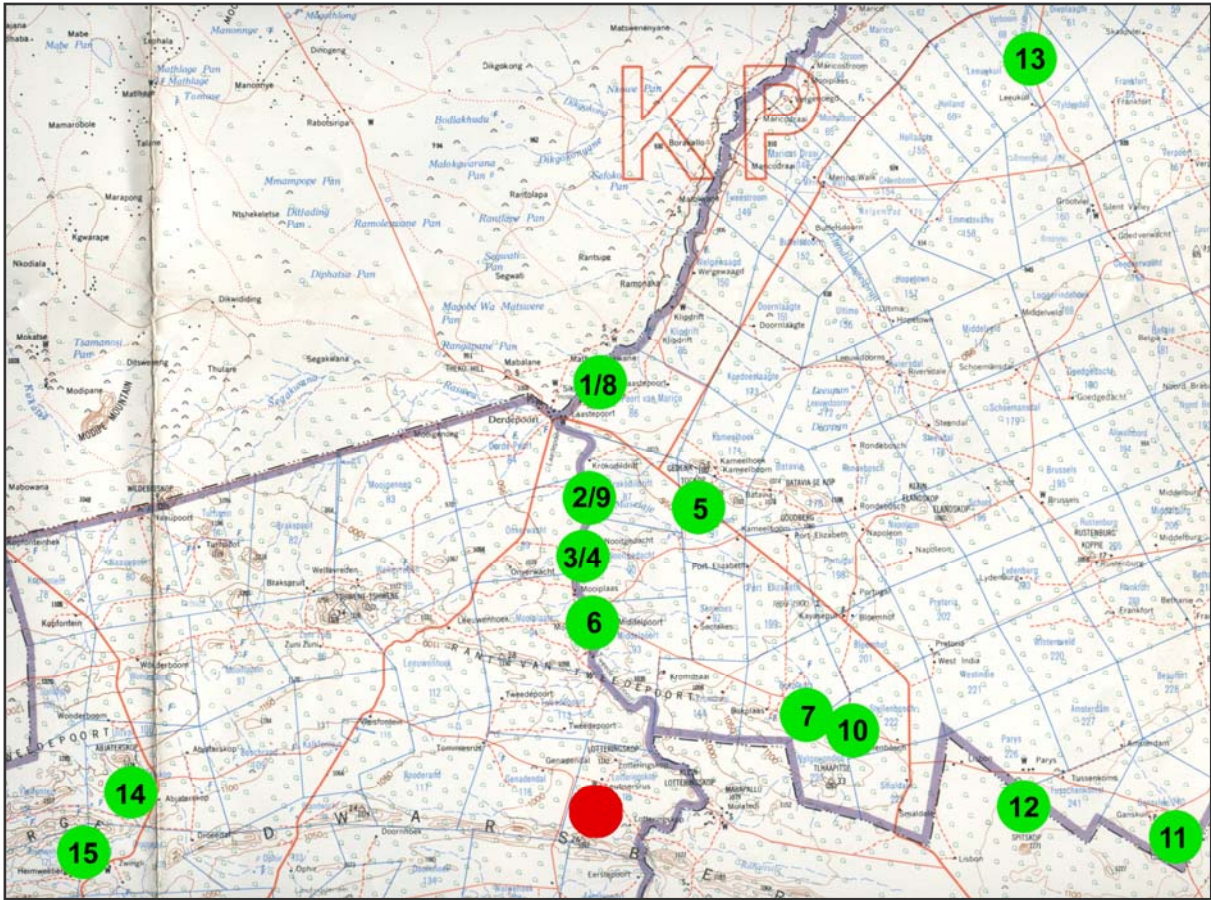
- Mr Oscar Lockwood
- Mr Poon Liebenberg
- Messrs Carl Trieloff and William Stephens
- Mr Mark Milne
- Mr Maans Booysens

The major players in this micro market said that the most important value determining factors were:

- The potential to be integrated into the Madikwe Game Reserve, this was further divided into farms with short term  $\pm$  5 years, and longer term  $\pm$  15 years.
- River frontage, particularly for wider parts of the river. Open water enhances the value of almost all properties, but is even more important in a holiday/nature reserve type of resort. Mr Poon Liebenberg said the value of farms with river frontage were about double that of other farms.
- Topographical features such as hills and large trees

All said prices were still increasing. This perception was confirmed in the prices paid in the recent sales, asking prices and offers made. Of course, as is common, prices varied, mostly because of the negotiating abilities of the parties concerned, but the variance was not such as to distort the overall pattern. The sales that were taken into account are shown in Exhibit 6.5.

**Exhibit 6.5**  
**Map showing the location of the subject property and the comparable sales**



- |                             |  |
|-----------------------------|--|
| <b>Subject property</b>     | <b>: Sebele 931 KP (marked in red)</b>                                   |
| Sales transaction number 1  | : Ptn 4 Laaste Poort van Marico 86 KP                                    |
| Sales transaction number 2  | : Remaining Extent, R E 2 & Ptn 3 Krokoldrift 87 KP                      |
| Sales transaction number 3  | : Remaining Extent Nooitgedacht 90 KP                                    |
| Sales transaction number 4  | : Ptn 1 Nooitgedacht 90 KP   |
| Sales transaction number 5  | : Remaining Extent Kameelboom 91 KP                                      |
| Sales transaction number 6  | : Ptn 1 Middlepoort 93 KP  |
| Sales transaction number 7  | : R E Bokplaaats 200 KP & Ptn 3 Welgevonden 223 KP                       |
| Sales transaction number 8  | : R E Ptn 1 Laaste Poort van Marico 86 KP                                |
| Sales transaction number 9  | : Ptn 4 Krodoldrift 87 KP  |
| Sales transaction number 10 | : R E Stellenbosch 222 KP  |
| Sales transaction number 11 | : R E, Ptn 1, RE 4 Gansvlei240 KP  |
| Sales transaction number 12 | : R E 1 & R E 2 Spitskop 244 KP  |
| Sales transaction number 13 | : R E Vetboom 68 KP  |
| Sales transaction number 14 | : The Farm Abjaterskop 940 KP  |
| Sales transaction number 15 | : The Farm Heimweeberg 121 KP &<br>Ptn 2, Ptn 7 & Ptn 8 Droogedal 120 KP |

**Exhibit 6.6**  
**Sales in Madikwe**

SALE No	PROPERTY	DATE	PRICE	AREA ha	PRICE/ha	SELLER	PURCHASER	CO
LAASTE POORT VAN MARICO 86 KP								
1	Ptn 4	29-08-2001	R 330 600	160.2096	R 2 064	North West Parks and Tourism Board	Laaste Poort Prop Holdings Pty Ltd	For R4 and The 200
KRODODILDRIFT 87 KP								
	Remaining Extent			443.0877				
	R E 2			710.0915				
	Ptn 3			446.0369				
2		08-07-2000	R 7 980 000	1599.2161	R 4 990	River Lodge (Madikwe) Holdings Pty Ltd	Africa Holdings SA Pty Ltd	Lar VA imp R6

Source: Belling (2003)

**Exhibit 6.7**

**Sales in short term Madikwe integration potential area**

SALE No	PROPERTY	DATE	PRICE	AREA ha	PRICE/ha	SELLER	PURCHASER	COMMENTS
<b>NOOITGEDACHT 90 KP</b>								
3	Remaining Extent	20-07-2001	R 4 200 000	763.6187	R 5 500	H P Schutte	Purple Rain Prop No. 328 Pty Ltd	Cattle fenced. Mr Lock 3km river frontage, with supply water to Botswana. The seller retained the worth R3000 per ha.
4	Ptn 1	18-02-2003	R 8 000 000	1234.8247	R 6 479	J F Mitchell	Marico Lake Conservancy Pty Ltd	Game fenced. 48 ha w encroachment. The gra move his cattle to another game to rest the velvet interest free bond, but the homestead.
<b>KAMEELBOOM 91 KP</b>								
5	Remaining Extent	25-02-2002	R 1 700 000	1006.1936	R 1 690	A W Coetzee	Prostart Prop 15 Pty Ltd	Cattle fenced. Partly in encroachment. The gra The Seller retains occupation. Purchaser estimates the
<b>MIDDLEPOORT 93 KP</b>								
6	Ptn 1	11-12-2001	R 3 200 000	465.0000	R 6 882	J M Jooste	Rapid Dawn 140 Pty Ltd	Game fenced. Very long trees.
<b>BOKPLAATS 200 KP &amp; WELGEVONDEN 223 KP</b>								
	R E Bokplaats			1990.2078				
	Ptn 3 Welgevonden			495.0084				
7		May-03	R 9 000 000	2485.2162	R 3 621	J Liebenberg Boerdery bk	Pro -Es Inv Pty Ltd	Game fenced, but sold Improvements two sma

Source: Belling (2003)

**Exhibit 6.8**  
**Sales in longer term Madikwe integration potential area**

SALE No	PROPERTY	DATE	PRICE	AREA ha	PRICE per ha	SELLER	PURCHASER	COMMENTS
<b>LAASTE POORT VAN MARICO 86 KP</b>								
8	R E Ptn 1	31-Jul-01	R 919 664	901.4477	R 1 020	Bala Farms Pty Ltd	Lebang Inv cc	Adjoins to African-E
<b>KRODODILDRIFT 87 KP</b>								
9	Ptn 4	25-10-1999	R 251 360	200.4465	R 1 254	River Lodge (Madikwe) Holdings Pty Ltd	M K Milne	West of D term integ
<b>STELLENBOSCH 222 KP</b>								
10	Remaining Extent	23-Jul-01	R 1 000 000	1011.0839	R 989	Mopomo Prop Holdings	Pro -Es Inv Pty Ltd	Part short
<b>GANSVLEY 240 KP</b>								
	Remaining Extent			1178.4143				
	Ptn 1			0.9579				
	R E 4			92.2342				
11		30-Oct-02	R 2 170 000	1270.6485	R 1 708	D Jansen van Vuuren	Pro Es Inv Pty Ltd	180 ha Bl dry lands, heritage p
<b>SPITSKOP 244 KP</b>								
	R E 1	March/April 2003		503.3177		M J Mokautu		Purchase One unfi
	R E 2	March/April 2003		503.3177		S S Sekunoe		
12				1006.6354	R 1 150		Pro Es Inv Pty Ltd	

Source: Belling (2003)



**Exhibit 6.9**

**Sales in area with no Madikwe integration potential**

SALE No	PROPERTY	DATE	PRICE	AREA ha	PRICE per ha	SELLER	PURCHASER	COMMENT
	VETBOOM 68 KP							
13	Remaining Extent	24-03-2003	R 2 000 000	1178.6452	R 1 697	R J Heroldt	Leeuwenkuil Boerdery cc	Game fenced. A Kudu included in no value on the and game contri land value there
	ABJATERSKOP 940 KP							
14	The Farm	14-01-2000	R 3 500 000	2046.3009	R 1 710	J P Smith	Hentiq 2065 Pty Ltd	Game fenced far value of the gam 000. The contri improvements w land only value (per ha)
	HEIMWEHBERG 121 KP AND DROOGEDAL 120 KP							
	The Farm Heimweeberg			2129.2857				
	Portion 2 Droogedal			384.9898				
	Portion 7 Droogedal			281.7789				
	Portion 8 Droogedal			44.7561				
15		24-11-1998	R 650 000	2840.8105	R 229	J G Haasbroek	Hentiq 1448 Pty Ltd	Overgrazed cattl condition. Impr land value there

Source: Belling (2003)

In addition to the listed completed sales transactions consideration was also given to the offer of R8 500 000 made during July 2003 by Mr Liebenberg of Pro-Es Inv to the estate of the late I J Booyesen for the Remaining Extent of Middlepoort 93 KP, in extent 964,0618 ha, i.e. R8 713 per ha. The purchaser said that due to the terms of the offer he calculated the present value of the offer to be R7 500 000, ie R7 780 per ha. This offer was refused. The offer and its rejection was common knowledge among the local property owners and was a fact of the market. However, most of the local property owners only seemed to be aware of the offer price, not the present value equivalent. This rejected offer was an important indicator of farm prices in the area and therefore had to be taken into consideration in the determination of the market value of the subject property as it was at the date of valuation.

All the purchasers in this market said they were buying potential game reserve land and therefore did not pay any more for lands than they did for grazing. They also said that the quality of the grazing, and whether the farm was game or cattle fenced were relatively minor matters, but do play a part as sellers use these aspects as negotiation points for higher prices.

Their attitude towards normal farm improvements was similar. In two of the listed transactions the sellers have retained occupation rights to their homesteads, in one case for 15 years (the Remaining Extent Kameelboom 91 KP) and in another for 10 years (Portion 1 Nooitgedacht 90 KP). The sellers obviously did place value on their improvements, and the continued occupation rights, which gave them free access to a part of a big five game reserve. These rights formed part of the purchase consideration and therefore had to be taken into account.

In the sale of Remaining Extent Kameelboom 91 KP, the seller had a 15 year occupational right. The purchaser Mr Trieloff said he thought the occupational right was worth about R300 000. In the case of Portion 1 Nooitgedacht 90 KP, the agreement is that when this farm is incorporated into the Madikwe, the purchaser will at his cost erect a big five security fence around the homestead. The occupation right and the seven months free grazing given to the seller on one of the purchaser's other farms could be considered to be

offset against the one year interest free bond of R4 000 000. The seller, Mr Mitchell said that because of the drought he had been looking to hire grazing and the best price he could get in the general area was R50 per head per month. Mr Mitchell said this was uneconomical, but it was the cost of grazing in the area, and if the drought continued it could even go higher. The value of the grazing rights Mr Lockwood gave Mr Mitchell therefore was worth about R100 000 and the contributory value of the homestead approximately R400 000. When the sales were analysed, it was found that the seller and purchasers did place value on the farm homesteads.

Some said that the quality of the grazing was not very important as the purchasers were basically buying land area with Madikwe integration potential. However, during the discussions with the sellers and purchasers in this micro market it became clear that the condition of the veld was a factor and did play a part during the negotiations. The local property owners in the area were aware of the relative condition, topography etc of the farms in this area. After their purchases in some cases the buyers were expending money, time and effort to improve the attractiveness of their new acquisitions, as good looking bushveld adds to the value of a game park experience.

The major purchasers were sophisticated, well informed businessmen, aware of the time value of money and that the listed transaction price is only one of the factors in the cost of ownership. Both pre and post purchase expenses are part of the consideration. The fact of the matter was that in some cases they had incurred additional costs to counteract these negative aspects.

Some examples. On Portion 1 Middlepoort 93 KP, Messrs Trieloff and Stephens said they were combatting areas of bush encroachment by selective chopping and burning the sickle-bush (sekelbos). Mr Lockwood said he had to rest one of the farms he had purchased for a couple of years to allow the veld to recover. He said Portion 1 Nooitgedacht, his most recent purchase, was so overgrazed that there was almost no grass left. He therefore had Mr Mitchell move his cattle to one of Mr Lockwood's other farms which had good grazing. To further lessen the burden on this overgrazed farm, Mr Lockwood had cut down trees to cover the bare areas and he said he was also going to catch and remove the game from Portion 1 Nooitgedacht. These actions have cost implications.

As all fencing, game or cattle, both internal and perimeter, would be removed when these farms are integrated into the Madikwe, these are at best transitory items. However until they are integrated they do serve a purpose, if only to control poaching and therefore do have value, particularly game fencing as it allows owners to hunt throughout the year. During the market research a lot of hunting was taking place, so much so that on Mr Mitchell's farm a couple of herds of Impala were seen fleeing across the road. Mr Liebenberg said that the cost of game fencing worked out at about R250 per hectare for the average sized farm. Although the difference between a cattle fenced and a game fenced property was an important value determining factor in most other areas it was not as important in the subject area as the fences would be removed to be replaced by the big five game fence.

The major purchasers were also asked their opinion of the subject property and what they would pay if given the chance to buy it. Messrs Trieloff and Stephens first said that because of the size of Sebele they said about R5 000 per hectare, but when they were reminded of the price paid in recent sales, they said R6 500 per hectare. However, they said they would need about six months to get enough investors together to syndicate the purchase. Mr Lockwood said that Sebele is an icon type property and added that if the state wanted to sell it, he was willing to buy it immediately at R6 500 per ha. However, when told that there was a land claim on the property, he said he would still buy, but then only at 50 % of the abovementioned price as he would have to make an arrangement with the land claimants. He would still be willing to buy as he is on good terms with the head of the probable claimants (those living in Molatedi) and was sure he could do a joint venture with them. In assessing these purchase price estimates one has to bear in mind that these are major property purchasers who have purchased several farms in the immediate area. Although not doubting that they were being open and truthful, it is almost inevitable that they would have been conservative in stating the price they would be willing to pay. It is a fact of the property market that sellers ask more for a property than the price at which they are prepared to sell and purchasers offer far less than the final purchase price, which is usually somewhere between the two extremes. These price statements were made in June 2003, and the rapid price escalation in the area also had to be taken into account.

When asked about the improvements, Mr Lockwood said he had not seen the game camp, but he was presently building a lot in the area, and knew the cost of construction. He said

that even at a basic level buildings so far from major suppliers and contractors cost about R2 500 per m<sup>2</sup>. The homestead could be used for the game ranger, and so would also have value, but would not as major an item as the game lodge.

Everyone the valuer spoke to said the game lodge definitely adds value, the general feeling was that the contributory value would be at least a million rand, and probably more. The price of accommodation in the Madikwe itself varied from R900 to R8 000 per day, this of course included full board and game drives. Camp Mosela Sela charged R400 per person per night bed and breakfast, excluding game drives. That camp on Portion 4 Krokodildrift is outside the reserve, in the longer term area, and does not have either the ambience or attractive accommodation as Sebele. Mr York charged R345 per person per day, with a minimum daily charge of R1 380 per party non-catering. Catering, excluding drinks, was an additional R345 per day. Full board therefore was R690 per day, but as this did not include game drives or on-safari costs, the prices compared with the lower to middle cost lodges in the Madikwe. This indicated that the value of the lodge was at least, and probably more than the cost Mr Lockwood mentioned. The Sebele Game Camp is built on the side of the main Lotteringskop hill, well away from the main road through the farm, and has extended bushveld views. Taking all these factors into account the contributory value of the main game lodge on Sebele was estimated to be R1 200 000.

## **6.7 MARKET VALUE OF THE SUBJECT PROPERTY IN 2003 (AFTER VALUE)**

Taking all the factors mentioned into account, both positive and negative, including the fact that prices in the area were rising rapidly, the indicated present land value of the developed property was considered to be R7 750 per ha. That price included the boreholes, water rights and basic farming infrastructure. However all the local market participants said that value should be added for the existing lodge and the main dwelling with its pool has value as it could be used to accommodate a game ranger. Neither of the homesteads on RE Kameelboom and Portion 1 Nooitgedacht had a pool or as pleasant a garden as that of the subject property. In turn the finishes in the main dwelling on Sebele were not as good as that of the abovementioned houses. In relation to these homesteads the contributory value of the homestead on the subject property was estimated to be

R300 000. The old farm buildings and the informal camp sites would have had no use or added value for a property to be incorporated into the big five Madikwe Game Reserve.

The present value of the improved property in 2003 was therefore calculated as follows:

Land 4087,2579 hectare @ R7 750 per ha	R31 676 249
Improvements (lodge and homestead)	<u>R 1 500 000</u>
	<u>R33 176 249</u>

Rounded off to R33 000 000

This worked out at R8 074 per hectare, which for a farm with the attributes of Sebele was realistic when compared directly to the recent sales in the vicinity.

## **6.8 MARKET VALUE OF THE FARM IN ITS ORIGINAL CONDITION (BEFORE VALUE)**

The before valuation presented a difficult problem as no recent sales were found of an unfenced farm with no electricity or water infrastructure, poor old buildings and seriously degraded grazing that could be used as a direct comparable. An adjustment would have to be made to the sale of the farm with the poorest grazing to estimate the “before” value of the farm.

As the study was intended to determine the compensation to the lessee for the improvements made to the farm, as a check on the result of adjusting the price of the closest comparative sale, estimates were made of the possible costs and time involved in the improvements made. This could then be used as a guide to adjust the prices of the sales transactions in estimating the probable selling price of a basically unimproved farm with seriously degraded grazing, plus the added value because of the integration potential with the Big Five Madikwe Game Reserve, the Molatedi Dam, the Marico River and the topographical features.

One of the ways to do this would be to calculate the present value of resting the farm long enough to allow the grazing to recover to its present above average state. There are precedents for this type of approach as in addition to the rest period Mr York gave the veld of Sebele. Mr Lockwood did the same with the farm he bought from Mr Mitchell. Mr

York had rested the farm for two years before introducing 50 head of cattle on the 4 000 hectare subject property. Several years later, when the author first inspected Sebele in 1998, the grazing was still far below average. At that that time the veld was still in a poorer condition than Mr Mitchell's. The time to be allowed for a natural recovery of the subject property should therefore be at least double Sebele's original two years, say five years.

Mr Mitchell had recently tried to hire grazing and the best price he could find in the area was R50 per head per month. Mr York estimated the present carrying capacity of the subject property at 8 hectare per LAU which seemed reasonable. Using his estimate of carrying capacity, R50 per head would equate to a land area rental of R6,25 per hectare per month (R50/8). In view of the serious grazing problem in the northern bushveld, the price seemed reasonable when compared to the price of approximately R3 per hectare per month paid by Mr Daan van der Merwe for grazing near Zeerust. That price was the result of a contract that had been running for several years with an annual escalation of 12%.

Because of the drought the price of grazing in the northern bushveld was uneconomically high, and if the drought continued and the grazing price escalated, it would make hiring of grazing beyond the means of most cattle and game farmers and so reduce the size of this market. The unadjusted grazing price of R6,25 per hectare per month was therefore used in the calculations for the entire period. The discount rate in the agricultural sector was discussed with several different people. It seemed that a rate of 12% was almost standard. The potential present value cost of resting the subject property to allow veld recovery was then calculated as follows:

$4087,2579 \times R6,25 = R25\ 545$  per month.

The present value of R25 545 per month for five years at a nominal interest rate of 12% pa = is R1 148 376.

In September 2003 an estimate of the cost of game fencing was obtained from Harrop-Allin, one of the leading fencing organisations. Mr York had 28,9km of 22 strand perimeter game fencing and 7,5km of internal 12 strand wildebeest/zebra fencing. Using the Harrop-Allin cost estimate per meter the price of this fencing worked out at ± R1 170 000, (far less than the usual sales premium paid for a game fenced farm).

The contributory value of the lodge and homestead was estimated as R1 500 000.

The sum of the present value of resting the grazing (R1 148 376) and the cost of fencing (R1 170 000) is R2 318 376 and including the improvements contribution (R1 500 000) adds up to R 3 818 376. In addition an allowance has to be made for water and other basic farming infrastructure the total would be in the vicinity of R5 million. However, these are just calculations of the possible price difference, not a market comparison between the price of an established game/hunting ranch with good veld and a very poor undeveloped farm without fences or farming infrastructure.

The best market related guide to the likely value difference would be to find a sale of a game farm with good veld and an overgrazed but cattle fenced farm, situated in the same economic/climate area, and sold in a reasonably similar time frame. There was such a case. The two properties to be compared were the game fenced Farm Abjaterskop 940 KP in extent 2046,3009 hectares and the adjoining overgrazed but cattle fenced farm consisting of Portions 2, 7 and 8 Droogedal 120 KP and the Farm Heimwehberg 121 KP in extent 2840,8105 hectares. These farms are situated west of the Madikwe directly across the main tarred road between Zeerust and Gaborone (see Exhibit 6.1, sales 14 and 15).

The farms in these two transactions are adjoining, reasonably similar in area, bought by companies of the same farming family (Engelzakis). Between them, the Engelzakis family not only have one of the largest cattle and game farm holdings in the area, but had been active in the market for many years, both as buyers and as sellers. These and their other sales and purchases were discussed with Mr Savos Engelzakis on several occasions during the past few years. He analyses each transaction in depth and always estimates the contributory value of the improvements. The two transactions were also discussed with Mr Haasbroek, the brother of the seller of Droogedal/Heimwehberg, and manager of the cattle farm that was in poor condition. Mr Haasbroek, an informed local farmer and member of the local conservation committee, estimated the carrying capacity of Droogedal/Heimwehberg as 15 hectare per LAU at the time of the transaction. So although the grazing was poor, this cattle fenced farm was better than Sebele when Mr York took occupation. Mr Smith, the seller of Abjaterskop, had been reducing bush encroachment and opening up the veld on his farm. He had also been sowing Blue Buffalo grass, so that at the time of transaction the veld on Abjaterskop was reasonably comparable to Sebele at the date of valuation.



Droogedal/Heimwehberg was purchased in November 1998 for R650 000 (R229 per ha). The contributory value of the very poor improvements was R25 000 and the basic cattle fenced poor grazing worked out as R220 per hectare. Abjaterskop was sold in January 2000 for R3 500 000 (R1 710 per hectare including game). The value of the game was agreed to as being worth R500 000. The improvements were taken to be R100 000, so the basic game fenced grazing worked out to R2 900 000 or R1 417 per ha. The basic land value difference between the poor cattle fenced farm and the adjoining good game fenced farm worked out as R1 197 per hectare (R1 417 less R220). Of course the difference between a game fenced and a completely unfenced grazing farm with an even lower carrying capacity could be expected to be even more. Using these transactions as a guide the indicated “before” and “after” basic land value difference for Sebele could reasonably be expected to be in the vicinity of R1 250 per ha.

The sale of the Remaining Extent of the Farm Vetboom 68 KP also had relevance as it was in a similar climate and bushveld zone as most of the subject property. This sale was discussed with the seller, the purchaser and the local area estate agent who told the valuer about this transaction. All said it was a normal open market transaction, sold at market value. The basic game fenced land value of this farm worked out at R1 570 per ha. The difference between the “before” and “after” land value of the subject property therefore should be quite a bit lower than that as it would still have all the other attributes of a property with integration potential. This was seen as a confirmation that a "before and after" price difference of R1 250 per hectare was realistic.

The difference between the “before” and “after” value on this basis therefore could be calculated as follows:

4087,2579 hectare @ R1 250 per hectare	R5 109 072
Improvements contribution (lodge and homestead)	<u>R1 500 000</u>
	<u>R6 609 072</u>

The grazing on the subject property when Mr York took occupation, was considerably worse than that of any of the listed sales, and in addition was unfenced and without electricity. The price of ± R6 500 per hectare paid in the most recently registered sales transaction (Portion 1 Nooitgedacht) was game fenced and included water rights and game, but excluded the homestead. This farm had been so heavily overgrazed that the purchaser,

Mr Lockwood, had not only provided alternate grazing for Mr Mitchell, but had chopped trees to cover large parts of the veld to assist the natural veld to recover. He was also going to catch and remove the game on the farm. In comparison, the subject property, with considerably worse grazing, no electricity, not game fenced, but better located for integration and with the additional benefit of hills and the Molatedi Dam could be similar to the price paid for Portion 1 Nooitgedacht in February, 2003. It was therefore concluded that if the farm, without the improvements made by Mr York and with the veld in the condition that it was when he took occupation, was placed on the open market, it would most likely change hands at R6 500 per ha. The other old improvements would not have any contributory value for a property to be incorporated into the Madikwe Big Five Game Reserve.

In a process of negotiation the asking price of an owner of such a property is likely to be higher, possibly R7 000 or more per hectare basic land value, which was unlikely to be paid by a realistic purchaser at the time. The purchaser would be likely to start considerably lower, possibly R6 000 or even less per hectare, which a realistic seller in turn would reject, even for such a degraded farm – the integration potential, dam, river and topography were still all there. Negotiating theory suggests that with two informed, realistic parties to a transaction with similar negotiating abilities, the final price arrived at is likely to be midway between the initial asking and offer prices, i.e. R6 500 per ha.

The calculation of a likely “before value” therefore is:

4087,2579 hectare @ R6 500 per hectare = R26 567 176, rounded off to R26 500 000.

On this basis the difference between the “before” and “after” value, the compensation for the improvement in value that could be attributed to Mr York was:

R33 000 000 less R26 500 000 = R6 500 000.

## **6.9 CONCLUSION**

By 2003 this was the way the leading legal advisors considered restitution valuations should be done—in the present. This valuation was initially opposed by the Department of

Land Affairs and a meeting to discuss the valuation was held at the Advocate's chambers was attended by the Chief Land Claims Commissioner and his departmental legal advisors, a representative of the State Attorney and the valuer.

At this meeting the valuation was dissected as Land Affairs had thought the derived compensation was too high. At one time during the meeting it was suggested that another valuer be appointed, but this did not happen and in time an offer was made to Mr York.

Originally Mr York thought the offer was too low, particularly as he considered that he had a moral right to Sebele, but after some time after the valuation report, which had been given to Mr York, and analysed by his legal team, the matter was settled.

This case demonstrates that formulaic approaches, such as the Gildenhuis formula, which were advocated before, are not necessary. It is feasible to conduct a historic valuation entirely using present market data. This approach also avoids the potential errors that may be introduced when past opinions on value forming attributes have to be interpreted and escalation factors have to be used to obtain present values.

## **CHAPTER 7**

### **CONCLUSION**

#### **7.1 INTRODUCTION**

This study set out to trace the changes in the evolution of thought in land restitution valuation in South Africa. The manner in which this has been done will be discussed chapter by chapter.

Conclusions will be drawn in the final section of this chapter.

#### **7.2 OVERVIEW OF THE STUDY**

##### **7.2.1 Chapter 1**

This chapter motivated the study and delineated its scope. As part of the background sketch the following matters were raised:

Land restitution is a world wide phenomenon and not confined to South Africa. Whereas previously conquerors took possession of the country, nowadays the rights of the original inhabitants are being recognised and at least parts of the land of which they were deprived is being returned to them.

Property is also being returned to people whose land was confiscated by the communist regimes in Eastern Europe, and those displaced as a result of ethnic conflicts in places such as Bosnia Herzegovina and Kosovo.

However for various reasons the land restitution process tends to be an emotional and controversial issue. The landless and formerly dispossessed complain that the restitution and redistribution of land to the landless is too slow, while others complain about its adverse effect on the agricultural economy of their countries.

## 7.2.2 Chapter 2

This chapter gave some examples of land restitution in other countries and how it is applied. It also shows that it is not only non whites who were deprived of their land by whites, but that dispossession and restitution also occurs between similar racial groups.

In Eastern Europe the downfall of communism led to the return of private ownership of property. However, the amount of land or financial compensation any individual could receive was limited. The objective was to prevent the re-emergence of large land owners.

Mostly the previous land owners in the former communist bloc were given land, but in some cases, such as Hungary, the previous land owners were given redeemable bonds which could be used to purchase property, or be sold on their stock exchange. In Hungary the amount of compensation was calculated according to a fertility standard called “gold crown points”. A regressive scale was applied, so that the more valuable the farm, the smaller the percentage of the value would be allowed. A maximum compensation was also set.

The property of owners who were forced to flee as a result of ethnic conflicts in places such as Bosnia Herzegovina and Kosovo were returned to them as were the properties of other ethnic groups who were evicted in Iraq as a result of Saddam Hussein’s Arabisation program. The international community were against the practice of “ethnic cleansing” and wanted the different ethnic groups to learn to live with each other.

However, in Canada and the United States, various First Nation and Native American tribes are being given limited self-government of the territory now returned to them. Critics of this type of land restitution aver that their governments are creating something similar to the “homelands” in the former of pre-democratic “Apartheid” South Africa. They feel that this type of partitioning is a serious form of racial discrimination. They believe the different ethnic groups should live together

as citizens of the same country with the same basic rights as the international community wanted for the citizens of Eastern European countries such as Bosnia.

Land reform in Guatemala and Hawaii was also discussed.

In Southern Africa brief examples were given of the land reform process in Namibia and Zimbabwe, South Africa's neighbours.

As far as could be determined, the land reform process encountered problems and controversy in all the countries in which land restitution and land reform has been instituted.

### **7.2.3 Chapter 3**

In the first part of this chapter the history of racial discrimination and the historical deprivation of property rights in South Africa were discussed, the Constitutional provisions and the legislation introduced to rectify the matter, and some of the problems encountered in the implementation process, including the pace of the restitution and land redistribution.

The Native Land Act of 1913 is widely considered to be the key legislation in the discrimination and dispossession of non-white property by the white minority in South Africa and was therefore used as the earliest date from which land claims would be recognised. However, the dispossession of the land of the indigenous people already began with the arrival of the Dutch in 1662. As the white settlers spread out through the country they progressively took land from the Khoi Khoi, the San and the black Africans.

After the Nationalist Party came into power in 1948 they introduced the policy of "Apartheid" and in 1950 passed the Group Areas Act in which most of South Africa was declared a White Group Area, then started the forcible removal of non-whites to their separate Group Areas, such as the ethnic "homelands". This was strongly opposed by the black liberation groups.

With the advent of universal suffrage in 1994 these “homelands” were abolished and the new South African Constitution made provision for either the restitution of land taken from blacks or for payment of the present value of realistic compensation for the properties taken from them.

Although there have been requests to move the earliest date from which land claims will be recognised the new democratic government are not prepared to change this date. They believe earlier indigenous land claims and counter claims would be almost impossible to unravel and could lead to destructive ethnic friction. Observers feel that moving the date back in time could result in an enormous mess. However, some, like the Khoi-San, have not yet given up trying to have their claims recognised.

The most important legislation governing the land restitution and redistribution were: Sections 25 and 36 of the Bill of Rights in the Constitution of the Republic of South Africa (Act 108 of 1996), Section 33 of the Restitution of Land Rights Act (Act 22 of 1994) and Sections 12(5) (a) to (h) of the Expropriation Act (Act 63 of 1975).

As valuers and officials of the government departments involved with restitution valuations were experiencing difficulty in applying the provisions of the relevant legislation the Minister of Agriculture and Land Affairs, set up a Committee to clarify the matter. They came up with a formula that became the standard for some years.

After problems were pointed out to the department, a revised formula was introduced. This formula was later also found to be incorrect and all restitution valuations now have to be done as at the date of valuation.

The Department of Land Affairs decided to appoint valuers themselves. Their approach was to call for tenders. This had the effect that those quoting for the work tended to undercut each other and therefore often cut corners instead of taking the time for a properly conducted market research. Some even value the properties at the farmer’s asking price.

As the Department of Land Affairs did not have staff able to assess the accuracy of the valuations they finally started appointing review appraisers. It was found that a large percentage of the valuations were above market value.

#### **7.2.4 Chapter 4**

This case study examined the valuation of the Remaining Extent of the Farm Kinde Estate 269 IN. Kinde Estate was formed from the Farms Doornbult 260 IN and Vergenoeg 258 IN which were expropriated from the black Cindi family in terms of racial legislation. The completely unimproved grazing only farm was subdivided and sold at subsidised prices and subsidised interest to selected white famers.

The heirs of the Cindi family submitted a land claim for the restitution of this property and the author was appointed to value the farm in terms of the so called “Gildenhuis Formula” designed by a committee appointed by the Minister of Land Affairs. In terms of this formula the amounts of the purchase price subsidy and the interest rate subsidies had to be taken into account as well as other subsidies granted to the farmer concerned.

In terms of the valuation brief, both an historical and a present time market valuation was required. The valuer estimated the difference in the original purchase price and the historical market value and escalated the amount into the present. He researched the purchase financing of farmers in the area and found that the standard financier was the Land Bank. Their mortgage rate, as changed from time to time, was compared with the interest charged to the farmer by the Department of Agriculture. The difference was escalated to the date of valuation. As the farming subsidies received were in terms of national agricultural policy, to achieve national agricultural goals, not to subsidise a particular farmer, the amounts were noted, but not deducted from the suggested compensation amount.

The escalation rate used was the interest free rate offered by the Post Office, which was higher than the average return on invested capital in the agricultural industry in the subject area. The present value of these benefits was deducted from the present market value of the farm to arrive at the suggested compensation.



The report was approved by the client, and the claimants. After some litigation the valuation was also accepted by the expropriated farmer.

### **7.2.5 Chapter 5**

This case study examined the valuation of Portion 1 of the Farm Schildpadnest 385 KQ. The Baphalane tribe, the black owners of this farm, were forcibly removed to another farm in a nearby black “homeland”. The Baphalane community claimed that they had not been adequately compensated for their farm and their improvements and in terms of the “equitable relief” clause were seeking financial compensation.

For several years the Department of Land Affairs had unsuccessfully been trying to settle this restitution claim. The Department, taking cognisance of the successful Kinde Estate valuation, approached the valuer to solve this problem. The assignment was to determine the present value of the historical undercompensation paid to the community at the time of dispossession.

An historical market research and a search of the National Archives was undertaken to establish the historical market value of the farm and to obtain details of the improvements on the property at the time of dispossession. The values placed on both the farm and these improvements and the amount paid to the community were traced.

It was established that the community were not adequately compensated for their land and improvements and these amounts were escalated from the date of dispossession to the date of valuation using the Consumer Price Index.

### **7.2.6 Chapter 6**

This case study examined the valuation of the Farm Sebele 931 KP. This farm was originally leased to Mr B York by the Bophuthatswana government with an option to buy. As the lessee intended to purchase this farm he improved it considerably during the period of his lease. He had already game fenced this farm before the

establishment of the adjoining big five Madikwe Game Reserve. In addition he upgraded the old main dwelling, brought electricity to the farm, erected internal camps, drilled boreholes and built an internal water supply for cattle, game camps and the architect designed game lodge. He also rested and dramatically improved the grazing (grass cover), He later stopped cattle farming, removed the internal fences and introduced other game. He ended up with a successful, fully exempt, game farm. However, in spite of several attempts to purchase the farm in terms of the lease agreement, the Bophuthatswana government refused to sell the farm to Mr York.

In 2003, several years after this homeland was re-incorporated into South Africa, a land claim on this farm was approved. The lessee therefore had to be compensated for the improvements he had made during the period of his occupation.

In accordance with the latest legal opinion on how restitution compensation valuations now had to be done the valuer was instructed to undertake two valuations. The one as the farm was on date of valuation (the “After” valuation) and the other in the condition it was at the date of occupation by the lessee (the “Before” valuation). In both cases the valuations were to include the benefit of the potential to be incorporated into the Madikwe Game Reserve and features such as the Molatedi Dam, the Marico River and the attractive topographical features such as the Dwarsberge range of hills in the southern part of the property and the Lotteringskop hills in the northern section.

Both the “Before” and “After” valuations were to be done in the present, i.e September, 2003. This removed the problems associated with historical valuations and escalations. The lessee’s interest in the farm was to be calculated as the difference between the farm as it was when he took occupation and the well developed game farm in 2003,

The “After” valuation was direct as there were several reasonably comparable sales. As there was no directly comparable sale of an unfenced farm without electricity and water infrastructure, and extremely poor grazing, some simulation and adjustment of the most comparable sale had to be used in the “Before” valuation.

The valuations were accepted by both the state's and the lessee's legal teams and the matter was settled.

### 7.3 CONCLUSION

During the course of the research it became clear that in the Southern African region, poverty is equated with landlessness. However, looking at all the people in the world, with the different societies and political frameworks, it is a fact that a large percentage of the world's population are not landowners. Millions live in apartments or houses they don't own. Some of these dwellings are owned by private investors, some by the authorities and some by large organisations such as mining companies. Some of these dwelling units are rented, some subsidised and others allocated to the tenants without charge as a part of their employment benefits, or as part of a social scheme.

Semantics may be a large part of land desire as in many languages, e.g. Afrikaans, the same word is used for both land and country. In South Africa, one of the reasons for the initial antagonism between the present government and the (mostly black) state officials tasked with land distribution and the white farmers, may have been that the Afrikaner uses the same word for farmer (Boer) as they do for their tribe and culture. As most of the people in our country grew up in the Apartheid era, the word "Boer" tended to be equated with the Afrikaner (Boer) controlled government and its racist policies, leading to the liberation slogan of "kill the farmer, kill the Boer". Sadly, an unacceptable percentage of farmers have been killed in the past decade.

As stated in several articles, the white farmers feel victimised. The Land Reform initiative affects them most. They have been accused of resisting the changes, and it has even been said that the endemic farm murders are (at least partly) as a result of their intransigence. The farmers also feel that they are not being treated fairly when their farms are being purchased for restitution purposes, and that they cannot replace their farms with the money they receive in exchange. They believe it is wrong that only they should bear the brunt of paying for the past injustices.

However, compared not only to past conquests and land confiscation, but to property owners in the developed European countries, South African land owners are relatively well treated. In Eastern Europe most of the great estates were broken up before the advent of communism, and those owners were seldom paid market value. In the restitution process after the downfall of communism, only the smaller of the former landowners received full compensation. The larger landowners had to be content with far smaller farms.

In the early stages of the implementation of land restitution there was a lot of friction between the (white) landowners and the (black) landless claimants. Mistakes were made, particularly in handing over productive farms to some who were unable and/or unwilling to correctly manage and work the properties they were given. Initially government tended to cover up these failures, but in more recent times are open about the problem and are taking action to correct it.

In 2003, when he was Chief Land Claims Commissioner, Mr Tozi Gwana spoke about the negative attitude of the white farmers, but his tone has changed. Barron reported in the Sunday Times of 11 November, 2007 that Gwana now has good relations with white agricultural organisations. Gwana has now also acknowledged that too large a percentage of the land claim beneficiaries have not been able to farm successfully and that more attention should be given to training and support. He does not want South Africa to go the way of Zimbabwe, whose previously productive agricultural sector is now in a shambles.

However, it should be borne in mind that in many other countries land for redistribution purposes was forcibly taken or acquired at less than the actual market value. For example in Poland the owners were only paid 50% of the value. Throughout much of the past century large landowners have not been viewed in a favourable light by most governments or the majority of their citizens. It should therefore not be considered surprising when South African government officials want to acquire farms for less than market value. Because of the frequent calls for the "willing buyer/willing seller" basis to be dropped, one can expect some changes when the draft of the new Expropriation Act comes before Parliament, expected to be sometime during 2008.

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