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## Urban land restitution in Cape Town: demanding the return of land rights in Constantia and Kensington/Ndabeni

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**Abstract.** One of the hallmark policies implemented post-apartheid, the Restitution of Land Rights Act 22 of 1994, is a rights-based program aimed at addressing the loss of land resulting from past racially discriminatory laws or practices. The aim of this research was to identify what are the factors that determine the different outcomes of the restitution process when claimants are demanding the return of land rights and to highlight the challenges regarding the implementation of this land restitution policy. Focusing on two specific yet contrasting areas in Cape Town, Constantia and Kensington, it was determined that due to factors pertaining to the lands in question, the neighborhood surrounding the lands, the claimants, as well as the organization, function, and performance of different public entities, the policy has managed to fulfill restorative justice, but has yet to fulfill its ultimate goal of returning land rights to the claimants and undoing the injustices of the apartheid regime.

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## 1. Introduction

It is well documented that forced removals in support of racial segregation have caused enormous suffering and hardship in South Africa (Buford, Van der Merwe, 2004; Maharaj, 2008; Walker, 2005) and that “no settlement of land issues can be reached without addressing such historical injustices” (Department of Land Affairs -DLA 1997). Reparations are defined as a “legal remedy from a wrongdoer to a victim, but without the constraints of identity between the wrongdoer and the payer, or between the victim and the beneficiary. In other words, the person or people paying reparations do not have to be the people who committed the wrong, nor do the people benefiting from the restitution have to be the people who were themselves harmed” (Tucker-Mohl, 2005: 3-4). A common application of reparations is a transitional justice situation where restitution, as a type of reparation, refers to restoring a property right that has been diminished or taken to its original status, or providing a form of compensation if this is not possible. Typically there are three options dealing with injustice of prior expropriation or inequalities in land distribution: restitution, redistribution and tenure reform (Tucker-Mohl, 2005), and in the case of South Africa, all three formed part of the land reform process in the post-apartheid era. The redistribution of land to correct for past injustices has long been seen as a “viable path to a materially and symbolically equitable future for historically displaced and dislocated communities” (Hargovan, 2008: 881).

The 1913 Native Land Act, which prohibited black South Africans from purchasing or leasing land outside the reserves is considered one of the “original sins” of apartheid (Mazibuko, 2013). The history of loss of land rights for majority of South Africans was institutionalized after the passing of the land act (Walker, 2014). The act limited the rights of the native Africans to buy, sell, and lease

land to specified areas, amounting to a mere 7.3% of the territory. The total amount of such areas, called “homelands” or “Bantustans,” was increased in 1936 to 13% through the Bantu Trust and Land Act. Further legislation was passed in 1950 (the so-called Group Areas Act), which segregated urban areas (particularly residential areas) and “prompted large-scale removals of black residents to townships on the urban periphery or in faraway homelands” (Hall, 2009: 2). This forced the dispossessed residents to commute long distances in order to enter the cities, which further exacerbated their exclusion. It has been recorded that between 1960 and 1983 “alone about 3.5 million people were forcibly removed from their land and homes” (Platzy and Walker 1985 cited in Hall 2009: 2). If the number of removals is expanded to include the betterment and homeland consolidation figures, the number of dispossessed increases to 7.5 million. These figures show the extent of the exclusion of those classified as blacks and colored people, and the extent of the segregation espoused by the apartheid regime. Due to the implementation of the Group Areas Act, Cape Town’s social geography was completely redrawn by apartheid. Before 1950 Cape Town was one of the most integrated cities in South Africa. However, after a dispossession process that lasted for more than forty years, Cape Town has transformed into one of the most segregated cities in the country. In being the majority non-white residents in the city the social cost was particularly strong with colored people. They were forced to move from different areas in the city, such as District Six, Mowbray, Hout Bay, Constantia and Kensington (Western, 1996).

In the paper we investigate the factors that determine the different outcomes of the restitution process when claimants are demanding the return of land rights with case studies in Cape Town. In the process we identify some of the main institutional strengths and weaknesses of the Western Cape

CRLR and its coordination with the government agencies at the municipal level, we explore the potential correlation between the characteristics of the claimants and the land requested with the outcomes related to the process and status of their claims; the different costs - time and economic resources - of a restoration process and the role that they play in the motivation of the claimants to lodge their claims; if during the process the claimants settle with another method of compensation different from that with which they originally lodged; and to analyze to what extent this policy accomplishes its objectives in terms of addressing exclusion and social justice in people dispossessed of their land. Constantia and Kensington (an area where Ndabeni area claimants were offered alternative land.) were selected as the two case study areas and a total of 25 interviews were conducted with keystakeholders such as the claimants, trustee members, government officials, lawyers and academics. In the case study almost all lodged claims demand the return of original land rights (except for one in which financial compensation is demanded) and all claims have yet to be settled. In the case of the Ndabeni claim, the analysis is based on the interview with one ex-trustee who also is a beneficiary. His contributions are valuable given his former function and knowledge about the process, and also given the difficulty in contacting more claimants

## 2. Up north: restitution in transitioning countries

According to Tucker-Mohl (2005: 4-5) there are five potential factors explaining why transitioning countries might produce different restitution systems: “(1) Strength of individual property rights against the state prior to the regime that conducted the expropriations; (2) Degree of injustice present in land expropriation; (3) Willingness of society to recognize collective moral obligation; (4) Internal constraints on new government; and (5) External constraints on new government”. Restitution of land for Fay and James (2010: 3) is concerned with meaningful ties between people and places (i.e. spatial) but also is an extended social process through which property rights are contested and established.

They depict restitution as process, internationally as having four basic formative characteristic moments. First, is through conquest, treaty, expropriation, eviction, sale, or contested transactions - i.e. dispossession itself. Secondly, the interim period after dispossession and relates to one's own nostalgia (Dhupelia-Mesthrie, 2006), distant ancestral historic connection to the place to the “*new owners who may claim they bought land in a morally-neutral transaction and argue that restitution will simply create new injustices*” (Fay, James, 2010:3). Thirdly, the creation of a restitution policy where the conditions for restitution is possible, “*both the disjuncture experienced as a result of the original dispossession and the emergence of a new social order may facilitate their plausibility. Societies emerging after the end of the Cold War, such as those after apartheid and socialism, are the most obvious examples*” (Fay, James, 2010: 4). In such restitution policies categories of potential claimants are necessary. In Eastern Europe this meant asking “which precommunist property order should restitution recreate? In South Africa, the 1913 cutoff date and the requirement of evident racial discrimination set limits. Creating criteria of legitimacy also creates significant exclusions: by defining those who are not eligible, policy may define those who could be vulnerable under restitution. Regardless of the scope of policies, gaps may exist between restitution in principle and in practice. In the case of land claims in New York State, USA, and Western Ontario, Canada, the gap is evident in the lengthy negotiations between the federal government and white settler citizens who are reluctant to allow an Indian reservation in their “backyard” (Fay, James, 2010 : 4). Fourthly, is that of making particular land claims. Restitution policies “define eligible categories, but actual land claims typically entail another round of boundary-drawing: concrete groups of people constitute themselves or are constituted as claimants through the brokerage of non-governmental organisations (NGOs), activists, and benevolent – if paternalistic – state agencies” (Fay, James, 2010: 4).

Since the fall of the Berlin wall transitioning societies have been grappling with land reform processes. A new post-socialist city (Kubeš, 2013; Stanilov, 2007; Lavigne, 2000, Sailer-Fliege, 1999; Andrusz et al., 1996; Ghanbari-Parsa, Moatazed-Keivani, 1999) is emerging and private ownership through resti-

tution processes is key to this transformation. Kozminski's (1997) research on restitution of property confiscated by the communist regimes in Central and Eastern Europe examined the problems experienced by these new democratic governments such as practical aspects related to investors' confidence, moral, symbolic, and emotional problems. The restitution process has resulted in the creation of land tax laws, previously not known in countries such as Estonia (Ott, 1999). In the study of Hanley and Treiman (2004) it is seen that the transformation from socialism substantially restored pre-communist property relations in the five Eastern European countries of Bulgaria, the Czech Republic, Hungary, Poland, and Slovakia. They have found that "continuity between the pre- and post-communist period with respect to property ownership can be attributed mainly to property holdings either remaining intact throughout the communist period or to the restitution of property to the original owners, or their heirs in the post-communist period" (Hanley, Treiman, 2004). In the former People's Republic of Romania a large number of privately owned houses were nationalized (confiscated) during socialist rule. In Chelcea's (2003: 714) study he explains how in 1950, the state appropriated both leased and family homes that were considered to have too much domestic space and the "inhabitants of confiscated houses became tenants instead of owners. Tenants were made to live with the former owners in such expropriated domestic space. With the collapse of state socialism in 1989, former owners and their descendants began seeking to regain the property rights for these confiscated houses. In a limited number of cases they succeeded, although the majority of houses had been sold by the state to the sitting tenants at very low prices". Restitution of a different kind relates to 336 towns (75%) towns in Poland that have under Russian occupation been deprived of their urban status. In the Czech Republic, after 40 years of Communist rule with state ownership of land and most housing, the urban restitution process to restore private ownership and recreating markets is being hampered by a "paucity of land records and price information, absence of mortgage funds, rent controls, and continued public ownership" (Reiner, Strong, 1995: 200). According to Miller (2003) international scholarship has generally been laudatory of Bulgaria's land restitution

efforts, painting them as part of an overall success story but a real analysis of Bulgaria's so-called 'success story', has been sorely lacking. Miller (2003: 75) has found that in "many ways the approbation Bulgaria has received from the international community for its restitution efforts is more a reflection of the Bulgarian government's willingness to confront the problem than its ability to effectively deal with it". The restitution of private property has been most extensive in Germany and most controversial in Poland. Restitution has resulted in winners and losers, with some claimants having long-lost property returned, but too often at the cost of residents losing their homes. However, an important benefit, notably in Germany's New Bundesländer, has been the introduction of much-needed new investment into the urban fabric of towns and cities, although the landscape impacts elsewhere have been less significant (Blacksell, Born, 2002). Nevertheless, throughout Central and Eastern Europe restitution policies have helped governments to come to terms with a difficult aspect of the past and move forward. The restitution of town (urban) status is another case. The loss of urban status during communist rule is further emphasized by the fact that the lack of town privileges in Poland degrades a settlement to rural status, which – in this particular context – may be disadvantageous in terms of prestige, economic growth, community cohesion and preservation of cultural heritage (Dymitrow, 2013). Although 40% of the reform towns have by 2012 been restituted, recovery of urban status has been hampered by an array of obstacles, which in turn could be tantamount to the undermining of the meaning and the purpose of the concept of urbanity (Dymitrow, 2012).

### 3. Down south: The South African case

In a public opinion study conducted in 2009 the political scientist James Gibson surveyed 3,700 South Africans and found that two of every three blacks agreed that "land must be returned to blacks in South Africa, no matter what the consequences are for the current owners and for political stability in the country" (Atuahene 2011a: 122-123). Even though blacks compose only a part of the dispos-

sessed, this alarming finding resonates across many of the unfairly dispossessed (Atuahene 2011a: 122–123). The legislation concerning land reform (tenure reform, redistribution and restitution) is exceptionally complex. However, the restitution leg of reform has been guided by only one act (the Restitution of Land Rights Act, 1994 (Act 22 of 1994)), and the two amendments thereof in 2003 and 2014. The latter extended the date of lodging a claim for restitution to 18 June 2018. According to this act, those dispossessed, or their descendants, are eligible to submit claims against the state requesting one of the following methods of compensation: restoration of their original right in land, granting of an appropriate right in alternative state-owned land; or payment of financial compensation. The Act also established two main institutions to implement the restitution program: the Commission on the Restitution of Land Rights (CRLR) and its regional offices, which handles the claims process end-to-end, and the Land Claims Court (LCC), in charge of deciding any issues arising from disputes during the process. In addition to these two institutions there are other associated public agencies in the different levels of the administration that participate in the implementation of the program either as secondary agencies involved in a specific step in the process or as public agencies that own land. After the claim is lodged and registered, the CRLR will screen and determine if the claim could be classified as valid, and if so, will continue to the negotiation phase. In this stage the CRLR negotiates for the original land, if not available, it offers alternative land or a standardized amount of financial compensation. If the negotiation process is successful, the agreement is signed and the settlement is implemented. The program has been adjusted during the last 20 years, in order to make it faster and improve institutional coordination. Some of the main changes are related with the competencies and organization of the CRLR and associated agencies, the way to determine the amount of financial compensation and has become a more administrative (or a non-judicial) process. In relation with the reopening of the process as per the 2014 amendment to the act, academics have estimated the additional number of claims to be at 350 000 to 400 000. Will the CRLR have the capacity to handle these claims in the future since they have not had all the tools to resolve these in the past?

The bulk of land reform and restitution research in post-apartheid South Africa (and elsewhere – Kozminski 1997; Moseley, McCuskert, 2010) has been focused on the rural context. Surprisingly, the scope of research within an urban context remains relatively scant (see Battersby 2012; Cavanaugh, 2013; Dhupelia-Mesthrie, 2006; Parnell, Beavon, 1996; Thompson, 1999; Beyers, 2007, 2013; Maqasho, Bank, 2001; Dewar, 2001; Carruthers, 2000). This is attributed to the fact that “urban land restitution has been criticised for contributing only marginally to social and economic development and transformation. This is because of the perception, amongst other things, that whereas community claims predominate in rural areas, urban cases consist of individual claimants and are therefore resource intensive. Urban claims are also typically settled through monetary compensation, which has little tangible effect on development” (Beyers, 2012: 827). Walker (2006: 81) rightly commented that in the academic literature, “urban restitution is most commonly analysed in the niche areas of heritage and identity studies, which operate somewhat apart from-parallel to-research on policy development and the political economy of land and housing reform” where restitution has been seen as a not significant component of analysis. She further claims that a detailed analysis of urban restitution claims would be revealing the different political and social dynamics at work in urban reconstruction. Fay and James (2010: 9) argue that across the world “the work of restitution remains unfinished, a reminder of histories of colonial and socialist dispossession”. In Canada in 2003, 13 ‘comprehensive’ land claims had been settled (encompassing about 40 percent of Canadian territory) while more than 70 remained under negotiation, alongside the settlement of 251 “specific” claims out of 1 185 submission. New Zealand’s Waitangi Tribunal had received 779 claims by 1999, and planned to entertain new claims through 201... Romania is perhaps the most extreme example. Following Law 18 of 1991, providing for liquidation of collective farms and restitution to prior owners, there were about 6 200 000 claims”. In South Africa, an 18-year timeframe was set out for restitution in the 1997 White Paper on South African Land Policy, which initially gave claimants three years to lodge claims; however, the final deadline was later extended to 31 December 1998 (Hall,

2009). Five years were proposed for the settlement of claims, and an additional ten years for the implementation of all settlement agreements and court orders (Hall, 2009). A total of 79 696 claims were lodged by the extended deadline of 1998 (revised upwards from 63 455 in 2007). From 1995 to 1999 the CRLR had resolved just 41 claims. As a result, there was mounting pressure to settle claims rapidly and the CRLR's approach to financial compensation was standardized, leading to mass offers of financial compensation that did not require the valuation of each claim (Hall, 2009). By 2013 the Land Claims Commission claims that a total of 77610 restitution claims have been settled to date. A total of 3.07 million hectares acquired at a cost of R17 billion; and financial compensation in the amount of R8 billion has been awarded to 1.8 million beneficiaries coming from 371 140 families – of which 138 456 are female headed families. The total cost of the restitution programme by the end of 2013 was R29.3 billion (Department of Rural Development and Land Reform, 2013).

Considering the number of outstanding restitution claims, the challenges faced by the implementation of restitution include onerous information requirements, duplication and confusion of institutional roles, the nature of how claims are settled, legal constraints (for example the process of acquiring land on a willing-seller basis from current owners slows down land restoration cases and increases the cost of the process), and group and communal claims, which are more complex claims to settle (Du Plessis, 2004). According to Maphoto (2012), these challenges include conflict amongst beneficiaries, claims made on unsurveyed or invaded state land, claims made on occupied communal land, claims made on state land that is being leased on a long-term basis, and claims made on state-owned entities, where the municipalities demand compensation valued at market value for the land. On the other hand, however, it could equally be assumed that some may have been “forced” to accept financial compensation due to various reasons, including problems in the land restoration process that has resulted in long delays and disillusioned claimants - with the majority of the people who had opted for land restitution since 1994 having yet to receive their land serving as proof (Atuahene 2011a; Bohlin, 2004). Some of these problems have included:

**Willing Buyer, Willing Seller principle:** The Constitution affirms the property rights of both owners and the dispossessed; however, when claimants wish to return to their land and current owners refuse to sell the latter has trumped historical claims essentially having an effective veto on land restoration (Hall, 2009).

**Land Negotiation and Valuation :** Landowners challenging the validity of claims or asking exorbitant land prices has caused delays. The purchase of land by foreigners, particularly in the Western Cape, has contributed to increased land prices, resulting in a serious distortion of the land market resulting in more money spent than necessary by the CRLR (Pepeteka, 2013).

**Budgetary Constraints :** In 2010 the CRLR placed a moratorium on purchasing land claimed under the restitution program because it had run out of money to honor sales agreements it had already entered into with landowners. The commission requested R5.3bn from the South African Treasury, partly to honor outstanding commitments to landowners, but it was allocated only R1.9bn causing some owners to sue the commission for failing to honor its sales agreements (Atuahene, 2011b).

**Institutional Constraints :** Under staffing in the CRLR, coupled with high staff turnover, has affected the efficiency of processing claims. Most positions within the commission were contract-based until the end of 2005, which led to a rapid increase in staff turnover until this date. The conversion from contract to permanent employment has not sufficiently addressed the problem of staff turnover (Pepeteka 2013 : 6).

Another trend particularly relevant in Cape Town is the low amount of the money given as financial compensation. According to the Restitution Policy Guidelines on Standard Settlement Offer issued by the CRLR on December 2009 (the Standard Settlement Offer Policy was developed in 2000 to facilitate negotiation and speed the settlement of a large number of claims. The method to calculate the amount has been adjusted a couple of times. In fact, one of the officers of the CRLR mentioned that they decided recently not to use this type of approach anymore), the Western Cape offers a compensation of R40 000 (€3000) for urban claims (CRLR, 2009). This amount of money is overwhelming low compared with the value of

the land in some areas of the City, especially in the areas under study in the present paper.

#### 4. The case for Constantia and Kensington/Ndabeni

In our case study we focussed on two contrasting areas. First, Constantia was chosen because (i) it is a sought after valuable suburban area with low density. These parcels of land, owned by the very-high income class are generally large and valuable, priced up to R80 million (SEEFF 2012); (ii) the majority of the landowners are white and the land claimants are demanding for land in the area are mostly colored; (iii) the majority of the land claims filed in Constantia have been for land restoration and not financial compensation; and (iv) as of the end of 2013, 98 claims remained pending (with a little under 80 waiting to be resettled in Constantia), 20 have been rejected and 38 claims have been settled - The latest settled claim awarding an 8.9ha piece of land to an attorney who went to the Land Claims Court for clarification after being initially awarded only 2.6ha (Koyana, 2013). Our second case is Kensington/Ndabeni, chosen because (i) it is a multiple land use (residential-commercial) landscape with a very high density. The value of the land is considerably lower than in Constantia and the need for housing in the area is prominent; (ii) Kensington is a more socio-economic diverse area, the current residents belong to the middle class and they are generally composed of colored people; (iii) land claimants from Ndabeni are mostly black; (iv) Ndabeni claims have been settled with alternative land in the Kensington area; and (v) the land in the Kensington area has been already transferred, but to date, no claimant has returned to the land and the land has not been developed yet.

According to the information gathered in the field 11 main factors were identified that determine the different outcomes of the restitution process when claimants are demanding the return of land rights. These interrelated and overlapping factors have different impacts in the two areas under review making it difficult to establish an order of importance for these factors. For the purposes of this paper, and to develop a comparison between

the claims in Constantia and Ndabeni, the factors are presented in four groups: (1) Land, (2) Claimants, (3) Neighbours, and (4) Administrative.

##### 4.1. Land

After a land claim is gazetted and verified by the CRLR it enters the restoration step of the lands claims settlement process. The CRLR then determines if the original dispossessed land is feasible to restore, if not, alternative land is identified. However, the different characteristics of the land, including the current state of the land, ownership and value of the land, influence the restitution process when claimants are seeking the return of land rights which in turn determine the various outcomes. When the current state of the original land is vacant the CRLR notifies the landowner of their interest in the land and may lead into a negotiation stage. The best-case scenario for a claimant in getting their original land returned is when the land is vacant and owned by a public entity. This was illustrated in Constantia this past year. The provincial Department of Public Works and Transport (DPWT) transferred a 2-hectare land site back to one of the families in Constantia, the original owners from 40 years before. However, on the other hand, in the Ndabeni case the original land is already developed and the CRLR has offered alternative land. A majority of the cases in Constantia and Ndabeni have played out like the latter scenario where vacant original land is not available because often the land is already developed with roads, highways and buildings. When original land is not available the CRLR will try to identify alternative land. Yet, where the two areas under study differ, alternative vacant land is extremely limited in Constantia (or similar-valued land in another area) which has caused the process to prolong, and in many cases, reach a point where the CRLR offers financial compensation as no short-term, feasible solution is visible. In Ndabeni, alternative land is available and is often similar to the original land.

The current ownership of the original land plays a considerable role in the different outcomes of the process. When the original land is privately owned the CRLR makes contact with the owner and asks if they are willing to sell. When and only if the owner is willing the negotiation process begins. In the

case of an unwilling seller, an officer from the CRLR states “...that’s it...we cannot start to talk about price if they don’t want to sell. This is a constitutional right (so) we cannot force them.” Only on rare occasions has land been expropriated but never in Western Cape. After the claimant is notified by the CRLR of an unwilling seller and if they are still interested in land the CRLR starts its search for alternative land. Once alternative land is identified and presented to claimants, and if they accept, negotiation begins. If the alternative land is privately owned the process is “willing buyer, willing seller” and according to the CRLR “in general the owner says no.” On the other hand, if the original land is publically owned the CRLR starts negotiation with different public entities, which include the provincial DPWT and appropriate municipal agencies (the CRLR does not own any land). When its provincial restoration land is transferred for free but if its alternative, they sell it to the CRLR at the nominal price. It is the same for city-owned land: free for restoration but alternative land is sold at the market value. To conclude, the “willing buyer, willing seller” principal and the difficulties to use expropriation as a tool to recover the land, are the biggest obstacles to restore the land to the people that were dispossessed. Since private owners have the right to decide if they want to sell the land for restoration purposes, in most of the cases the CRLR cannot recuperate the original land back. As a consequence, the CRLR offers alternative methods of compensation, such as financial compensation or alternative land.

The amount of money offered for financial compensation is low in nominal terms (Battersby 2012; Bohlin, 2004), compared to the value of the land - “peanuts” as the interviewees described them. It is not able to compensate for what they have lost regarding the land and the opportunity cost in real terms. That’s why the trend for financial compensation is an unexpected outcome of the process besides the other factors. According to one of the claimants interviewed, the “average” value of a property in Constantia is around R30-40 million (€2.2 - 3.2 million). The sense among the claimants interviewed is that they are holding out for restoration due to the high value of the land, if not available, for similar-valued land. Due to the high value, many of the Constantia claimants have not settled for alternative land nor financial compensation be-

cause the values of alternative land are often too low and offers compensation have been less than R50 000 (€3 500) - nominal to the actual value of the original land. A farm landowner claimant stated that alternative land had been offered in Lotus River, an area that can be described as a low-economic development area. Thus, with less than ideal alternative land locations and the overwhelmingly low-value of alternative land and financial compensation, coupled with the high-value of land in Constantia, many claimants are continuing to demand for restoration or similar-valued land. In Ndabeni when original land is not available the alternative land that is available are similar in value to the original land - enabling the CRLR to identify and transfer land comparatively quicker in Kensington/Ndabeni than in Constantia.

Since around 2007 the CRLR began to place less emphasis on financial compensation and favored land transfer, “partly because its dominant institutional belief was that, overall, financial compensation had absolutely no long-term economic benefits for recipients” according to an official. The official in the Western Cape regional office stated that “financial compensation is not having an effect...they don’t know what to do with the money”. Also, the CRLR has made financial awards intentionally small to discourage claimants from choosing financial compensation. A deputy director at the CRLR said, “We need to give low amounts, so people choose land. I think we should be able to force claimants to choose land.” Moreover, the director general stated by official policy, “financial compensation is less in value than land, and this is done to discourage people from taking financial compensation...” Despite the dispossessed favoring land restoration and the CRLR promoting it, a great majority of claimants have chosen to settle with financial compensation since the land restitution process began in 1995 (Atuahene, 2011b).

#### 4.2. Claimants

The research aimed to explore if a claimant’s socio-economic profile was affecting the decision to continue with the restoration process and if it was common that low-income levels moved people to settle with financial compensation. This hypothesis



was based on the possible costs associated with the restitution process. The information collected during the field research did not show evidence that confirmed this first hypothesis. Even though the claimants in the Ndabeni/Kensington case are of a different socio-economic status from the one of the claimants in Constantia, in both areas the majority of the claimants are looking for the original land or for an alternative one (when restoration is not feasible). In fact, claimant's interviews showed that other factors are influencing their decisions, in particular the expected value of the land they will receive and the possibility to develop the land and receive a greater profit compared to financial compensation. This could be illustrated with one of the cases in Constantia where the claimant expressed that, even though he was unemployed and the CRLR offered him financial compensation a couple of times, he rejected these and aims to obtain farming rights on alternative land that is as profitable as the one that he had before. Among the claimants interviewed in Constantia, only one is seeking financial compensation simply because the long time it takes to get the land back and the way Constantia has been developed. From his point of view, the neighborhood has changed and he is not interested in going back to the area. However, he did not express that his economical situation was a main factor in asking for this type of compensation. Although there were no findings about claimant's socio-economic status, it was possible to identify other claimants' characteristics that were determining the different outcomes on the restitution process, such as: type of right in land, source of representation and the claimant condition of original owner or descendant of the original owner.

The land restitution program was designed to protect a wide variety of rights in land, including ownership and tenure (Walker, 2008). According to a government official, there are four types of claimants in Constantia: (i) claimants that owned farms; (ii) farmers who leased land from owners; (iii) owners who had small cottages, and lived in them; and (iv) tenants that leased from owners, and lived in the area. This classification does not apply to Ndabeni because this area was principally urban, in that sense in this area there are only two main categories: tenures and owners. In the case of tenures, it is relevant to divide between farmers and lessees.

Farmers, tend to seek arable land with the objective to farm the land in a profitable way. On the other hand, lessees tend to settle with financial compensation because landowners have priority to get alternative land. As a consequence, they would have to wait even more than landowners to get their right in land back, so they prefer to settle with financial compensation from the beginning.

Two different forms of representation were identified: trusts and lawyers. Also, it is possible for a claimant to be part of the process without the intervention of an intermediary. In both areas, trusts placed an important roll in the process. They group claimants around a common objective, provide assistance and lead the negotiation process with the different actors involved. In terms of the type of method of compensation, trusts place a major role in encouraging people to continue with the objective of getting original or alternative land. In spite of the contributions, our fieldwork also showed the difficulties and risks attached to this source of representation. First, it could create spaces where personal interest of the members of the trust can affect the common interest that is behind this form of organization. According to information from a claimant, there have been scandals and complaints of corruption in these organizations, especially in the Ndabeni claim. This has led to a proliferation of new different trustees created to represent the interests of the Ndabeni beneficiaries. The lack of coordination and unanimity between the new trustees has led to a bottleneck in the negotiation process with the developers. In the words of one former trustee *"our greatest problem is that the current trustees are also inexperienced, and they don't want to come to play. We've met with developers, but they don't want to sign, because they have their own internal fights."* At the moment this problem has not been solved, the internal fight persists, and the land has neither been developed nor distributed to the beneficiaries. The trusts in Constantia do not have the same issues in terms of internal coordination. However, officers in the CRLR stated that the *"representatives of the trust are not really interested in claimants' benefit."* According to the officers, there is a connection between the trust and a specific developer and this is affecting the settlement process in the area. To summarize, in both areas, trusts have had an important effect in supporting claimants to ask and

settle with land. However, trust representation has also affected the process in a negative way, slowing it down and, in some cases blocking it.

Since the dispossession occurred in the first half of the 20<sup>th</sup> century and the restitution process has taken a long time, it is common to find claimants that did not experience the dispossession directly. In these cases, claimants are descendants of the original owners of the land claimed. The research showed that claimants that experienced directly the dispossession process tend to be more interested in seeking the original land back and are more willing to keep the land if they are able to have it back. In particular, some of these cases were found in Constantia. On the contrary, descendants tend to see the land as a source of profit, like in most of the cases in the Ndabeni/Kensington area.

#### 4.3. Neighbours

Residents in Constantia can be characterized as highly educated, well resourced and a demographic makeup that is largely white. However, in Kensington/ Ndabeni colored residents makeup a larger part of the population than it does in Constantia and it is largely working class. These different characteristics of current residents have been playing an influential in affecting the outcomes in Constantia but no so much in Kensington/Ndabeni.

Many of the Constantia claimants interviewed expressed that if they were granted land in Constantia they would not go back because they do not feel accepted in the area. But due to the high value of the land Constantia claimants have continued for restoration or alternative land. Constantia residents have opposed numerous development proposals on Constantia land earmarked for claimants. One of the reasons Constantia residents have expressed concern in building high-density, “gap and affordable housing” is that such developments would bring in crime. However, one resident during a Constantia public participation meeting pointed out integration was not an issue, as people of “all different hues” were in Constantia. Moreover, according to an officer from the CRLR, “*They (owners) don't feel that they (claimants) would be comfortable in the area. They (owners) don't want to change the set up. It is in the white peoples interest to keep things the way they are.*”

The “Firgrove” site (9.5 hectares) in Constantia has already been determined by the owner, the provincial DPWT, to be transferred to the claimants. However, before the transfer is made certain conditions have to be met through a development proposal agreed by all parties. A separate Land Steering Committee (LSG), composed of resident owners living in the surrounding area, was formed to make sure the development will blend well into the area. The LSG was formerly led by the current councilor of Constantia's sub-council. However, the sub-council states there is no direct link with the LSG and the sub-council. According to the Constantia Trust proposals have been made by both the Constantia Trust's developers and by the LSG's recommended developers, but no proposal has yet to be agreed upon. What makes Constantia's case different from the Ndabeni case are the conditions that have been attached to the “Firgrove” transfer by the DPWT but not in other cases such as the Ndabeni case. One may reasonably suspect the involvement of the LSG and the sub-council as being influential in the transfer process. Interviews seeking clarification from the DPWT was not feasible due to time constraints.

#### 4.4. Administrative factors

The last type of factors affecting the land restitution process is related to the organization, function, and performance of the different public entities involved in the process. The research helped to identify multiple administrative factors that were affecting the outcomes of the restitution process and include the duration of the process, the issue of no cost and available legal assistance, and the non-standardized and unregulated negotiation and land transfers process.

One of the most important administrative factors is the duration of the process. According to a public officer of the City of Cape Town, when alternative land is offered, the process lasts around 15 years. This time frame refers to the strict administrative procedure. If the development phase is taken into account, the duration of the process increases considerably. From the claimants that were interviewed in Constantia, only one family has been able to finalize the process and get their land back. The rest

of the claimants are still waiting in different phases of the process. In the Ndabeni/Kensington case the procedure was simpler and the land was transferred to the Trust ten years ago. Nevertheless, the development process has not yet started. The slowness of the restitution process is one of the main reasons that incentive claimants to settle with financial compensation. However, as explained above, in some cases other factors related to the value of the land incentivize claimants to continue seeking original or alternative land.

No cost and available legal assistance is a factor that affects the process in a positive way. During the first phase of the research, the cost of the process and the difficulties to have legal representation was identified as one of the factors that could be affecting claimant's decision to settle with certain type of method of compensation. Nevertheless, it was found that the process is free of charge and the CRLR provides free legal support to claimants. CRLR officers informed us: *"In order to go to the Court, claimants need lawyers. We will provide them. They just have to make a request and we provide legal assistance. The commission has different ways to support the process. We work in the favor of the claimants."* This information was confirmed with academic researchers and other public officers.

The restitution act only gives a general panorama of the process and regulates the main functions of the CRLR and the LCC. Some important issues, such as the negotiation process with the public land owners and the engage and execution of development projects is not regulated. Moreover, there is not a unique guideline about the way this issues should be approach. According to the interviews made with the CRLR and the different public landowners in the municipal and provincial level, the negotiation process is done case by case and depends on the conditions and policies of the public landowner. In some cases the public entity gives the land without any payment, sometimes they sell it, and the way the price is determined varies between the different public landowner. According to a land valuator from the City of Cape Town, the decision of which land is given and which one is sold is a *"political decision, usually it's sold at market value. For the above, the city decided to give it. Sometimes, we sell it at below market value. But general principle is we sell it at market value."* In addition there is

not a clear directive in the way the land should be acquired from the public landowner. Officers from the CRLR point out this issue in the specific case of Constantia: *"My issue is that the province has put a lot of conditions to release the land. They talk about the conditions. In general they don't ask about conditions 'bout in Constantia they do"*. The same problem exists with the management of the development projects. In some cases, like in the Ndabeni/Kensington case, the land was transferred before engaging a developer and the process after has been extremely complicated. In contrast, in some of the Constantia areas public agencies (i.e. DPWT) are trying to engage the developers before transferring the land. This situation has also complicated the negotiation process at a point that has not been possible to transfer the land to the claimants that already prove their right to be restored. In the absence of a clear guideline to be applied to all the land restitution cases inefficiencies and opening-up spaces that could be used to fulfill personal interests rather than achieve the public objectives that the policy must address became the norm.

## 5. Conclusion

The symbolism of the land restitution policy, to recognize the victims of apartheid, has been fulfilled to some degree. Indeed, most of the beneficiaries have received some form of compensation, in one way or another. In that sense, the policy has managed to fulfill restorative justice. However, the process has been mired in administrative and situational difficulties. In fact, more than 60 years have passed since the Group Areas Act was issued and the land has been developed and substantially altered. This makes it in some cases impossible to give the original land back. In addition, the role of the CRLR is limited by the "willing buyer, willing seller" principle, giving private and public owners liberty to decide if they are willing to sell the land. This has been reinforced with the fact that expropriation is almost never used for restoration purposes. Therefore, due to all these factors, the majority of claimants have opted for financial compensation and there are claimants still waiting for suitable alternative land to be available. That is why the process has yet to fulfill

its ultimate goal of returning land rights to claimants and undoing the injustices of the apartheid regime. Although contrasting in nature, the two areas of study share factors that have different influences in the varied outcomes of the land restitution process when claimants are demanding the return of land rights. The main differences are the characteristics of the land and the role that neighbors play. In Kensington the value of the land does not affect the administrative process, especially during the negotiation step, and the integration for the claimants in its neighborhoods is more feasible. In the area of Constantia, however, these factors play a negative role in the management of the process and in the motivation of the claimants.

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