

Linking land restitution and urban development:
lessons for restructuring the apartheid city from the Kipi land claim,

Durban Metropolitan Area

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Abstract

This paper undertakes an indepth study of the Kipi land restitution claim. This study focusses on the nature of the settlement achieved in the case of the Kipi land claim and covers the period 1993 to 1999. It compares the Cato Manor reconstruction and development process and the Kipi land restoration and housing process within the Durban Metropolitan's Inner West Council area. The study does this by tracing the history of the Kipi community's relationship with the land, documenting the communities resistance of the removal in terms of the Group Areas Act and presenting a critical examination of the communities efforts to reclaim and develop their land.

The study uses the case study method to analyse the principles embedded in this settlement and attempts to draw on these to inform possible policy recommendations in respect of other urban land claims. The central thesis of this dissertation argues that the quality of restitution delivery is directly affected by the degree to which it is located within local development coordination and management institutions and structures.

In the Kipi claim the Council chose negotiation rather than the apartheid planning principles of prescription and coercion. This resulted in a integration of the housing and restitution processes. It is in this light that the role of the land claims working group which was set up by the Commission and the Durban Metro Inner West local council is evaluated. While in the Cato Manor case the Council chose to follow the legal route and opposed restoration in terms of section 34 of the Restitution of Land Rights Act. The consequences of following the legal route has been that the housing and land restitution processes have been compartmentalised.

It is argued that post apartheid planning is indeed a complex process that needs to engage creatively and flexibly with issues of over due social justice and the current development needs of the urban poor. It is important that in reconstructing the urban landscape that communities are involved in planning models that focus on bottom up processes for successful outcomes.

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Declaration

This Masters thesis was researched, compiled and completed by Brendan Patrick Boyce. It is the original work of the author. All the sources consulted and used in the preparation of this thesis have been duly acknowledged and referenced where applicable. This thesis has not been submitted in any form to any other university.

It should be noted that the views expressed in the thesis represent the personal views of the author. These are not a reflection of the Commission on the Restitution of Land Rights or the Department of Land Affairs's view on the issues discussed.

Brendan Patrick Boyce

Date:

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List of Acronyms/shortened names

ACLA	Advisory Commission on Land Allocation
BoP	Borough of Pinetown
COLA	Commission on Land Allocation
CLCC	Chief Land Claims Commissioner
CMDA	Cato Manor Development Association
Commission	Commission on the Restitution of Land Rights
DFA	Development Facilitation Act
DMA	Durban Metropolitan Area
Land Affairs	Department of Land Affairs
GNU	Government of National Unity
Inner West Council	Durban Metropolitan Inner West Council
KDC	Kipi Development Committee
Land Court	Land Claims Court
MDC	Marianridge Development Committee
Housing Board	National Housing Board
PELCRA	Port Elizabeth Land and Community Restoration Association

PDLA	Provincial Department of Land Affairs
PHB	Provincial Housing Board
RDP	Reconstruction and Development Programme
RLCC	Regional Land Claims Commissioner
Restitution Act	Restitution of Land Rights Act
SSO	Standard Settlement Offer

CHAPTER ONE

INTRODUCTION

1.1 Introduction

This thesis examines the tension between the implementation of the urban land restitution programme and the delivery of low cost housing within the Durban Metropolitan Inner West Council (Inner West Council) area. The thesis undertakes an in depth analysis of the case of the Kipi land claim in order to evaluate the areas of convergence and divergence between the land restitution process and the housing programme in the Inner West Council area. The thesis attempts to identify and analyse the policy gaps that this case highlights. It does this by comparing the resolution of the Kipi land claim with the manner in which land claims in Cato Manor were concluded. The study concludes by suggesting policy recommendations that would facilitate closer integration of the restitution and housing programmes.

The land issue in South Africa is a complex and vexed one. It is this single issue more than any other that has drawn the dividing line between black and white and has produced a huge chasm of inequality. The struggle for access to land and land rights has historically been at the centre of the broader struggle for political, economic and social equality in South Africa. The political transformation of the early 1990's and the establishment of a non racial democracy in South Africa in 1994 has seen the question of redressing these historical injustices come under sharp discussion. Authors such as Maharaj (1999) have noted that the political transformation of the past decade has seen an increase in scholarly attention to the challenges facing urban reconstruction and development in the post apartheid South Africa.

The ravages of colonialism and the intransigence of the minority apartheid regime to the inevitable and unstoppable wave of liberation has left South Africa with an unenviable bequest of a dramatically lopsided land ownership regime and racially skewed patterns of land distribution. Platzky and Walker (1985) and Bundy (1990) have noted that the law under these regimes was used as a political mechanism to effect racial segregation and provide legal sanction to dispossession. The result of this process was the infamous and often quoted fact that the policy of racial segregation resulted in the forced removal of between 3,5 million and 4 million black people (Surplus People Project, 1983: 5; Unterhalter, 1987:1).

A significant number of those affected were located in urban areas. The Group Areas Act stands out as the piece of legislation that has defined the human settlement patterns in South Africa's urban centres. Whilst the Group Areas Act was not the first piece of racially based legislation used to effect urban removals it was perhaps the most far reaching and systematically applied with some 120 000 families being uprooted (Surplus Peoples Project, 1983: 217). The overriding imperative of this cornerstone of grand apartheid policy was to enforce a system of racial segregation in urban residential areas. Numerous well established, and in some cases, racially diverse communities were uprooted from their homes in central areas and relocated to rudimentary housing on the outskirts of the metropolitan area (Surplus Peoples Project 1983:217). When viewed nationally the Group Areas Acts victims were mainly those classified as Coloured, Indian and Africans with very few whites being negatively affected.

Consequently the apartheid model of land dispossession and segregation based planning has resulted in a situation where currently there is a severe land crisis. For blacks the net result of this process was to restrict access to land and severely limit land ownership. In the cities this is evidenced by huge housing backlogs, the shortage of serviced land and mushrooming informal developments within the urban areas and on the periphery of metropolitan areas. Other consequences have included illegal land occupations and informal trading in the central business districts (DLA, 1997).

Even prior to democratization, the urgent need to reverse the legacy of apartheid was realised. During the period of reform (1990-1994) the National party government installed an Advisory Commission on Land Allocation (ACLA) and later a Commission on Land Allocation (COLA) to identify land for the purposes of restitution to victims of removals (Khosa, 1994). Whilst several large rural community claims were resolved through this process, this initiative yielded very little success as the ACLA served only in an advisory capacity and had limited terms of reference (Ramballi, 1998). Although numerous land claims were received in respect of urban areas, the vast majority of these claims were not dealt with as a result of the narrow mandate and the limited time the ACLA had at its disposal.

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In the post apartheid dispensation the need for social justice in relation to the land issue has taken centre stage. Therefore with the passage of democratic elections in 1994 and the establishment

of the ANC led government of national unity, one of the very first laws to be passed was the Restitution of Land Rights Act in 1994 (Restitution Act). This piece of legislation was aimed at addressing the historical injustices relating to the land issue. It was considered to be the primary mechanism to effect restoration or alternative relief for land dispossessions under apartheid. This Act provided for the establishment of the Commission on the Restitution of Land Rights (the Commission) which not only enjoyed greater legitimacy as it was the product of a democratic dispensation but it also had a far wider mandate to accept, investigate and process land claims from individuals or communities that were dispossessed of land rights as a result of past racially discriminatory laws or practices (Restitution of Land Rights Act No 22 of 1994).

Public response to the restitution process has been overwhelming. By 31 December 1998, some 68 878 land claims had been lodged with the Commission nationally. Of this number some 72% of these claims were lodged in respect of urban areas. The province of KwaZulu-Natal received the second most number of claims with some 14808 claims being lodged and registered.

Table 1: Table of Claims Lodged Nationally

Region	Number of claims lodged
Gauteng and North-West	15 843
Kwa Zulu-Natal	14 808
Western Cape	11 938
Eastern Cape	9 292
Mpumalanga	6 473
Northern Province	5 809
Free State and Northern Cape	4 715
Total	68 878

(Source: Commission on the Restitution of Land Rights Annual Report 2000/2001:11).

Despite the fact that the Restitution Act created a legal mechanism for the dispossessed to pursue their land claims, the process of settling land claims in practise has proved to be very slow, technocratic and complicated (Khosa, 1994; Walker, 1996; and Ramballi, 1998). Early problems which slowed down delivery were the lack of sufficient staff and the need for procedures and administration systems to be developed. These were problems common to any new organisation. However as these issues were gradually addressed it became evident that the critical reason for the retarded rate of delivery was the legalistic nature of the process which prescribed that every single claim had to be presented to the Land Claims Court (the Land Court) for adjudication or ratification (Restitution Review Report, 1999 and Commission Report 2000/2001:7). Another important issue was the fact that the process was managed by three different institutions namely the Commission, the Land Court and the Department of Land Affairs (Land Affairs) which was the representative of the state in all land claims. One of the arguments put forward in this thesis is that this institutional separation of roles made the process of claims settlement very time consuming, it created confusion around roles and responsibility and made the process of policy making which was already highly contested difficult to coordinate (Restitution Review Report, 1999). Therefore whilst there was a robust debate around policy within and between these institutions very little policy was approved and implemented in the first five years of the restitution process.

This study seeks to analyse the case of the Kipi land claim which is located in the Inner West Council area to identify further policy gaps in the urban restitution programme. (See figure 1 for a locality map of the Kipi land claim.) One of the intended outcomes of the study is to contribute to the policy debate and the implementing framework around urban land restitution.

Using the case study approach the thesis provides a detailed account of the Kipi land claim settlement which was the first case involving land restoration within an urban context. This historic settlement made provision for two situations. On the one hand it provided claimants with financial redress in recognition of the injustice of the removals under the Group Areas Act. On the other hand it also allowed those claimants who wanted to return to Kipi the opportunity of restoration of a portion of the original Kipi area and development assistance by the local council (Commission Report 1). This situation is looked at in contradistinction to attempts at land claims settlements in Cato Manor where only 1 claim has been settled to date with only one family being successful in their fight for justice thus far. In this case the Durban North Central and South

Central Metropolitan Substructure Councils perceived restitution claims as a threat to the redevelopment of Cato Manor and efforts to redevelop the area have largely ignored the opportunity that the restitution process offered (Commission Report 2 and Ramballi, 1998).

Drawing on the processes followed in the Kipi land claim settlement, this study seeks to demonstrate that negotiations, rather than the use of court processes which are more formal and legalistic in nature are the most appropriate way to fast tracking the processing of land claims. The Kipi study shows that housing development and land claims can be successfully integrated.

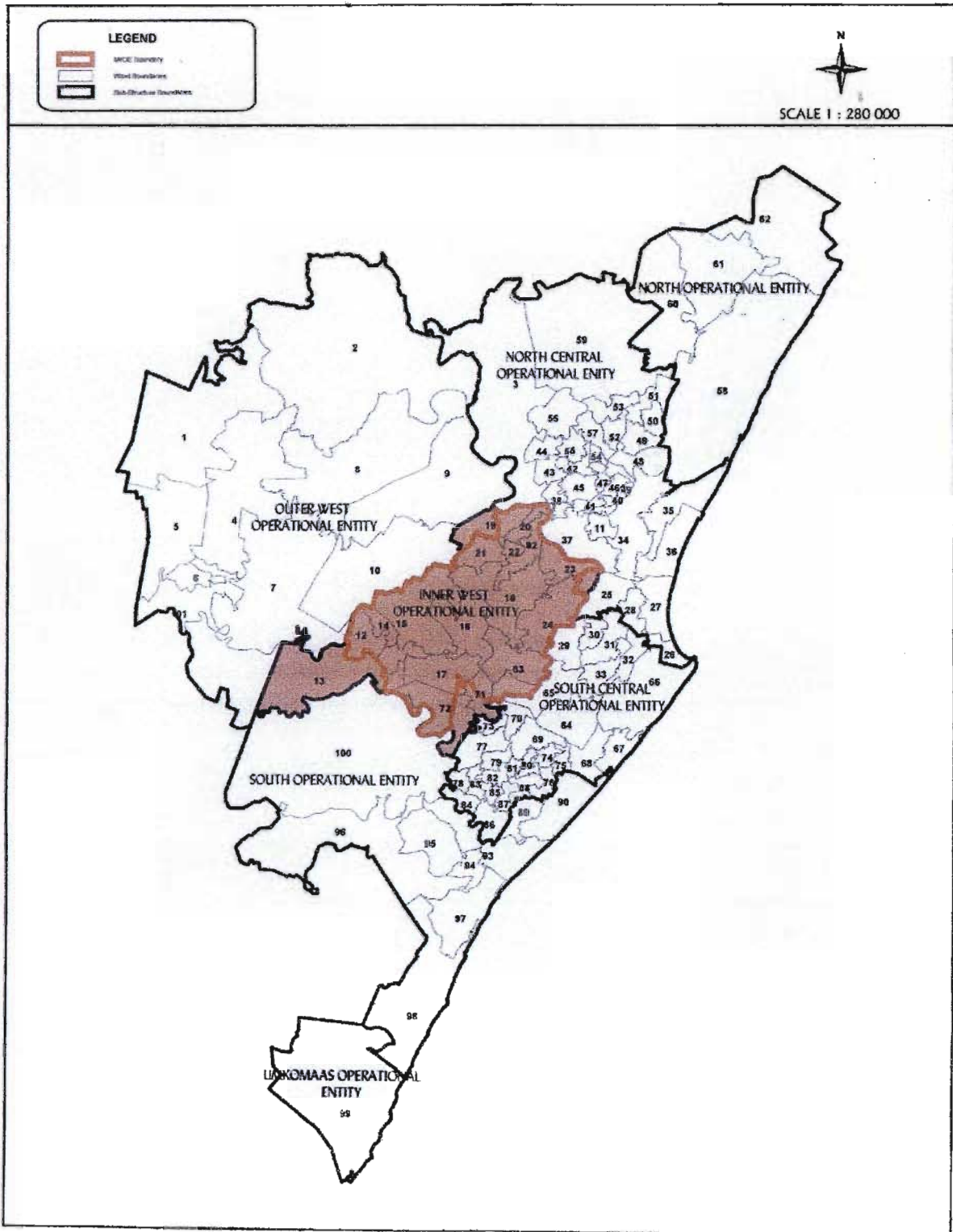
The study can be distinguished from Ramballi's work on land claims in Cato Manor which focussed on the conflict between the restitution process and the CMDA's plans for housing development (Ramballi, 1998). Ramballi's study of Cato Manor land claims was concluded much earlier in the implementation of the restitution process and focuses mainly on the section 34 application launched by the Durban Metropolitan Council. The Kipi study updates and consolidates the earlier research by Ramballi as it documents and analyses the actual implementation of the section 34 agreement and reflects on a later agreement where the CMDA agreed to make land and housing opportunities available to land claimants. The Kipi study focuses on the negotiation process and the various, dispute resolutions structures developed in the Inner West Council by all the roleplayers in this claim. An important area of analysis in the Kipi study is the policy principles that were incorporated in the Kipi settlement packages and the broader implications these had for other settlements generally and specifically to the Durban Metro Area. In this way the Kipi study goes beyond the summary report by Ramballi (1999) entitled, "**Lessons from Kipi Land Claims Settlement for Policy Development**". Figure 2 indicates the Inner West Council area boundaries in relation to the Durban Metropolitan Council area.



Figure 1

Figure 2

Inner West Council within Durban Metro Council



The study adds to the existing body of knowledge, which addresses the issue of urban land restitution. It confirms and concurs with arguments put forward by Ramballi, (1998) and the Ministerial Review of the restitution process that the settlement of urban land claims needs to occur in an integrated and developmentally sustainable manner (Ramballi, 1998 and Restitution Review Report, 1999). It asserts the view that the restoration of land to land claimants is a legitimate and appropriate strategy that needs to be considered by local authorities in reconstructing the apartheid city.

A central thesis of the dissertation is that the quality of restitution delivery is directly affected by the degree to which specific projects are located within local development coordination and management institutions and structures. It is in this light that the role of the land claims working group which was set up by the Commission and the Durban Metro Inner West Local Council is evaluated. It is also argued that the quality of restitution delivery is directly affected by the degree to which high levels of institutional coordination are attained between complimentary governmental programmes and projects. In this instance the level of coordination between the land restitution programme and the housing programme is considered.

It is argued that the core principles of a workable model which could result in enhanced coordination and community participation and faster delivery are embedded in the Kipi land claim settlement. These principles are supported at a policy level by the White Paper on Land Reform, the Reconstruction and Development Programme and at a theoretical level by the sustainable livelihoods theory of development management. A related argument put forward in this thesis is that post apartheid planning is indeed a complex process that needs to engage creatively and flexibly with issues of social justice and the current development needs of the urban poor. Negotiation rather than the apartheid planning principles of prescription and coercion are required. It is important that in reconstructing the urban landscape that communities are involved in planning models that focus on bottom up processes for successful outcomes.

1.2 The Current Development Scenario: Policies and Problems

The legacy of apartheid has meant that the present South African urban landscape and development environment has been beset by problems that are in many ways unique. These challenges include the need for the spatial and racial reintegration of South African cities, such that the present rigid divide between business, industrial and residential space is diminished. Another challenge is the need to meet the political and development imperatives of facilitating security of tenure, ensuring mass housing delivery, local economic development and effective land restitution. It should be noted that these challenges are in addition to the general urban planning challenges such as managing growing quantities of waste and curbing a sprawling city (DLA, 1997).

The results of apartheid restrictions have been an incremental build up of enormous backlogs with regard to housing and have created a land need. Further consequences have been land invasion, the proliferation of informal settlement and the development of a illegal land market. Another aspect of apartheid planning has been overcrowding of existing townships. The poor location of townships on the outskirts of cities has meant that the poor are located in inaccessible areas far from employment areas and face exorbitant transport costs. The vast majority of informal urban residential settlements tenure is insecure, human settlement is haphazard and confused and little or no record exists of rights conferred by various forms of tenure. For the individuals and the communities and local authorities concerned this is a recipe for instability and a constraint to coordinated service delivery.

Another consequence of South Africa's apartheid legacy is the fact that land planning and development historically have been characterised by the stark absence of community engagement and involvement. "Sustainable land development requires the participation of affected individuals and communities as partners in the process" (DLA, 1997: 23).

While the White Paper on Land Reform in South Africa places a firm emphasis on the issue of gender, authors like Walker (1998) have pointed out that the issue of incorporating a gender based focus to policy development, planning and implementation is required (DLA, 1997; Walker, 1998).

1.2.1 Urban Land Reform and Urban Land Restitution in South Africa

The spectre of forced removals and land dispossession looms large on the recent South African urban historical landscape. The haunting memories of community destruction through spatial separation and segregation along racial lines through the mechanism of the infamous Group Areas Act has been indelibly imprinted on the South African collective consciousness. There is a well established and academically rich body of literature which focuses on the harsh consequences of the impact of and community resistance to urban land dispossession and forced removals (Surplus Peoples Project, 1983; Platzky and Walker, 1985; Bundy, 1990).

More than 120 000 families, involving 73 000 properties, were dispossessed. Thousands of black people were prevented by apartheid from acquiring access to land including urban land. African people in particular were subject to the pass laws or were specifically prevented by racially discriminatory legislation such as the Native Land Act of 1913, the Asiatic and Land Tenure Act of 1946, the Group Areas Act of, 1950, the Community Development Act, 1966, and the Resettlement of Blacks Act, 1954 from acquiring legal occupation of well located land (Surplus Peoples Project, 1983). Some of these individuals received consideration or compensation for their properties by the state and others were forced to sell on the open market under circumstances that can be described as unjust and inequitable.

Viewed against the historical backdrop of the colonial land dispossession and apartheid forced removals, the important task of redressing the racially skewed distribution of land resources through a coherent and coordinated land reform programme is emphasised. The abolition of discriminatory statutes alone is insufficient to ensure access for the millions of blacks who had been prevented from acquiring prime land (Moore, 1992). In 1997 the Department of Land Affairs formalised the national land reform policy with the finalisation of the White Paper on South African Land Policy. The land reform policy can be described as having three branches: land restitution, land redistribution and tenure reform. Land reform provides the opportunity in both the urban and rural areas to contribute significantly to redressing the lopsided landownership disparity in South Africa, fostering redress and reconciliation whilst also supporting the economic imperatives of poverty alleviation and economic growth (DLA, 1997: v). Land restitution is the primary mechanism for dealing with some 3.5 million people who were removed from rural and urban areas between 1960 and 1980. Since this dispossession took place the vast

majority of this urban land has been redeveloped and has changed hands, or has been earmarked for the provision of land and housing for disadvantaged communities.

In the light of these developments the study of land reform and the policy developments in this area have become of vital importance. Land reform is concerned with fundamentally reordering the existing power relations to land. It has also been acknowledged that land reform should not only be about the redistribution of land and other means of production (Khosa, 1994). It is essential that the manner in which this occurs reduces poverty is compatible with development and results in sustainable land use (DLA, 1997).

Ramballi (1998) has correctly noted that most academic studies, as well as policy and other literature that address the issue of land reform in South Africa have a distinctly rural biased. Given the overall poverty focus of the broader land reform policy, restitution in the first instance seeks to prioritise the areas with the greatest needs that in the main are the rural areas. This is “where the poorest ten per cent of the people are African and where women-headed households are particularly impoverished” (DLA, 1997:11). Therefore, land reform attempts to redress the huge inequality of incomes and provide the African rural population with basic needs and secure livelihoods (DLA, 1997:11). However, this study contends that urban restitution can play a important role in supporting urban reconstruction. Urban restitution presents an opportunity to support urban renewal and local economic development initiatives. Recent events such as the massive land invasion in Bredell, Gauteng have underlined the need to vigorously address urban landlessness and housing backlogs.

Therefore in urban areas the challenge to land reform is to assist the urban poor by facilitating access to well located land, secure tenure and phased provision of services thereby averting the ever present potential of land invasions and resultant instability. The objective of land reform in the urban environment is to address the urban land release issue and homelessness by directing development of affordable housing and services to unused or underused land within the present urban boundaries close to employment opportunities. The resultant distortions of the apartheid planning model of racial segregation has meant land use fragmentation according to race and income and the strict enforcement of separate residential, business and industrial zones have to be addressed (DLA, 1997:11-12).

This strategy recognises that access to well located land for the previously marginalised in the urban areas is a prerequisite for a successful urban redevelopment programme. The critical question of urban land reform and urban land restitution has received little attention and has been largely neglected at the levels of policy development and academic research. Even vital policy documents such as the White Paper on South African Land Reform only contain a brief note on urban land reform. Nevertheless this area of study is vital if South Africa's urban centres are to become integrated living spaces and vibrant economic centres. Restitution in the urban environment has created the opportunity for the restructuring of the apartheid city by the restoration of valuable, strategically located residential, business and industrial land. It must be acknowledged that as a result of township establishment and other private urban development land claimants may not be entitled to acquire restoration of the exact piece of land that was historically dispossessed (Dawood, 1995; Walker, 1996). The primary reason for relief in terms of restitution is to redress the injustices and to alleviate the impoverishment and suffering caused by apartheid (DLA 1997:11). However it has been realised that because of the enormity of the injustices the measures proposed can only render "a measure of restitution" and can never reconstruct the often romantic and idyllic past (Restitution Review Report, 1999). However even in this context, restitution has the potential to leverage access to state driven housing projects and alternative land for land claimants as the Kipi land restoration and housing project has demonstrated.

The Restitution Act also provides for monetary compensation and alternative relief for claims settlements. Therefore the danger exists that claimants may not be prepared to wait for developmental solutions to the question of urban land restitution which are inevitably more time consuming and technically rigorous. A Ministerial review of the restitution process which was conducted during the course of 1998 noted that the lack of policy which supported developmentally based outcomes created the situation where "cheque book restitution" could characterise the urban claims settlements (Restitution Review Report, 1999). It is gaps in the area of policy development such as these that remain a challenge to policy makers, land reform practitioners and land reform activists alike.

Authors such as Ramballi have noted that there is an emerging debate on urban land reform and the role that the restitution process can play in being a mechanism and contributor to restructuring the apartheid city. Sadly though it is a debate that in the main is monopolized by

the Commission and DLA officials with very little constructive engagement from local government institutions, development planners, the non governmental sector and other land development organisations.

1.2.2 Some Laws and Policies Governing the Urban Development

Since the onset of political transformation, as with land reform, the fields of urban planning and local economic development have witnessed the passage of a plethora of new legislation. The South African urban development environment has become a minefield through which private sector developers and local government officials have to navigate.

It has been argued that the legislative framework inherited from the apartheid era is inappropriate for land development as much of it is apartheid based and duplicative (Donaldson, 2000). The prime goal of these laws were aimed a racial separation and an inflexible definition of residential, business and other activities. What this has resulted in is a confused and complex legislative and institutional framework that varies greatly from province to province and within provinces, where former homeland legislation and procedures were in force. As noted in the White Paper on Land Reform, “ this legislative environment is further complicated by the lack of coordination and integration in planning and legislation affecting different sectors (DLA, 1997:23).”

The most important pieces of legislation which now provide a framework for urban development include amongst others, the Development Facilitation Act (Act No. 67 of 1995), the Integrated Development and Planning Act, the Housing Act (Act No. 107 of 1997), the Municipal Structures Act (Act No. 117 of 1998) and the Local Government Transitional Act (No. 209 of 1993). In the area of policy the Reconstruction and Development Programme, the Urban Development Strategy and the Urban Development Framework have fundamentally changed the rules of the game as far as land development is concerned. One of the core purposes of these laws was to create a framework for coherent urban reconstruction. An ancillary aim was to unify, simplify and harmonise the rubric of often conflicting town planning laws and regulations and to create a legislative environment which enabled metropolitan councils to effectively address the consequences of apartheid planning.

While there has been numerous benefits which have flowed from the enactment of these laws. Often these policies were formulated without considering the synergistic possibilities available by developing strong linkages between complimentary line functions (Donaldson, 2000:46). Their existence has sometimes resulted in fierce contestation at all levels of government around the issues of what roles each department should play. There has been little consensus as to how the restitution process in particular and the other processes such as the housing development programme should relate to each other. Departments have often been in direct competition for scarce resources such as land. This has arisen primarily because of competing visions for the redevelopment of such land. Therefore the challenge exists for development practitioners in the urban sector to overcome the potential conflict of policies and to define local development management models and institutional linkages to coordinate and manage the situation effectively. The Kipi land restoration and housing process which is located in the Durban Metro Councils Inner West Council area exemplifies this type of challenge and is a good example of a case where the potential conflict of policies was overcome.

On a macro level rapid urbanisation poses tremendous pressure on urban land. It is evident that urban reconstruction needs to occur within the framework of clear and coordinated policies and strategies to provide for speedy land delivery, management and development. There is a need to ensure that this contestation does not unduly frustrate the delivery of these departments and where possible integration is achieved between the two programmes. This study argues that the successful resolution of the Kipi land claim demonstrates that it is possible to integrate urban land restitution and low income housing delivery in such a manner that the twin goals of urban reintegration and housing delivery to the urban poor are achieved.

Urban land restitution therefore presents myriad opportunities to recognise the injustice of forced removals and remedy the effects of apartheid planning by facilitating the racial integration of cities and providing a catalyst for local economic development. However, there have been very different ideas on how restitution should be implemented and how it relates to the broader need for urban reconstruction and development.

1.2.3 The Restitution and Housing Challenges Facing the Durban Metropolitan Area

Developmental pressures combined with the scarcity of land in the Durban Metropolitan Area (DMA) has meant that the land restitution programme and the local authorities who are responsible for the provision of housing have found themselves in direct competition for vacant urban land. To a large extent this captures the situation which prevails with regard to the need for mass housing delivery and urban restitution.

In sum, there is the need to redress the injustice of apartheid whereby some 120 000 black people were dispossessed of the land that they owned and or occupied within the old Durban borough and surrounding areas. On the other hand, there is the desperate situation where some 140 000 families, largely African live in overcrowded shack settlements in the DMA (Durban Metro Restitution Claims Strategy document, 1997).

It appears that the two national government policies and programme of housing and restitution are in potential conflict. On one side we have the national restitution campaign framed by the Restitution of Land Rights Act of 1994 read in conjunction with the Constitution of South Africa Act No 200 of 1996. This process provides that people who were dispossessed under apartheid legislation can claim the return of their land rights or alternative relief. On the other hand the Durban Metropolitan Council which, in many cases, is the successor in title to such land and which is also tasked by the constitution and national housing legislation to meet the challenge of providing low cost housing to the urban poor.

The scale of the problem on a restitution front is that there are some 8 000 urban land claims which have been lodged with the Commission in KwaZulu- Natal for the DMA (Commission on Restitution of Land Rights 2000/2001). Many of these claims may require restoration of the claimed land. While on a housing front, the Durban Metropolitan Council has committed itself to the delivery of 7 000 housing opportunities per year over the next decade (Durban Metro Restitution Claims Strategy document, 1997). See figure 3 for a map indicating land claims registered and mapped in respect of the Durban area.

Table 2: Effects and Challenges of Forced Removals in Restitution and Housing Terms

Effects of Forced Removals in Durban	Challenge for Restitution
120 000 black people dispossessed	8000 urban claims to be settled within 5 years
Housing backlogs	Challenge for Housing
140 000 mostly African people are homeless or living in overcrowded conditions	7000 low cost homes to be built p.a. for a decade

(Sources: Durban Metro Restitution Claims Strategy document, 1997.)

Nowhere else have these tensions played themselves out so starkly than in the DMA. The tension between the two programmes has been managed and resolved in very differing ways, by the various Durban Metropolitan sub structures. Ramballi, in his thesis entitled: **“Land Restitution in Cato Manor”**, has examined the apparent conflict of interest between restitution and specifically low income housing development in Cato Manor. In this case the Durban Metro’s North and South Central Council considered restitution to be a threat to efforts to redevelop the area and consequently took the legal route by approaching the Land Court in terms of Section 34 of the Restitution Act with the objective of blocking out land claimants rights to restoration of any specific piece of land in Cato Manor (Ramballi, 1998 and Ex parte North Central and South Central Metropolitan Substructure Councils of Durban Metropolitan and Another 1998 (1) SA 78 (LCC).

The actions of the North and South Central Councils stand in contrast to the approach taken by the Durban Metro Inner West Council which has opted to negotiate with claimants and attempt to accommodate restitution beneficiaries in low cost housing projects (Interview with Jama, 10/11/2000). This study will present the background to the Kipi land claims settlement which was achieved in the Inner West Council area and contrast it with the manner in which the land claims in respect of Cato Manor were addressed.

The Durban Metropolitan Strategic Housing Plan and the Commission on the Restitution of Land Rights 5 year plan for the resolution of the majority of urban restitution claims emanate from and

are located within the parameters of existing legislation and policy. This overarching framework provides the operational context within which there is ample scope for reasonable variation and flexibility to accommodate local initiatives. The section which follows underscores the central questions that the study seeks to address.

1.3 Central Arguments and Specific Research Questions

As stated above, the central arguments made in the thesis are, first, that separations in the roles of the three institutions involved in land claims made the settlement process cumbersome and slow. Second, that the Kipi case provides an example of a fast track approach to land claims based on negotiations and links to urban development. Thirdly, that while a largely successful example, the Kipi case reveals some weaknesses in the wider land claims approach and specific and continuing difficulties even with more integrated and negotiated approaches.

Against the background sketched above, this study aims to consider and formulate some answers to the following critical questions:

- 1) Is there a tension between mass housing delivery and urban restitution in the DMA?
- 2) What opportunities are there to reconcile the two competing programmes such that neither programme is unduly frustrated?
- 3) What are the key determinants to whether there is convergence or divergence between the two programmes and where convergence is possible between the two programmes, what is the nature of the partnerships?
- 4) What is the legal framework governing land restitution and what is the early experience in land reform implementation in South Africa?
- 5) What lessons can be drawn from the Kipi case and other land claims settlements, such as Cato Manor?

This research study proposes to examine the case of the Kipi land restitution claim where there appears to be strong convergence between the restitution and the housing programmes and to compare this to the Cato Manor housing development where this tension was addressed very differently. Therefore the results of this study could be used to inform and develop policy recommendations on these issues.

1.4 Research Methodology

The choice of research methodology is a vitally important aspect of any academic study as it shapes the overall approach and specific procedures adopted in the collection and analysis of evidence. This section of the thesis discusses critical issues related to the research methodology, data sources used in the study and the limitation and assumptions. Here it is noted that the case study approach was employed in the study. The merits, benefits and flaws of this approach and how these were dealt with are presented.

This research study on the Kipi land claim has adopted a broadly qualitative approach towards the research problem. As noted by Mouton and Marias (1990:18) qualitative approaches may be described as “those approaches in which the procedures are not strictly formalised, while the scope is more likely to be undefined, and a more philosophical mode of operation is adopted.” Yin (1989:25) notes that this approach to a research problem attempts to avoid prior commitment to any theoretical model.

One of the advantages of this open and much broader approach is that it allows the researcher flexibility to analyse concepts and constructs so as to access deeper understandings of a given concept or phenomenon. Further, in these types of studies, the central thesis tends to emerge gradually and may often be described as the result of the investigation. This framework allows the researcher to tackle highly complex research questions (Mouton, and Marias, 1990:19-21). Some examples that characterise this approach include participant observation and case study methods.

The qualitative approach favours the use of case studies. The case study approach is useful for the description and analysis of small groups and communities and may be successfully employed to formulate theories on the functioning of such units (Huysamen, 1994:96). The Kipi land claim was compliant with these criteria, as the community was small and well defined.

A key determinant which influenced the choice of research methodology for this study was the fact that the study drew extensively on work done by Ramballi (1998) on urban land claims in Cato Manor. In his study Ramballi utilised the case study approach. Therefore it was appropriate to use the case study method in the study of the Kipi land claim as it was important to use a

method which was the same or consistent so as to facilitate consistent comparisons between the studies.

One of the negative aspects of this approach is that the research participants are not passive, neutral beings or inanimate objects but are susceptible to reactivity to the research. This means that because the participants are aware that they are part of a research project they may act and supply information in a way that they think the researcher requires. Therefore, Huysamen notes that, "If the research participants are familiar with the researchers hypothesis, they may consciously or unconsciously act in a manner that their behaviour facilitates the confirmation of the hypothesis" (Huysamen, 1994:67).

Case studies are useful tools to achieve understanding of a particular case with all its related complexities. Particularly where the case is either highly representative or atypical of a particular population. Some of the specific procedures for data collection are participant observation or unstructured interviews (Huysamen, 1994: 168). This method was appropriate in this case as the Kipi land claim could be regarded as a highly representative land claim of a particular sub group of claims known as urban group claims. While the Cato Manor claims are representative of urban individual land owner claims and urban tenancy in general, the manner in which these claims were opposed through the section 34 application was atypical in many respects.

Through the collection of on site observations, open ended interviews and the analysis of relevant documents the researcher is able to understand the meanings social actors gave to their experiences. The researcher is able to allow the subjects to speak for themselves by using rich direct quotes. Hamel, (1993:16) notes that with, "this approach, the empirical details that constitute the object under study are considered in the light of the remarks made in context." As this issue of the Kipi land restitution claim was not previously researched for the purposes of an academic study, the data collection strategy of gathering rich primary material was relevant, appropriate and added to the broader body of knowledge of group based land claims in an urban environment.

A traditional critique of the case study method has been that this approach is vague, imprecise, unrepresentative, and lacks objectivity and rigour. Another element of the critique has been that the subjectivity of the researcher introduces bias into such studies (Yin, 1989:10; Hamel, 1993:

23). These weakness in the methodology were limited in the Kipi study as the information obtained through interviews was triangulated by using other documentary material and newspaper reports.

Hamel (1993:33) notes that the case study is “the descriptive study, par excellence and in depth.” However it is also noted that the application or the construction of theoretical models is still required to provide an overall explanation (Hamel, 1993:33). Yin (1989) argues that it is relevant and advantageous to use the case study approach where “how” and “why” questions are being asked by the researcher about a contemporary set of events over which the investigator has little or no control. The method was useful in the Kipi study as it not only allowed for the detailed description of the problems but also facilitated a process of critical inquiry.

Yin (1989: 23) defines the case study as an empirical inquiry that

- 1) investigates a contemporary phenomenon within its real life context; when
- 2) the boundaries between phenomenon and context are not clearly evident; and in which
- 3) multiple sources of evidence are used.

One of the strengths of the case study method is that it relies on a range of information sources such as documents, archival reports, direct observation participant observation, physical artefacts and systematic interviews (Yin, 1989). The case study approach was used in this instance with the focus being the Kipi land claim and housing process. Semi structured interviews were a primary data collection technique. Therefore interviews with prominent members of the claimant group, officials of the Regional Land Claims Commission, officials of the Durban Metro Inner West Council’s Housing Department and councillors for the area form the primary material.

The data collected by means of the interviews was triangulated with newspaper reports and minutes of the housing and restitution working group meetings which addressed restitution and development issues. This data was analysed to determine whether there were any recurrent themes or any discernable patterns. The outcome of this process was compared to findings of a similar study conducted in respect of the Cato Manor housing project.

This set of data collection strategies served as a means to corroborate the research findings and to ensure that the research was conducted in the most objective manner possible. A further

measure that was employed to limit the extent of the participants reactivity to the research process was that the researcher avoided the use of leading questions and did not explicitly expose the hypothesis to the interviewees at the outset of each interview. The hypothesis was revealed at the conclusion of each interview. Further it was explained to each interviewee at the beginning of the interview that although the researcher is a departmental official this was not an official evaluation of the project but a piece of personal research for the purposes of a masters thesis and that all information would be treated in the strictest confidence and that anonymity would be observed.

Further evidence was collected from documentary sources. This was important as it assisted in providing an account of the Kipi land restitution claim and the housing development. The advantages of documentary evidence was that there was little or no reactivity, these were easily accessible and presented the “official account” of events. Some of the disadvantages of documentary evidence was that these may be incomplete because of poor filing and record keeping. Other reasons for gaps could be that documents were deliberately destroyed or remain classified and are therefore not accessible. They may be inaccurate as the officials who prepared them wanted to present a positive account of the events or project to superiors at the time. Another important disadvantage of documentary evidence is that their content was not written for social research or academic purposes and therefore may be biased. Many of these disadvantages can be overcome by careful comparison of documentary accounts of the same event and the researcher being critical of the information obtained in this manner (Ramballi, 1998).

A issue worth noting is that the researcher in this instance already has a detailed knowledge of the field of land reform and land restitution. This knowledge is a result of Mr Boyce’s professional association in his position as Project Manager: Implementation. The researcher will draw on this experience in the compilation of the study. However where ever possible the researcher will use documentary sources to limit any bias.

1.5 Data Sources

The following primary data sources were consulted during the completion of this study:

1. Commission on the Restitution of Land Rights (CRLR) files:

A. File Ref KRN6/2/3/E/39/836/1863/2A

B. File Ref KRN6/2/3/E/39/836/1863/2B

2. Newspaper Articles:

Table 3: List of Newspaper Articles Used

Name of Publication	Title of Article	Date
The Highway Mail	Landmark settlement for Kipi community	Friday 16 th of July 1999
The Sunday Tribune	They still waiting for a home	Sunday 18 th of January 1976
The Daily News	Back to where we belong	Monday 19 th of July 1999
The Mercury	Joy as community is compensated	Monday 19 th of July 1999
The Sowetan	Kipi residents back to where they belong	Monday 19 th of July 1999

3. Government Notices, and Laws:

Table 4: List of Government Notices and Laws Consulted

Title of Law/Notice	Number	Year
Gazette for removals	No. 1432	1966
Interim Constitution Act	No. 200	1993
Restitution of Land Rights	No. 22	1994
Gazette for township establishment	No. LGMN175	1995
Constitution Act	No. 108	1996
Housing Act	No. 107	1997
Gazette Notice ito sec 11	No. 305	1997
Municipal Structures Act	No 117	1998

4. Interviews with the Claimants Committee and Key Officials of the Commission and the Inner West Housing Department:

Table 5: List of Interviews

Name and Surname	Designation/Affiliation	Date of Interview
Ms B Benson	Planner Durban Metro IWC	02/06/2000
Ms Gordon	Claimant from surrounding area	02/06/2000
Ms Hoozak	Councillor for Marianridge	02/06/2000
Ms C Walker	Former Commissioner	02/06/2000
Mr K Ramballi	Project Manager Urban Claims	10/11/2000
Ms V Jama	Community Liaison Officer	10/11/2000
Ms R Ramdas	Cato Manor Researcher	15/11/2000
Mr Z Dube	Secretary of Kipi Committee	01/02/2001

The secondary data used in this study was collected by way of a literature review of forced removals, urban land reform and general reform in South Africa.

The preceding sections have highlighted the aims and objectives of the study, the benefits and drawbacks of the case study method have been presented. Careful consideration has been given to how the inherent weaknesses of the case study approach could be limited. Finally the data sources which were consulted by the author in the preparation of the thesis were presented. The section that follows shall note the limitations and the assumptions of the study.

1.6 Limitations and Assumptions

This study focuses on the nature of the settlement achieved in the case of the Kipi land claim. The study covers the period 1993 to 1999. It renders an analysis of the principles embedded in this settlement and attempts to draw on these to inform possible policy recommendations that may be implemented in other urban land claim settlements. The study is not exhaustive and does not attempt to cover the period after 1999. This is due to two major considerations. The first was the time constraints that were faced to complete the research. Secondly, the lengthy delay between the signing of the settlement agreement and the eventual implementation thereof by the Durban Metropolitan Inner West Council made it difficult to include observations of the implementation process. This is a severe limiting condition to the findings of this study. Therefore the study uses township planning information produced earlier in the process to evaluate the quality of the settlement. The study acknowledges this limitation and identifies this as a possible future area of research.

The study also draws on research done in another set of land claims in Cato Manor, Durban. The research on Cato Manor is updated and reevaluated in the light of recent events and the current policy direction. The study attempts a comparative analysis of the two settlements. While the study notes various other land claims projects within the Durban Metropolitan Area it does not attempt to render an exhaustive account of these land claim projects, which are possible research projects on their own.

In summary the study focuses on the Kipi land claim settlement for the period 1993 to 1999 and presents a comparative evaluation with land claims in Cato Manor. The study also presents an overview of claims in the Durban Metropolitan area and raises some of the opportunities and policy challenges that will need to be resolved if these claims are to be settled in a sustainable manner.

1.7 Organisation of the Study

This thesis examines the tension between the implementation of the urban land restitution programme and the delivery of low cost housing by the Metropolitan Council within the Durban Metropolitan's Inner West Council Area. This work has been arranged in four chapters. Chapter one provides a broad historical backdrop to the study; it outlines the importance of the land questions in South Africa and discusses the importance of remedying the effects of colonial dispossession and apartheid. This chapter sets out the aims and objectives of the study. This section of the thesis notes that the case study approach to research methodology was employed in this study. The strengths and the weakness of this approach are discussed in relation the Kipi land claim and housing process.

Chapter two, looks at the mechanisms that the African National Congress led government of national unity enacted to effect land reform. It discusses land reform as a product of a negotiated compromise. Early debates around the implementing framework for land reform are discussed. An analysis of the legislative framework which governs the implementation of these respective programmes is made, with consideration of the policy and legal framework for land reform and urban restitution in South Africa and how these have developed. This section of the thesis undertakes a comparative analysis of the Kipi land claim in the Inner West Council with the land claims for Cato Manor and that of the Cato Manor Development Associations housing process in the North and South Central Councils.

The third chapter examines the specific historical background to land dispossession and urban removals in the Pinetown area beginning with a brief look at colonial encroachment. The issue of segregation and the effects of racially based legislation are documented. The chapter outlines the attempts by the Kipi land restoration committees to negotiate the return of their land prior to the enactment of the Restitution of Land Rights Act. The chapter also focuses on the events that unfolded after the enactment of the Restitution of Land Rights Act. It takes a detailed look at the process as driven by the Commission on the Restitution of Land Rights. This chapter provides an analysis of the roles of the various stakeholders played in the process and outlines the final settlement that was achieved in the land claim.

Chapter 4 analyses the process whereby the restitution claim and the housing project were integrated. The institutional alignment that was achieved between the restitution process and the housing programme in the Kipi land claim is discussed. The problems experienced in this process and the success achieved are considered. This chapter discusses the central policy principles and gaps that are highlighted by the case study. Finally, it evaluates the local institutional framework for development management in the Inner West Council area.

The chapter concludes with policy recommendations and possible refinements to the local institutional framework for development management within the case study area.

CHAPTER TWO
PUTTING SOUTH AFRICAN LAND REFORM IN CONTEXT: EARLY DEBATES
AROUND THE IMPLEMENTING FRAMEWORK FOR LAND REFORM AND
URBAN RESTITUTION.

2.1 Introduction

Land and access to land is universally accepted as one of the most basic of human rights (Claasens, 1991 and Smith, 1994). Land struggles have been key elements of struggles for political, social and economic change. Recently this pressure has been channelled into institutional and negotiated processes as witnessed in countries like Venezuela (1960), Chile (1964-1970) and South Africa (1990-1994) (Thome, 1994: 93-105). The systematic dispossession of land for racially based motives was one of the linchpins of the apartheid system and caused untold hardship to millions of victims. It is not surprising that the question of land has historically been one of the core issues in the struggles for a democratic nonracial society in South Africa.

Political reform in the early 1990's created the possibility of a negotiated settlement to the seemingly intractable conflict in South Africa. It was in the context of these multiparty discussions that an overall constitutional framework was negotiated that would address a range of issues including the need for social justice within respect to the land issue.

In this section of the study, I consider how broader debates and developments in the international context and international law influenced the shaping of the restitution process in South Africa. Secondly, I consider how early debates around the legal, institutional and policy framework influenced the final piece of legislation. Finally, having outlined the evolution of the debate around restitution, I will locate the Cato Manor and Kipi lands claims within this debate and clarify the critical policy and implementation issues that they highlight.

2.2 Land Reform As Social Justice, The Product of A Negotiated Compromise

When considering the whole question of how and whether to deal with the issue of land restitution in South Africa, one has to consider the prior questions of how does one deal with the painful history of gross human rights violations in a newly emerging society? How is the broader issue of addressing the need for social justice and redressing past human rights violations balanced against the need for promoting national reconciliation and national unity? Should the state wipe the slate clean, thus ignoring the past, or should it vigorously address issues of social justice, ideally within a framework which acknowledges specific past injustices and remedies them in a manner that promotes the political goals of national unity and reconciliation and achieves the economic imperatives for economic growth and development (Rwelamira, 1996: v). Some commentators argued that formal equality that is the situation where everyone is equal under the law and is protected from discrimination is not enough to address the question of the entrenched inequality which was the result of decades of racial oppression under apartheid (Jaichand, 1997:25; Ramballi, 1998).

The manner in which these issues of redress have been resolved in South Africa has been largely shaped and influenced by the nature of the transition to democracy. In the case of South Africa there was no outright military victory as was the case in Germany after the Second World War. In the case of South Africa, the apartheid regime conceded to multiparty discussions that yielded a negotiated solution (Davidson and Strand, 1994: 26). Therefore the question of how the legacy of discriminatory and unjust legislation would be dealt with in a new democratic dispensation was the product of a political compromise (Jaichand, 1997; Rwelamira, 1996).

One of the products of the multiparty negotiations was a democratic constitution that was to become the supreme law in a fledging society. This document captured the hopes, aspirations and rights for a new democratic society. It also represented a compromise that had been reached on a number of issues that the new state would have to address such as forced removals, murder and other crimes and gross human rights violations (See Jaichand, 1997: 28-29; Dangor, 1996). During the course of the struggle against apartheid, parties and organisations within the liberation movement had defined their positions concerning the fundamental principles that would underpin a democratic society. The Freedom Charter (1955), the African National Congress's (ANC) Constitutional Guidelines (1988), the Harare Declaration (1989) and the ANC's Ready to Govern

(1993) made clear the need for justice in a post apartheid South Africa (Davidson and Strand, 1994: 26). The call for land and agrarian reform was a key demand of the ANC (Levin and Weiner, 1997).

2.3 Early Debates Around An Implementing Framework for Land Reform

It has been noted that early debates and the resulting implementation framework surrounding the land restitution process have been profoundly influenced by developments in international law and international experience from both the developed and the developing nations. The experiences of states such as Canada, Australia and New Zealand, on the one hand, and the experience of India, Phillipines and Zimbabwe, on the other, are relevant to South Africa (De Villiers, 1999; Adams, 1995). The South American land reform experience and the manner in which the former Eastern European states like Poland, Estonia and Germany have dealt with restitution claims to property which have arisen as a result of dispossession under the communist era are also instructive (Deininger, 1999; Visser and Roux, 1996: 91; Commission Report 3). The restitution of rights for past losses is a global phenomenon. While the international law on the subject of restitution, compensation and rehabilitation for victims of gross human rights violations has not been consolidated, there are important principles that may be drawn on from this body of knowledge.

In order to avoid confusion, it is important to distinguish between reparations, restitution and compensation. The Chorzow Factory judgement that was handed down by the Permanent Court of International Justice defines reparation as the comprehensive notion embodying restitution, compensation, rehabilitation, satisfaction, and guarantees of non repetition. A United Nations study on the same subject expressed the view that restitution demands, amongst other things, restoration of liberty, citizenship or residence, employment or *property* (Fernandez 1996:67 *my emphasis*). A current example is the unclaimed wealth of Jews who fled Nazi Germany. Recently various Swiss Banks have made serious attempts to locate the descendants of their former clients and return the unclaimed monies. Therefore, at the broadest level restitution may be defined as the recognition of past injustices and the return of property and /or monetary compensation (Shriver, 1992; Barkan, 1996:52). In the context of South Africa, Walker (1996) puts forward the view that restitution is concerned with, “reversing some of the most appalling injustices of the past, by restoring or compensating for a defined range of dispossessed land rights, in a way

that is not incompatible with development” (Walker, 1996: 50).

When one considers the issues of land dispossession internationally and the various attempts at land restoration and redistribution, restitution of land and land rights has often been used as an integral part of a broader land reform programme. Land restitution has been considered an important vehicle to effecting social justice and improved economic performance (Leatherdale, 1995:1). An important distinction is that restitution is a rapid and direct intervention of restoring assets to former owners using the law (World Bank, 1990:9). Of all the land reform mechanisms restitution is considered the most politically urgent in South Africa (Murray, 1997: 209).

Even prior to the enactment of remedies related to land dispossession under apartheid, there was broad acknowledgement from the ANC that priority would be given to victims of forced removals under apartheid. Further, it was acknowledged that where possible efforts should be made to restore such land (Claasens, 1994: 101). While early debates emphasised the principle of restoration it was recognised that this was not aimed at recreating a romantic past but was to be a forward looking developmental process which emphasised the goals of restoration to deal with landlessness and restoration as a foundation for secure property rights for all (Claasens, 1994: 101; Restitution Review Report, 1999).

Thome (1994) noted that as societies change so do their laws and institutions. Property rights are particularly resistant to change. Often historical property rights and concepts retain power long after they have outlived their initial economic and political justifications. The longer this situation continues the more intense the pressure from grassroots social movements representing the landless and the poor becomes (Thome, 1994:105). Visser and Roux argued that one of the key challenges facing South Africa was the need to design a restitution framework which would adequately satisfy the need for social justice while minimising new grievances (Visser and Roux 1996: 96).

One of the critical questions that emerged in early debate around the proposed direction for land reform was which legal system should be adopted. Commentators like Budlender argued that this was a vital issue as the choice of model would have direct consequences for important areas such as legal, institutional and policy frameworks (Budlender, 1994: 93). These issues in turn would influence the administration and general pace of the process.

2.4 Legal Mechanisms For Land Reform And Restitution (1994 to 1997)

The Constitution of the Republic of South Africa Act No 200 of 1993 (also known as the interim constitution) was a significant piece of legislation as it established the principles of land reform and land restitution in our law and provided a constitutional framework which would govern the land reform and restitution arrangements in South Africa. Originally the provision for restitution was located in the equality clause of the interim constitution (Ramballi, 1998; Jaichand, 1997). Section 121-123 provided for the adoption of an Act of parliament aimed at the restitution of land rights to any person or community dispossessed of such rights during the period after 19 June 1913 to the present, if such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition against racial discrimination contained in section 8(2) had that section been in operation at the time of dispossession (Act No 200 of 1993).

The interim constitution also provided for a property clause at section 28. Numerous commentators expressed apprehension concerning the inclusion of a property clause in the Bill of Rights. Some felt that this would entrench the rights of existing rights holders to the detriment of land reform and restitution initiatives (Budlender, 1992). Others, such as Claasens, felt that the market value provisions would make land restoration prohibitively expensive and therefore frustrate the process once it was realised that the fiscus could not cope with these demands (Claasens, 1993: 442).

Interestingly the formulation of restitution arrangements in the interim constitution did not adequately capture the ANC's 1991 draft property clause which gave equal constitutional weight to rights to restitution alongside existing property rights. Some commentators felt that had the restitution of land rights been posited alongside property rights in the Bill of Rights then restitution would have assumed the character of inherent human rights (Murphy, 1996: 118). Visser and Roux (1996) note that the ANC resisted the exclusion of the restitution arrangements from the Bill of Rights as it was argued that the restitution clause even if separated from the property clause should be accommodated in the body of the chapter dealing with the fundamental rights. The concern here was that rights to restitution would be trumped by existing property rights (Visser and Roux, 1996: 93). Jaichand notes that the Constitution Act No 108 of 1996 (also

known as the final constitution) rectifies this situation in that it includes the principle of land restoration in the property clause at section 25(7). Jaichand argues that the formulation of restitution arrangements and the wording of the property clause should be viewed against the broader background of the negotiation process (Jaichand, 1997: 32 and 36).

While the final constitution affirms the state's commitment to restitution in section 25(7), it further underlines the importance of land reform by providing for expropriation for public purpose in the public interest. This commitment is further supported by section 25 2(2) which states that, 'Property may be expropriated only in terms of law of general application - (a) for public purposes or in the public interest; and (b) subject to compensation, the amount, timing, and manner of payment, of which must be agreed, or decided or approved by a court.' Section 3 notes that, 'The amount, timing and manner of payment, of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected...' It is important to note that section 4 declares, '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' (Act 200 of 1993).

While numerous commentators have argued for the use of expropriation, the policy emphasis and practice of the last five years has emphasised the achievement of amicable resolutions to land claims (DLA 1997). Thus far no land claims settlement has involved a expropriation action by the Commission or the Land Affairs. This is a surprising fact when one considers the number of settlements that have been achieved to date. Recently the question of how the tool of expropriation could be used to advance the restitution process has come into sharp focus with the Minister of Land Affairs noting that expropriation is a legitimate instrument that can be used particularly where disputes around price cannot be resolved through a process of negotiation (Commission Annual Report 2000/2001:3).

As observed by Jaichand, section 8(3)b of the interim constitution, the section which deals with equality, continues to be relevant to the new land restoration procedure (Jaichand, 1997:32). This section referred to claims being made in terms of section 121-123 of the interim constitution as described above provided for the adoption of an act of Parliament aimed at restitution of land rights to any person or community dispossessed of such rights during the period after 19 June 1913 to the present, if such dispossession was effected under or for the purpose of furthering the

object of such a law which would have been inconsistent with the prohibition against discrimination contained in section 8(2) of the Interim Constitution, had that section been in operation at the time of dispossession (Jaichand, 1997:32). The current constitutional framework that governs the land restitution process in South Africa has a peculiar history. Even though the final constitution replaced the interim constitution the drafters of the final constitution chose to import provisions of the interim constitution into the final document. Therefore the drafters of our constitution introduced a number of limiting provisions which would govern land restitution. The first of these is the criteria of a racial dispossession. The second criteria was a narrow time window in terms of which possible claims could be made so as to exclude the period prior to 19 June 1913. In so doing they rejected the possibility of indigenous or aboriginal land claims which could stretch into the period of colonial dispossession from the constitutional framework (De Villiers, 1999; Visser and Roux, 1996: 94).

Notwithstanding the above, the interim constitution introduced a number of innovative changes to our property law. The term restitution of land rights was deliberately chosen over the more conventional term of land restoration. By drawing on the modern concept of property as a bundle of rights, the drafters moved away from the notion of property as thing ownership. It was argued that in practice this would allow any authority adjudicating land claims to consider a range of rights in land such a beneficial occupancy and labour tenancy and would also be able to consider a number of remedies in resolving claims (Visser and Roux, 1996: 95). Authors like Visser and Roux (1996) have argued that this formulation limits restitution to land rights and is not a comprehensive attempt at redressing all hardships which resulted from forced removals. The implication of this argument is that provisions for restitution therefore exclude other proprietary and non proprietary interests. In principle a claim in respect of business goodwill, lost profit and claims for pain and suffering would not succeed (Visser and Roux, 1996: 95). However, a recent judgement handed down by the Land Court in the case of *Hermanus versus the Minister of Land Affairs* has confirmed the position that land claimants are entitled to monetary awards for pain and suffering as well as mental and emotional anguish caused as a result of the racial dispossession. The Land Court was cautious not to open the “flood gates” of claims in respect of hardships caused as a result of dispossession and pointed out that each case would have to be treated on its merits (*Hermanus versus the Minister of Land Affairs : In re Erven 3535 and 3536 Goodwood 2001 (1) SA 1030 (LCC)*). The role that the Land Court has played in shaping restitution practise and procedure through judicial precedent is briefly discussed in the section

that follows. These precedents are discussed in relation to the processing of the Cato Manor and the Kipi land claims.

2.5 The Restitution Process From 1994 to 2001.

The Restitution of Land Rights Act No 22 of 1994 (Restitution Act) which was contemplated in section 121 -123 of the interim constitution was one of the first laws to be enacted by the Government of National Unity on the 17th of November 1994. This law provided for the establishment of the Commission on the Restitution of Land Rights (Commission) and a Land Claims Court (Land Court) (Act No. 22 of 1994 and DLA, 1997).

This Act provided a detailed framework within which land claims could be lodged and investigated, and disputes mediated; detailed reports could be referred to the Land Court by the Commission. Visser and Roux (1996) describe this as a two tier approach of administrative proceedings followed by judicial intervention. A similar situation prevails in other parts of the world, notably in Germany. A crucial difference is that in the case of Germany the judicial process was seen as a last resort in addressing disputes (Commission Report 3 1998; Visser and Roux, 1996: 96).

Soon after the enactment of the Restitution Act, authors like Khosa, (1994), Walker, (1996) and Ramballi, (1998) argued that the approach outlined in the Restitution Act with its emphasis on a judicial approach was likely to be slow, technocratic and exclusive. This was exemplified by provisions, such as section 14 of the Restitution Act, that envisaged that each and every claim be referred by the Chief Land Claims Commissioner to the Land Court for adjudication or ratification. These provisions slowed the process significantly. Authors like Walker (1996) herself a former Regional Land Claims Commissioner at the time, observed that the settling of claims has proven to be a slow and complicated process (Walker, 1996: 46). It was also observed that the establishment of a land claims court was likely to exclude victims of forced removals from meaningful and direct participation in the process (Khosa, 1994: 55).

The sheer volume of claims that have been lodged has hampered the Commission. By the expiry of the extended cut off date of the end of December 1998, the overall number of claim forms lodged with the Commission had burgeoned to 63 455. While a significant proportion of these

claims may fail the test of compliance with the criteria laid down in the Act it is likely that the vast majority will comply. A further complicating factor is the concern that even this number could mushroom as one claim form may represent more than one claim. This has been especially true of urban claims. In terms of overall numbers the breakdown between rural and urban claims is significant with 72% of all claims lodged being in respect of urban areas (Commission on the Restitution of Land Rights Annual Report 2000/2001). (See Table 6). This statistic masks the fact that almost all rural claims are by large communities. Early on in the restitution process some commentators had articulated the concern that a practical and workable limit be placed on the number of claims for restitution (Murphy, 1996: 116). The Commission’s Annual report for the period 2000/2001 notes the tally of claims lodged with the Commission stands at 68 878 (Commission on the Restitution of Land Rights Annual Report 2000/2001).

Table 6: Breakdown of claims between urban and rural areas

	W.Cape	N. Cape	E. Cape	Free State	KZN	Gauteng	N. West	Mpum	N. prov	Total
Rural	595	2000	804	101	2810	203	1472	5210	4113	19140
% by prov.	5%	62%	11%	4%	19%	17%	37%	81%	73%	28%
Urban	11343	1200	6588	2668	11997	9863	2473	1226	1494	48852
% by prov.	95%	38%	89%	96%	81%	83%	63%	19%	27%	72%

(Source: Commission on the Restitution of Land Rights Annual Report 2000/2001:14)

Drawing on the experience of the Advisory Commission on Land Allocation (ACLA), which was a limited attempt at land restitution during the De Klerk regime, Khosa has argued that a Commission should “have power to make decisions which would be binding on all parties including Government” (Khosa, 1994: 55). Walker has argued that, “land allocation by the Commission could occur on certain land which was state land where the metro council, or provincial government did not want the land” (Interview with Walker, 2/06/2000). The situation where senior officials of the Commission did not have powers to make decisions on a limited range of cases where clear policy had been established was one of a range of factors that contributed to the initial slow resolution of land claims (Commission on the Restitution of Land Rights Annual Report 1997/8; Interview with Walker, 2/06/2000).

Another issue that retarded the restitution process was the poor use of the Land Court by the Commission. A critical shortcoming in the formative years of the restitution process was the failure of the Commission to proactively refer strategic claims to the Land Court in order to clarify the law and generate much needed precedent for the settling of claims. This observation can be drawn from the relatively few claims that proceeded along the court route within the first three years of the process (Commission on the Restitution of Land Rights Annual Reports 1995/6; 1996/7; 1997/8).

While the Land Court has been a source of delay to the process it has also been a valuable source of precedent that has served to clarify the interpretation of the Restitution Act. These precedents have had a profound impact on the processing of claims by the Commission. Some examples include the rulings from the Macleantown and Cremin land claims respectively where the court clarified the definitions of a community and that of a direct descendant (*Ex parte Macleantown Residents Association: Re Certain Erven and Commonage in Macleantown 1996 (4) SA 1272 (LCC)*). In the Cremin case the court ruled that a spouse of the dispossessed was to be regarded as a direct descendant. It further ruled that spouses of direct descendants, that is daughters in law and non formal customary adoptions, were excluded from the definition of a direct descendant (*In re Sub, Farm Trekboer 1998 (4) All SA 604 (LCC)*). Both of these ruling were relevant to the processing of the Kipi land claim and were used to guide the claimant verification process.

More recently the Commission, pursuant to a Ministerial Review in 1998 of the slow pace of restitution has modified its approach to processing claims. This new approach involves the Commission facilitating out of court settlements that are ratified by the Minister of Land Affairs in terms of section 42 D of the Restitution Act. This replaced a situation where the resources of the Commission were aimed at compiling reports to inform court rulings (*Restitution Review Report, 1999; Commission on the Restitution of Land Rights Annual Report 2000/2001*).

The Ministerial Review resulted in a number of strategic directives that sought to fast-track restitution claim settlements. These directives included the processing of land claims via an administrative process rather than a judicially based court process. The Ministerial Review streamlined the processing of land claims by vesting the Commission with the responsibility for the entire claims process from lodgement through to negotiations and the implementation of

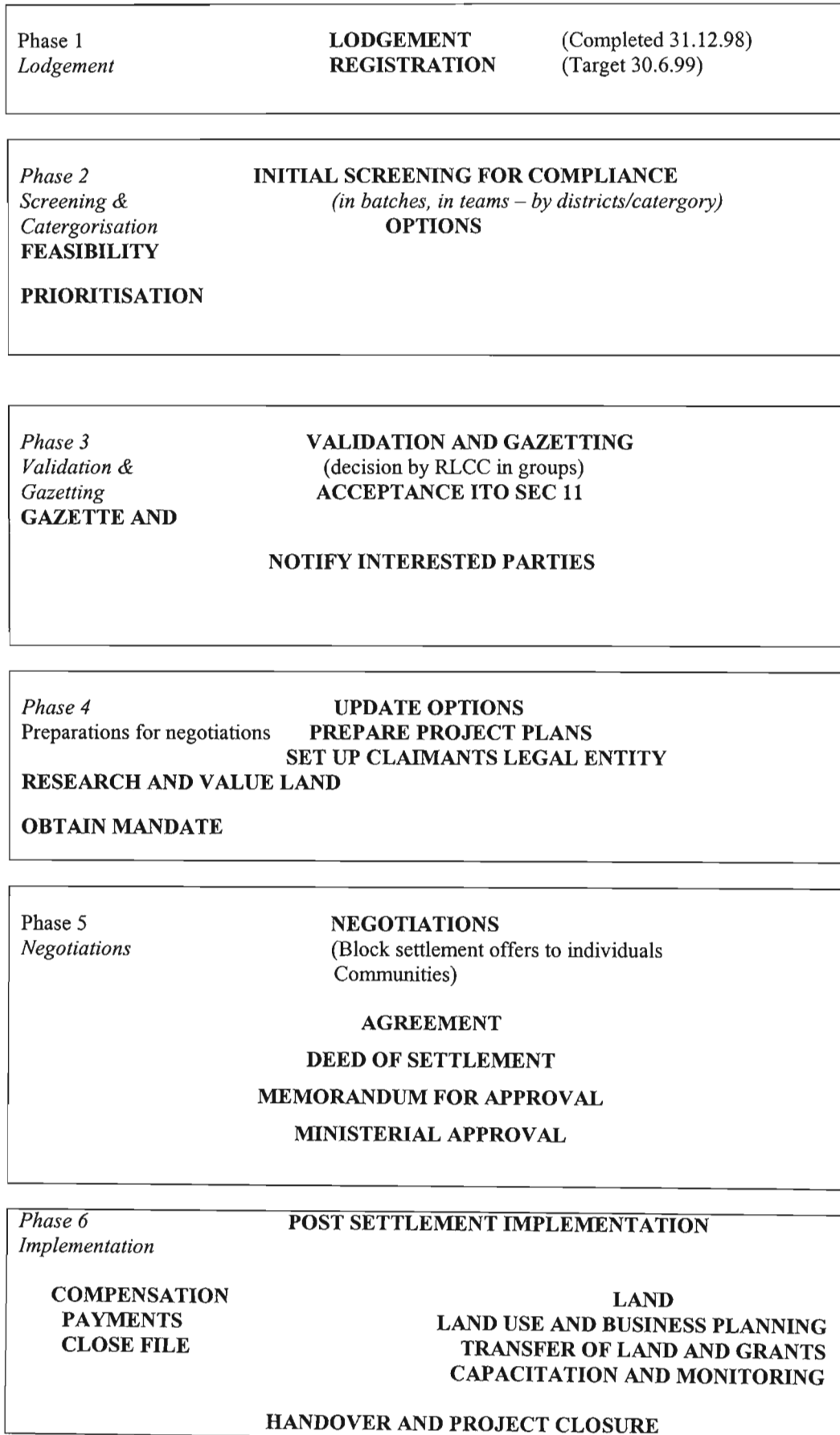
agreements. This remedied the situation whereby critical elements of the restitution process had been fractured by three different institutions managing the processing of claims. Under the system that prevailed from 1995 to 1998 three different institutions, namely the Commission, the Land Affairs and the Land Court shared responsibility for the processing of claims.

Initially the Land Affairs played the role of the respondent and representative of the state in all land claims. The Land Affairs was therefore a crucial roleplayer in negotiations towards a settlement. The Land Court played the role of ratifying negotiated settlements and was the final arbiter in the case of deadlocks. Therefore in the formative stages of the restitution process, the role of the Commission was to play the role of investigating agency and facilitator of negotiations. Therefore one of the products of the Review was a redesigned claims process. This document was later refined and formally adopted by the Commission. (See figure 4). Another change included the batching of urban claims into groups for processing and prioritisation in terms of clusters. Other practical changes included the reorganising of staff such that multi disciplinary geographically designated teams were made responsible for processing defined areas or numbers of claims (Restitution Review Report, 1999; Commission Report 3).

Although most claimants tend to equate restitution with restoring their land or payment of market value, the Restitution Act provides for a number of remedies (Conversation with Urban claims Researcher 1999). Therefore negotiation towards a specific settlement could involve restoration or return of the land dispossessed, alternative land, compensation or a combination of these (Act 22 of 1994; Khosa, 1994; Walker, 1996; Ramballi, 1998). As early as 1997 authors like Jaichand had argued that an efficient strategy to resolving the numerous urban claims which threaten to undermine the credibility and the financial viability of the restitution process would be to establish a policy in which urban claimants affected by the Group Areas Act would receive an adjustment in compensation (Jaichand, 1997: 118). Restitution policy analysts like Du Toit have been critical of the mechanical manner in which the Monetary Value of Urban land claims have been calculated (Du Toit, 2000).

An important innovation that arose out of the Ministerial Review was the idea of awarding standardised compensation to urban land claimants where urban development had radically altered the nature of the land under claim such that restoration would cause major social and economic disruption (Restitution Review Report, 1999).

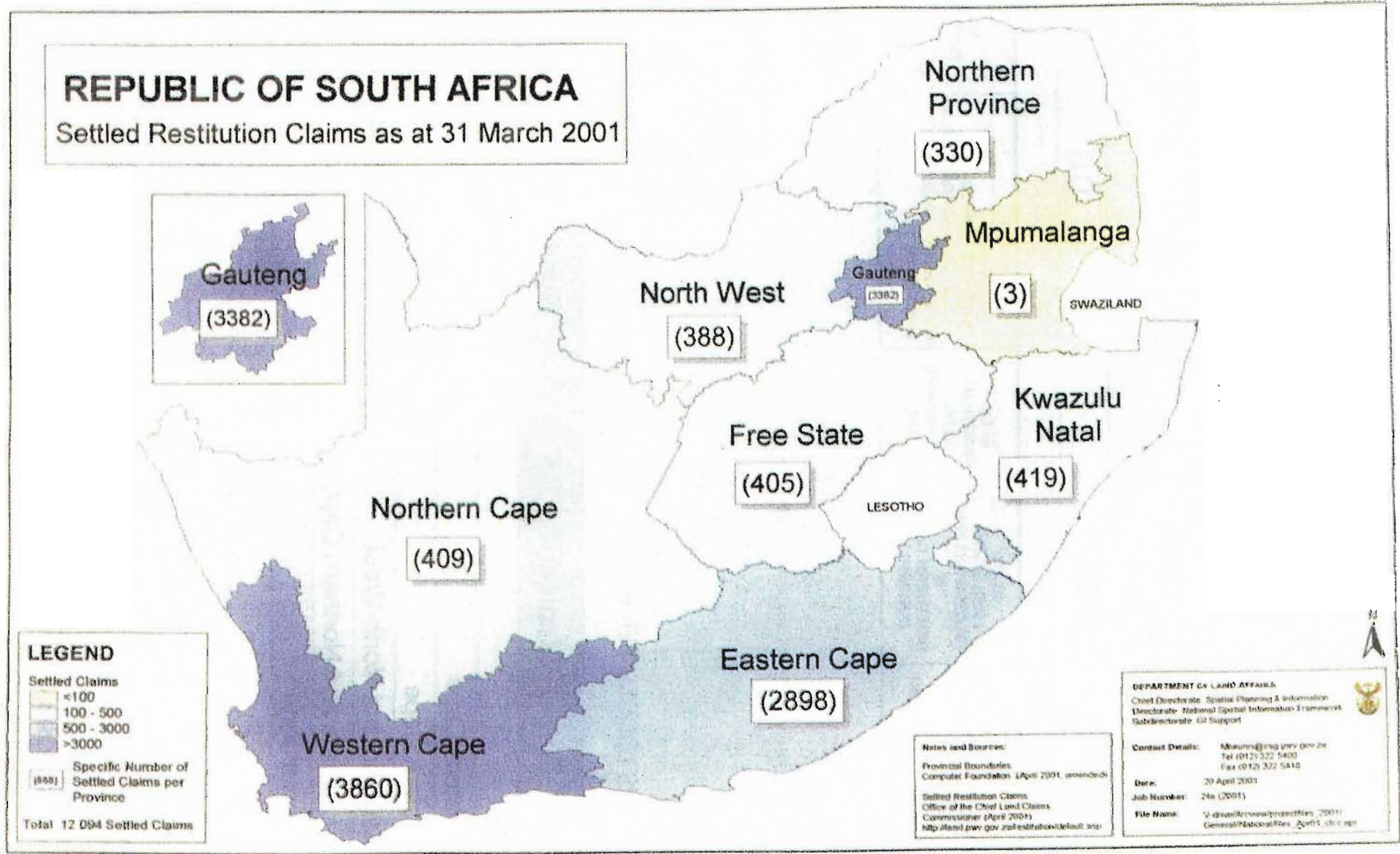
Figure 4
GENERIC CLAIMS PROCESSING FLOWCHART, 17.5.99



Here it was decided that the cumbersome and technical process of attempting to quantify the difference between what the claimants should have received historically and what they actually received at the time of dispossession would be replaced by an out of court settlement offer by the Minister of Land Affairs (Restitution Review Report, 1999). This was different from the Land Court which emphasised the historical approach (*In re Former Highland Residents 2000 (1) SA 489 LCC*). This idea was later refined at various workshops and dubbed the Standard Settlement Offer (SSO) (Input to Indaba on SSO prepared by Ramballi, 1999).

Other measures taken to speed up claims have included an amendment to the Restitution Act at section 43 that allows claimants to approach the Land Court directly. This so-called “direct access” clause provides that claimants conduct their own investigations into the facts of the forced removal and prepare and publish all relevant notices in respect of their claim. This avenue to claims settlement requires costly legal representation. Consequently few claimants have opted to approach the land claims court directly (Interview with Ramballi, 10/11/2000). Jaichand has argued in favour of the Commission aiming to resolve as many claims as possible out of court via negotiation and mediation, including section 34 applications (Jaichand, 1997: 118).

One of the overall effects of this new administrative approach to processing claims has been to simplify and speed up the pace of restitution settlement. (See figure 5). A key indicator of the increased pace of settlement is that 12094 claims had been settled by 31 March 2001 compared to only 31 claims settled from November 1995 to December 1998. The Kipi land claim stands out as one of the first claims that was settled in terms of section 42 D of the Restitution Act. The majority of the recent settlements have occurred via the section 42 D route compared to a handful via the Land Court (Commission on the Restitution of Land Rights Annual Report 2000/2001). Another indicator of the success of the 1998 Ministerial Review of the restitution process was the substantial increases in expenditure, from R 8 million and R 12 million in the financial years 1997/1998 and 1998/1999 respectively which reflected under expenditure of approximately 50% of the budget allocations in both instances, to the current projections of spending R 205 million in the 2000/2001 financial years. Despite these increases there has been a number of scathing criticisms that highlight that only about 40% of the total amount spent has been used to acquire land while 60% has been used to finance financial compensation awards. It has been argued that the increase in expenditure for restitution has not corrected the historic land imbalance as only 282 000 hectares have been restored via restitution since 1994 (Mayson, 2001:4).



Lahiff (2001) has observed that the implementation of restitution to date has had a clear bias towards urban claims and financial compensation (Lahiff, 2001: 3). While the bias towards financial compensation is valid it must also be acknowledged that a large number of urban claims settlements have incorporated a land and developmental focus. The Commission has made a concerted effort to package settlements in a manner that incorporates the provision of serviced sites and draws on housing subsidies (Mokono , 1999). Large groups of urban claims have been settled in this fashion. These include claims by the Port Elizabeth Land and Community Restoration Association (PELCRA) in the Eastern Cape, the Kipi land claim in KwaZulu Natal and the District Six Residence Association in the Western Cape (Commission on the Restitution of Land Rights Annual Report 1999/2000). The section which follows will examine some of the challenges and lessons that can be drawn from the restitution process as implemented in Cato Manor and then compares this with events in the Kipi land claim.

2.6 The Challenges and Lessons Highlighted by the Cato Manor and Kipi Land Claims

This section shall briefly review some of the academic research already done on the land claims in the Cato Manor area. It will also consider some of the recent developments on the land claims issue in Cato Manor and will compare and contrast this with the settlement achieved in the Kipi land claim.

Urban claimants who were in the main displaced by the Group Areas Act have lodged claims in respect of properties in towns but often private and state development projects have totally transformed these areas (Walker, 1996: 46). Walker notes that in the urban areas a major challenge confronting the Commission is to determine the 'just and equitable' balance between restitution and development. In the majority of urban cases developments of various kinds have meant that restoration of the exact property is not feasible, as it would cause severe social and economic disruption. In many instances properties have been consolidated, subdivided and totally redeveloped. Whole areas have been rezoned and new roads exist where there were none before (Walker, 1996:48).

On the other hand opposition and active resistance to Group Areas removals has meant that prime pieces of valuable urban land currently lie vacant and are well positioned for development. In

many instances, there is intense competition over this land by developers and other state departments such as the Department of Housing. In some cases, such as in Cato Manor, Block AK, Seaview in the central areas and further out in areas such as Newlands and Pinetown in the Durban Metro, land that has been vacant for some twenty years has been earmarked for housing development. This has resulted in tension and hostility between those who were dispossessed and those who stand to benefit from these new projects. There is a sense of a second dispossession by the current political and economic imperatives (Ramballi, 1998).

The area of Cato Manor with its in close proximity to the Durban Metropolitan area has a colourful and contested history. There are a plethora of social, economic and historical studies of the area, such as those by Edwards, (1989; 1994) Maharaj, (1994), Freund, (1995), Hassan, (1997) and Ramballi, (1998). The aim of this study is to draw on this rich academic research for the purposes of a comparative examination of the Cato Manor and Kipi land claims. Therefore this section of the thesis will briefly summarise the history of the Cato Manor area with particular reference to forced removals and proceed to outline the different issues that each case highlights.

The original Farm Cato Manor 812 which was situated on the outskirts of Durban was awarded to the Mayor of Durban Sir George Cato in the mid 1800's (Edwards, 1994). With the passage of time this original farm was subdivided and sold to ex-indentured Indians who sought to create a better life through market gardening which was very lucrative at the time (Maharaj, 1994; Freund, 1995). As the population increased a fully functional and thriving community evolved. Indians were not the only population in Cato Manor. Cato Manor also became home to a large African community (Hassan, 1997:24).” Around the 1930's, African freehold tenure also developed in the Chateau and Good Hope Estates. This was followed by informal settlements as some landowners took advantage of eviction in other parts of Durban and established shack farms (Edwards, 1989). Hassan, (1997), notes that, “these patterns of ownership and occupation created complex social and economic relations, which contained elements of both exploitation and cooperation (Hassan, 1997:24).” Therefore by the 1950's Cato Manor had developed substantially and its residents had access to services such as water to site or stand pipes, septic tank and pit latrines were also available. While more developed pockets had access to electricity and waterborne sewerage this was not the norm. Infrastructure within Cato Manor included twelve schools, sixteen mosques and temples, four cemeteries a crematorium and a sports field. Cato Manor also provided a range of business opportunities with approximately 131 traders and

general dealers in the area (Fitchet, et al, 1997).

The enactment of the Group Areas Act was part of a longstanding thrust to create a racially segregated city built around a white core (Mabin, 1992). The theme of segregation in the South African urban landscape reaches back to the late nineteenth and early twentieth centuries and was justified under the guise of progress, hygiene and modernity by municipalities (Freund, 1995). This was because there was no other legal mechanisms to enforce the removal of blacks from cities. Slum clearance was used as a tool to rid the inner cities of unwanted blacks (Swanson, 1978). Freund (1995) notes that in 1922 the Durban City Council initiated the passage of a provincial ordinance that allowed property owners to put racially exclusive clauses in deeds covering future sales. Other racially biased practices included neighbourhood covenants and the activities of certain real estate agents which worked against Indian “penetration” and ensured that parts of the city remained lily white (Freund, 1995).

Early racial legislation that affected Cato Manor included the Asiatic Land Tenure Act of 1946 that zoned Cato Manor Indian. Maharaj notes that the Durban City Council succumbed under pressure from its white voters and recommended to the central state that Cato Manor be zoned as a white group area in 1952 (Maharaj, 1994). Despite the staunch resistance and the numerous representations objecting to the proposals by both the Indian and African residents and various political and civic organisations, Cato Manor was proclaimed a white group area on the 6th of June 1958 (Maharaj, 1994). Given the weight of numbers and costs of removals, Cato Manor was the subject of a massive programme of social engineering. Ramballi (1998: 96-97) argues that, “the forced removals in Cato Manor under the Group Areas Act was the epitome of urban land dispossession in South Africa.” It has been estimated that some 160 000 people were forcefully removed from the area (Surplus Peoples Project, 1983). The total area affected in Cato Manor comprised some 1827 hectares of land covering 2917 subdivisions (Fitchet et al, 1997). The racial breakdown of land ownership at the time was as follows:

Table 7: Total people affected by the Group Areas Act in Cato Manor

Population Group	No of Hectares (ha)	Percentage (%)
Indian and Coloured	882	48
Blacks	38	2
Whites	502	28
Durban City Council	405	22
Total	1827	100

Source: (Fitchet et al, 1997:9)

Authors like Maharaj (1994), Freund (1995) and Ramballi (1998) have noted that by the late 1960's the vibrant and diverse community of Cato Manor had been destroyed. Its Indian residents were removed to the purpose built townships of Chatsworth and Phoenix while their African counter parts were relocated to the townships of Umlazi, Lamontville and later KwaMashu. The smaller Coloured community were forced to scramble into the existing areas of Sydenham, Redhill, and Wentworth. It was only three decades later, in the early 1980's, that the "sub-economic" areas of Marian ridge and Newlands East were developed for them (Surplus Peoples Project, 1983). It is worthwhile noting that while slum clearance discourse was prevalent in the pre apartheid era and was sometimes used as a guise for apartheid removals there was no acknowledgement, particularly by the Durban City Council, that this process of urban renewal would have to be accompanied by a vigorous public housing programme (Freund, 1995). It was only just prior to World War 2 that a small housing estate was created for poor Indians in Springfield Estate (Freund, 1995: 69). The above underlines the fact that while the apartheid state ruthlessly implemented its policy of Group Areas it failed to recognise the dire need early on for a state driven housing programme that would house the thousands of families affected by the removals.

By 1980 the vast majority of the relocations from Cato Manor had been completed. What remained were pockets of Indian families many of whom had demonstrated fierce and innovative resistance to the process of removals (Freund, 1995). Others were simply forgotten within the

bureaucratic processes (Interview with Ramdas, 15/11/2000). Many families suffered the indignity of having to rent their own homes for years (Interview with Ramdas, 15/11/2000). The grim result was that Cato Manor was converted into one of the largest undeveloped urban areas in South Africa as it was proclaimed for but never settled by whites (Maharaj, 1994; Freund, 1995; and Ramballi, 1998). This was the status quo up until the Interview with Ramdas, 15/11/2000).

The changing political climate of the 1990's witnessed the development of numerous plans by a wide range of divergent interests for the redevelopment of Cato Manor (Ramballi, 1998). At around the same time former land owners in Cato Manor initiated attempts to reclaim their land rights through the Advisory Commission on Land Allocation (COLA) and its successor the Commission on Land Allocation (ACLA) (Hassan, 1997). These early efforts at asserting land claims in respect of Cato Manor were unsuccessful in part due to the representations made before the COLA by the then Mayor of Durban, Mrs M. Winter and the Vice Chairman of the Cato Manor Development Association (CMDA), Mr Meyer (Ramballi, 1998: 104). The CMDA, a section 21 company, was the agency of the Durban Metropolitan Council responsible for facilitating the redevelopment of Cato Manor by providing affordable housing within a vibrant, high density, economically sustainable and ecologically balanced urban environment. Some of the challenges that faced the CMDA in the implementation of its vision for a new Cato Manor included overcoming conflicts stabilising and resolving informal and unregulated land invasions (CMDA, 1997).

Ramballi (1998) argues that the CMDA was originally envisaged to be a facilitator and not a developer, however the magnitude of the threat of land claims forced it to become a developer (Ramballi, 1998). The CMDA's own annual report for 1996 noted, "few factors have had as great a potential to impact negatively on the redevelopment of Cato Manor as the issue of land claims" (CMDA, 1997). The CMDA argued that the substantial risk of numerous and complex land claims would impede the developments progress as land owners claimed restoration of their land (Ramballi, 1998). It was argued that the private sector would not take the risk associated with land claims. Therefore in June of 1996, the Durban Metropolitan Council launched an application in terms of Section 34 of the Restitution of Land Rights Act (Ex parte North and South Central Metropolitan Substructure Councils of Durban Metropolitan Council and Another 1998(1) SA 78). This section allowed "any national, provincial or local government body" to approach the

Land Court “in respect of land which is owned by it or falls within its area of jurisdiction,” for an order to specifically rule out restoration of the exact portion of land to a claimant or prospective claimant (Restitution of Land Rights Act 108 of 1994). Section 34 placed the legal onus on the Durban Metropolitan council to prove to the court that land restoration was not in the broader “public interest” (Restitution Act; Walker, 1996: 48). The CMDA put forward a two pronged process to the land claims issue: the first was to have restoration ruled out as the possible form that restitution could take in the Cato Manor area and; the second was to include claimants in the development by using the housing allocations policy to accommodate legitimate claimants (Ramballi, 1998).

This was indeed a significant development for the success of land restitution in the Cato Manor, and the broader Durban Metropolitan area, as Cato Manor had the largest concentration of land claims in the Durban Metropolitan area and has been described by Ramballi (1998) as one of the most complex set of urban land claims in the country (Ramballi, 1998). Further this was at one stage the largest housing and urban renewal project in South Africa that sought to provide low cost housing to many thousands of South African citizens who had previously been denied housing opportunities with in the central areas of the city.

As noted in the White Paper on Land Reform, land restoration is a constitutional commitment by the democratic government and urgently needs to be implemented (DLA, 1997). The claimants during the court process argued that the CMDA failed to recognise the historical importance of land restitution in Cato Manor (Ramballi, 1998). One of the most scathing attacks on the CMDA’s approach to the land claims issue in Cato Manor came from Advocate Zac Yacoob who pointed out that CMDA’s planning processes had neglected to give serious consideration to the land claims by former owners. He further argued that no genuine attempts have been made by the CMDA to integrate the land restoration aspect into the development (Ramballi, 1998: 125). The CMDA, it was argued, had failed to explore the full range of possibilities in arriving at a balance between restoration and development (Ramballi, 1998). The glaring omission of a restitution component to the planned redevelopment of Cato Manor indicated the severe underestimation of the potential of restitution to support development, reconstruction and reconciliation.

As noted by Walker, “the section 34 route was not the most appropriate way to approach the

restitution issue in Cato Manor” (Interview with Walker, 2/6/2000). Likewise Ramballi states the section 34 process was a legal process and was not the best way to settle land claims (Interview with Ramballi, 10/11/2000). While numerous other section 34 applications have been launched by other local authorities, notably Block AK, Durban, District six in Cape town and Slangspruit in Pietermaritzburg, none of these have reached trial. These other section 34 applications have either been withdrawn by the relevant local authority or negotiated via out of court settlements. This is another indication that the launching of a section 34 application in Cato Manor was ill advised.

By January of 1997 the CMDA had begun considering the possibility of a negotiated settlement (Ramballi, 1998). By April 1997 the hearings were adjourned and the Court directed the parties to negotiate. It has been argued that considerable time and money would have been saved had the CMDA negotiated the issue with the claimants, their legal representatives, the Commission and the Land Affairs prior to legal action. On the 2nd of May 1997 a negotiated agreement was signed by the parties to the Cato Manor court process. This agreement which was later ratified by the Land Claims Court on the 24th of April 1997 was only the second ruling by the Land Claims Court in Kwazulu Natal and also concluded the first section 34 application in the country (Hassan, 1997).

The signing and ratification of the agreement by the Land Claims Court marked the end of a protracted court process and the beginning of period of implementation. In brief the settlement involved the setting up of a process and mechanism whereby land restoration in terms of the Restitution of Land Rights Act and primarily housing development driven by the CMDA in Cato Manor could proceed simultaneously (Hassan, 1997). It made provision for the possibility of restoration of the original land lost or the provision of alternative land (Hassan, 1997). This was conditional to the validation of claims by the Commission and the feasibility of incorporating such claims for restoration within the development without disrupting the development process. It was agreed that the CMDA would be responsible for producing the feasibility reports. This put the claimants and even the Commission at a severe disadvantage as neither parties had access to expert planners to help refute or challenge the “findings” of the technical feasibility reports (Interview with Ramdas, 15/11/2000). The agreement also set out clear time frames to guide the implementation process (Hassan, 1997). The agreements made provision for the establishment of a panel of mediators and arbitrators in the event of dispute. The overall performance of the

mediators left much to be desired, some of the problems experienced ranged from poor reporting and below standard facilitation to not arriving for mediation sessions (Interview with Ramdas, 15/11/2000).

While the procedures noted in the agreement were intended to fast track the restitution process to mesh with the rigorous Annual Work Programme of the CMDA this was not the eventual outcome as the last mediations were only concluded in 2001 some 4 years after the landmark agreement was signed. Other issues that are noteworthy is the limited coverage of the section 34 agreement, only those claimants who had formally objected to the section 34 application and were party to the proceedings. This defined the participants and potential beneficiaries to the agreement as being the 517 objectors (Ex Parte North and South Central Metropolitan Substructure Councils of Durban Metropolitan and Another 1998 (1) SA 78 LCC). The section 34 was granted by the LCC in favour of the DMC. This meant that development could continue on the land not being claimed by objectors (Ramballi, 1998). The settlement also represented a hollow victory for both the claimants and the CMDA. The claimants who had responded to the section 34 application had succeeded in forcing the CMDA to negotiate feasibility of restoration via a supervised mediation process. The CMDA had successfully eliminated the threat that land claims posed to the project by eliminating the possibility of restoration for the vast majority of claimants. In summary the out of court settlement of the section 34 was a poor attempt at integrating the land claims and the redevelopment of Cato Manor. It simply eliminated the time delays that land claims potentially posed to the project. The settlement agreement maintained and exacerbated a compartmentalised mentality and effectively scuppered the possibility of a more integrated approach to land restoration and development. This is because it effectively negotiated the approximately 7500 other claimants out of the development process. These people may have been intimidated at the prospect of challenging the CMDA. They would now have to be content with the other remedies available in terms of the Restitution Act. The objectors, some of whose land was already “developed” by the time their mediation was scheduled, were now subject to a further layer of bureaucratic processes before their claims would be resolved. The CMDA, the major benefactor of the section 34 application, itself was a loser in the process, as considerable resources were required to represent it at the mediation and arbitration processes and to research and compile the numerous feasibility reports.

An important aspect of the memorandum of agreement was the provision of a “social process”,

under which the CMDA had to present the structure plan to the claimants and allow for their comments to be included if appropriate (Interview with Walker, 2/6/2000). It was envisaged that a historical and cultural museum would be developed in Cato Manor and that the numerous significant historical, cultural and religious sites of Cato Manor would be retained and incorporated into the structure plan so as to enable the development of a tourist route that showcased the rich and diverse cultural history of Cato Manor (Ramballi, 1998).

During the negotiations towards the agreement of the section 34 issue the idea of developing a “restitution park” in Cato Manor was put forward. The notion of a restitution park was that a low to middle income housing development could be developed specifically for land claimants. Claimants would receive sites in the restitution park in lieu of restoration of their original sites. As this development was proposed, the CMDA, the Commission, Land Affairs and the land claimants would work together to develop this idea (Interview with Walker, 2/6/2000). Unfortunately this idea was not outlined in the section 34 settlement agreement and was therefore not part of the court order which was ratified by the Land Court (Commission on the Restitution of Land Rights, 1997a).

It was only much later in 2001 that the Commission initiated discussions with the CMDA to conduct a feasibility study to further define the parameters, location and costs of a proposed restitution park (Commission on the Restitution of Land Rights, 2001a). This represented the first concrete steps to bring about alignment of land restitution and development in Cato Manor.

Another important issue that arose as a result of the implementation of the settlement agreement was the need for the Commission and the CMDA to enter into a land supply agreement. The purpose of this agreement was to regulate the relationship between the parties and to set up processes whereby the outcome of mediation or arbitration would result in an agreement that restoration was feasible or not. In this event, the agreement provided for;

- A notification process,
- The valuation of land deemed to be feasible for restoration and,
- Clear processes and procedures for the purchase and sale of properties owned by the (CMDA, 2001)

An ancillary aspect of the agreement was to facilitate the allocation of state land in Cato Manor

to the land claimants where this land was not required by the CMDA for the development.

In this instance the CMDA offered the Land Affairs and the Commission an option to purchase state land. The land supply agreement provided that this land would be awarded to successful claimants in the following order of priority;

- “To participants who have elected to have their claims settled by way of the provision of alternative sites,
- To Cato Manor claimants who have elected to have their claims settled by way of provision of alternative state land in Cato Manor,
- To claimants from the Durban Metropolitan area that have elected to have their claims settled by way of the provision of the alternative state land,
- At the discretion of the Land Affairs and the Commission” (CMDA, 2001:10).

This was an important agreement as it finally clarified the relevant processes that a claimant wanting restoration would have to endure. It provided for state land which was superfluous to the development requirements of the CMDA to be restored to Cato Manor and other claimants from the DMA who wanted access to land in Cato Manor (CMDA, 2001).

Despite these significant advances in the possibility for restoration to claimants a flaw of this agreement was that it still did not go far enough in integrating land restitution and development in the Cato Manor area. This is because the vast majority of state land that was additional to the requirements of CMDA was more likely to be poorly located, steep, with poor road and service access and therefore undesirable to claimants (Interview with Ramballi, 10/11/2000). In short this land would be expensive to develop and would require substantial investment before it was livable. Another crucial issue was that the mandate of CMDA was to facilitate development yet the agreement only provided for the release of bare land without any provision for CMDA to assist with the provision of even the most basic of services (CMDA, 2001).

Finally the land supply agreement was reached very late in the process, some 4 years after the original agreement was signed. This effectively meant that 6 years into the restitution process and 4 years since the conclusion of the original agreements not one single claimant had been successful in the struggle to reclaim their land under the Restitution of Land Rights Act in Cato Manor. This single statistic is alarming when one considers the massive resources that were

deployed to the section 34 process and the arbitration and mediation process by the parties. The Durban Metropolitan Councils legal bill for the section 34 hearing alone amounted to approximately R 500 000 (Interview with Walker, 2/6/2000). The lack of delivery is a harsh indictment on the processes laid out in the original agreement that was overly cumbersome and technical in nature. In the final analysis, the CMDA goal of winning a clean slate for development and eliminating the risk of land claims was achieved (Ramballi, 1998).

In the case of Cato Manor the land claims were mainly in respect of individual freehold rights by Indian and Africans landowners and African tenants. These were viewed as being “incongruent with the kind of development that the CMDA had in mind. (Interview with Walker, 2/6/2000).” “There seemed to be a very strong prejudice against the claimants in general and some level of negative stereotyping of the claimants as being rich Indians (Interview with Walker, 2/6/2000).” This stereotyping was contradicted by the actual claims that came in, which reflected a diverse population group. These incorrect assumptions demonstrated that the CMDA did not engage or analyse the profile of the claimants from Cato Manor (Interview with Walker, 2/6/2000; Ramballi, 1998). This was not to the claimants’ advantage.

The launching of a section 34 application by the council created suspicion and a negative environment for successful negotiations (Interview with Ramballi, 10/11/2000). In the case of Cato Manor the Commission and the claimants got into an *adversarial* relationship with the CMDA around the issue of the section 34 application which had to be challenged (Interview with Walker, 2/6/2000, *my emphasis*). “The court process made it difficult to get an effective working relationship going (Interview with Walker, 2/6/2000)”.

Ramballi notes that the Cato Manor claimants had approached the council with regard to restitution prior to the enactment of the Act. He further notes that had the council engaged with the claimants in the planning of Cato Manor then much of the conflict around the section 34 application would have been averted (Interview with Ramballi, 10/11/2000). “The council missed an opportunity for reconciliation as restitution could have contributed to business as a significant aspect of the CMDA structure plan made provision for business development (Interview with Ramballi, 10/11/2000).”

2.7 Conclusion

This chapter has reviewed the broader debates and development in the international environment that assisted to shape the restitution process in South Africa. The chapter has discussed and explained the legislative framework for the implementation of restitution in South Africa. Finally the recent developments in policy and refinements in procedure and practise which have facilitated the increased rate of delivery have been discussed. It has also been noted that many of these developments influenced the approach taken in the Kipi claim and in part guided the implementation of the Kipi land claim.

An important issue highlighted by the Cato Manor and the Kipi land claims processes was the need for direct communication between principles as the role of intermediaries (lawyers, agents and consultants) resulted in miscommunication and a lack of coordination in the process.

CHAPTER THREE

THE KIPI LAND RESTITUTION CLAIM

3.1 Introduction

The history of land ownership and land settlement patterns from the arrival of settler communities to the 1950's in the Pinetown area are closely related to South Africa's colonial past. Here early missionaries coexisted alongside established African communities. During this period there was a slow, subtle process of land dispossession as whites acquired ownership rights over these lands. This chapter briefly looks at the process of colonial encroachment as a precursor to racially motivated land dispossession under the Apartheid system. This chapter also considers a brief account of the Kipi communities' struggle to reclaim their land prior to and after the enactment of the Restitution of Land Rights Act. The intra and inter community tensions that characterised this process will also be analysed in this part of the study.

3.2 Colonial Encroachment and Dispossession

The present Kipi community has a longstanding relationship with the claimed land that stretches back to as early as the 18th century, prior to colonial occupation. It is noted in a memorandum to the Commission outlining the communities' history with the land that this area was occupied by the Fosholo and his brother Phangumbala prior to the arrival of the German missionaries (Commission file). The Surplus Peoples Project (1983) notes that the Mapumulo and Mangengeni peoples were resident on this land prior to its occupation by whites. These peoples had settled in the area that was later to become known as the Pinetown area mainly along the Umhlatuzana river. The missionaries were given land by Chief Manzini Shoji and the Induna, Shofolo Dube, who had been converted to Christianity (Surplus Peoples Project, 1983: 465; Commission file; Interview with Mr Dube, 01/02/2001).

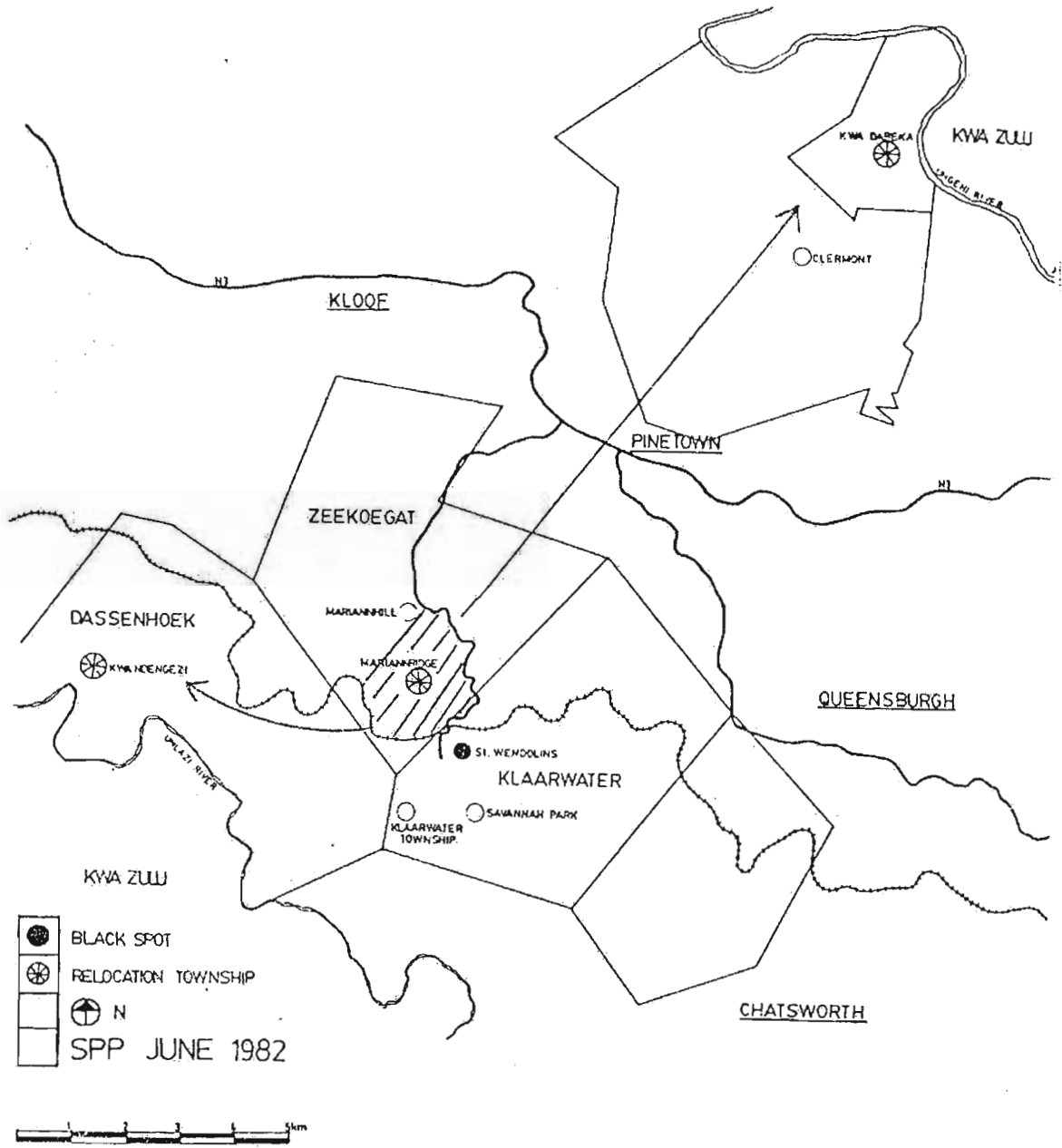
From the arrival of the missionaries there was a process of incremental dispossession that transpired over a drawn out period. This dispossession can be divided into two phases. The first phase was a legal change in the ownership of the land and the second phase was characterised by the physical dispossession of families by forced removals.

The first, was a formal process whereby there was a change in the ownership of the land. This occurred when the mission acquired formal ownership by gaining title to the land. Previously the community enjoyed longstanding rights under a traditional land tenure system with the land vested in the community and the individual families retaining usufruct rights. This resulted in a situation where they were regarded as tenants of the Marianhill Mission. This process of colonial land dispossession is well known and is recorded in works such as the Surplus Peoples Project (1983) and memorandum submitted by the Kipi Community to the Commission and will therefore not be replicated here. (Surplus Peoples Project, 1983; Commission file).

When considering the history of the farm known as Zeekoegat, which is situated in the Pinetown area and which was the subject of the Kipi restitution claim, it is interesting to note the inextricable link between the Marianhill Mission Institute and the surrounding communities. On the 20th December 1882, the farm Zeekoegat was acquired by the founder of the Marianhill Monastery, Father Frantz Pfanner, from the Natal Land and Colonisation Company for the sum of £ 1000. Subsequently the Marianhill Mission was developed on farm Zeekoegat. Later the Mission increased its land holdings by the acquisition of the adjoining farm Klaarwater on which the mission community of St. Wendolins was established (Surplus Peoples Project, 1983:465; Commission file). When, in 1909, the Monastery and the Missions of Marianhill were separated from the Trappist Order by Papal Decree. These farms were transferred by the Trappist Order to the Marianhill Mission Institute (Commission file). These farms remained in the ownership of the Marianhill Mission Institute until the apartheid dispossessions. (See Figure 6.)

During the period 1909 to 1966, primary and secondary schools facilities were established around what became known as the Marianhill Mission complex. Trade shops which employed skilled artisans were also established (Commission file). During this time the Marianhill Mission introduced a nominal annual rental of R 2,50 for those occupying the land (Commission file; Highway Mail, 16/07/1999). The resident African community, many of whom had converted to Christianity viewed this as a tithe to the church (Interview with Dube, 01/02/2001).

Figure 6



(Source: Surplus Peoples Project, 1983: 464)

3.3 Implementation of Racial Segregation in the Pinetown area in terms of the Group Areas Act.

The Group Areas proclamation No. 126 for the Pinetown district published in 1966 affected the entire area surrounding the Marianhill Mission. In all, the affected area comprised some 8 500 hectares (Surplus Peoples Project, 1983:466). The Marianhill area was included in the Group Areas Proclamation for the Pinetown District (Commission file). The proclamation designated the land on which the monastery, hospital, school and convent stood for white ownership and occupation while the land to the west was proclaimed for Coloureds. This area was later to be developed as a Coloured township called Marianridge in 1976. Finally the area to the east, which incorporated St Wendolins, was proclaimed for Indians. The Kipi community was amongst the communities affected by this proclamation (Commission file). The most harshly affected group were the African land owners and tenants of the area; despite the fact that they were in the majority they were eventually relocated to the townships of KwaNdengezi and KwaDabeka (Sunday Tribune, 18/1/1976). (See figure 6.) These communities' land rights were further undermined by the zoning of another 400 hectares of the farm Klaarwater for industrial purposes (Surplus Peoples Project, 1983:466).

At the public hearing which preceded the proclamations, all the Marianhill communities as well as the Health committee were represented. The communities affected and the Marianhill Mission made representations to the authorities against the implementation of the proclamations. However these were unsuccessful and the proclamations were implemented (Commission file).

The proclamation of Marianridge as Coloured in part had the potential effect of deflecting the anger of its threatened residents away from the authorities who were responsible for the situation. This was because, from these removals, the Coloured and the Indian communities stood to gain access to well located land relatively close to already developed facilities and the industrial area in Pinetown. A similar situation persisted with regards to the St Wendolins proclamation (Surplus Peoples Project, 1983:466). Much of the resentment and inter community tension towards the Coloured community only surfaced at the time of the restitution claim, which was to be resolved two decades later.

As far as the administration of the area was concerned, it was only in June of 1970 that the areas of Marianhill, Zeekoegat and Klaarwater were incorporated into the Pinetown municipal area. Prior to this many of the services that existed, such as both primary and secondary schools as well as church facilities, were supplied by the Marianhill Mission Institute (Surplus Peoples Project, 1983:466; Interview Dube, 01/02/2001). The proclamation and forced removals destroyed the once thriving communities that surrounded the mission and dispersed residents to the townships of KwaNdengezi and KwaDabeka (Interview with Dube, 01/02/2001; Gordon, 02/06/2000).

Pursuant to the Group Areas proclamation of 1966, in 1970 the Department of Community Development expropriated the claimed land from the Marianhill Mission Institute (Commission file). This was a consequence of the land having been zoned for the development of a Coloured township in terms of the Group Areas Act of 1966 (Government Gazette No 1432, 29/4/1966 of 126). The effect of this notice was to make the continued occupation of this area by the Kipi community, the tenants of the mission, illegal. During the period 1975 to 1976 the Port Natal Administration Board forcibly removed the Kipi community to the relocation townships of KwaNdengezi and KwaDabeka (Sunday Tribune, 18/1/1976). Through this process approximately 522 people from some 101 families were relocated (Commission Report 1). These removals coincided with the redevelopment of the area that began in January 1975 and was later to become known as Marianridge township (Commission file).

The Group Areas removal took place in two phases. The first phase commenced with the development of the bus route in 1976 and this led to the immediate removal of 7 African families, while the development of subsidiary routes led to the removal of a further 21 families. As the relocation township of KwaNdengezi was not complete, the affected families were temporarily settled in Klaarwater and then relocated for a second time to KwaNdengezi (Commission file; Sunday Tribune, 18/1/1976). The construction of homes in Marianridge began in January of 1976 and marked the second phase of removals of the remaining 73 families. A total of approximately 101 families were affected by these removals (Commission file).

While there is no documentary evidence that suggests that the community received any monetary compensation as a consequence of the removals, the community in its submission to the Commission has made representations stating that they received compensation for their homes,

which were demolished, and their fruit trees (Commission file). The elders of the community noted that each person received a small amount of money depending on the size of their homes. Some received R 50 while one person received R 180 for her 7 room house. The effect of the Group Areas Act was to dispossess the Kipi community of their rights to reside on their ancestral land (Commission Report 1).

In sum, the Kipi community has had a longstanding and intimate relationship with the claimed area even prior to colonial encroachment. At first the inter community relationship between the indigenous people and the settler population was based on cooperation, mutual respect and coexistence. However as time passed and the land rights regime in Pinetown and Marianhill areas became more formalised the Kipi communities' land rights were slowly undermined. Despite this uneasy situation the Kipi community still remained and enjoyed beneficial occupation of the area, albeit with the permission of the formal owners, the Marianhill Mission Institute.

The implementation of forced removals under the Group Areas Act in the Pinetown area by the Nationalist Party Government brought the situation to a head. One of the cornerstones of the apartheid system, the Group Areas Act was used to extinguish the limited rights of the Kipi community. This process effectively banished this once thriving and established community from their ancestral lands to the grossly underdeveloped areas of KwaNdengezi and KwaDabeka, which were both substantially further from the urban centres of Durban and Pinetown.

3.4 Community efforts to reclaim the area known as Kipi prior to 1995

By June of 1970 the area that the Kipi community had historically occupied was incorporated into the Pinetown municipal area and therefore fell under the jurisdiction of the Town Council of the Borough of Pinetown (BoP) (Surplus Peoples Project, 1983: 466). When the tri-cameral system that espoused the principle of own affairs administration was introduced in the 1980's, the House of Representatives (HoR) became responsible for the administration of the Marianridge area. However by September of 1992 the BoP and the HoR entered into an agreement whereby the BoP would take transfer of and complete township infrastructure in respect of Pinetown Extensions 65, 67, 68 and 71 which encompassed the Marianridge semi detached houses, the flats, the area known as Mazakhele and a new development comprising approximately 166 units (Commission file).

In 1991 a group of former residents formed the Kipi Committee (KC) with the aim of seeking the return of land occupied by the Kipi community prior to their removal in the 1970's by the former government (Commission file; Interview with Dube, 01/02/2001). By February of 1993 a group of 40 families who were former residents of the Kipi area and who had constituted themselves into the Kipi Committee (KC) initiated discussions with the BoP. The KC under the leadership of Mr Pius Kwela approached the BoP on behalf of this group of people who were displaced from the area by the Group Areas Act. The KC indicated that the former residents wished to return to the area and cited their historical claim to the area as well as the harsh conditions of high rates of violence, lack of amenities and severe overcrowding at KwaNdengezi as reasons in support of their motivation to return. (Commission file; Interview with Dube, 01/02/2001).

Initially the BoP proposed that the former residents be allocated a portion of vacant land, Lot 6897, which was located in the Marianridge area (Commission file). The BoP eventually allocated the KC a piece of land which would have yielded 68 sites (Commission Report 1). By February 1993 the members of the KC had contributed an amount of R 18 329, 75 towards the project (Commission file). This money was regarded as a refundable deposit towards the development. The Western Council of the BoP secured funding from the Port Natal Joint Services Board (PNJB) for the development of Lot 6897 (Commission file).

Throughout this process the KC were consulted concerning the detailed planning of the proposed development. Agreements were reached on issues such as the sizes of the sites, which varied from 350 to 450 square metres, the layout plan of the township, priority services which would be delivered and the name of the township. The name of Mazakhele, a Zulu word meaning to “build for yourself”, was accepted as the name of the township (Commission file). Figure 1 depicts the area in question.

The BoP's Western Council then approached the Joint Services Board and the Provincial Housing Board who pledged funding towards the development of Mazekhele for housing (Commission file). The KC and the BoP formed an allocations committee with a view to allocating sites to the members of the KC and facilitating a sales process (Commission file). By the 14th of June 1994 the roads and stormwater drainage had been installed and the water supply

was planned for completion soon thereafter. By the 2nd August 1994, 66 of the 68 sites had been allocated. Further sales documentation had been drafted and all that was required was signing by the respective community members (Commission file). By December of 1994 the development of Mazakhele was at an advanced stage and the broader development committee comprising community members was appointed to monitor the progress of the whole development (Commission file). As early as January 1995 the KC had concluded a social compact agreement regarding the development of Mazakhele with the BoP (Commission file).

At this point the news of the development of Mazakhele township for a group of former residents of Kipi filtered to the broader Kipi community who had also been affected by the removals. Members of the community then called a general meeting to discuss the proposed redevelopment of the area. It was noted that there was no proper consultation with all those former residents who were affected by the removals and that the Mazakhele development would only benefit a selected group of the community and not the entire group of those who were removed (Interview with Mr Dube, 01/02/2001). Members of the community also expressed concerns that the KC “was working in isolation and was not elected by the Kipi Community (Commission file)”. At the same meeting of the 8th January 1995, the interim Kipi Development Committee (KDC) was elected and mandated to police the Kipi area, link up with all roleplayers in Mazakhele Development and merge with Kipi Committee (Commission file; Interview with Dube, 01/02/2001).

On the 26 January 1995 the BoP convened a meeting between the old committee, namely the Kipi Committee, and the new committee known as the KDC to facilitate the resolution of the dispute between the two. At this meeting the KDC indicated that whilst the current development focussed on Mazakhele they intended “to negotiate on all land from which they were removed”. The new KDC also indicated unhappiness with some of the agreements reached between the KC and the BoP specifically regarding the allocations process and the agreement that pit latrines would be provided at Mazakhele (Commission file).

By late March of 1995, the KDC under the chairmanship of P Z Fakazi had met with BoP and had indicated that they represented the broader Kipi community and were seeking to negotiate on all land previously occupied by the Kipi community. It then became apparent that there was a boundary dispute between the KDC and the Mpola community. It was further clear that the new

KDC disputed the allocations of sites in the Mazakhele development as although this development was negotiated on behalf of the former residents the allocations included people who had not been removed and were not known to the Kipi community (Commission file; Interview with Dube, 01/02/2001). By the end of March 1995 the officials of the BoP had assisted the KDC to map the broader area claimed by the KDC and initiatives were launched to investigate the availability of land within the areas former occupied by the Kipi community (Commission file). By May of 1995 the KDC had requested the BoP to halt all development in the Marianridge further to investigations and inclusion of KDC. As far as the Mazakhele development was concerned a stalemate was reached regarding the inclusion of six families which the previous KC were willing to accommodate in the development (Commission file).

Another development occurred on the 11th of May 1995, when Mazakhele township was designated by the Minister of Local Government and Housing for development in terms of the Less formal Township Establishment Act of 1991 (Provincial Gazette Notice No. LGMN175, 1995). Subsequently, the Provincial Housing Board approved funds in 1994 for a further development in Marianridge for those people of the Marianridge community who had been classified as Coloured. This project was a much larger development and it was projected to yield at least an additional 156 residential sites for housing development. This estimate was increased during the detailed planning phase when the final layout of the proposed development indicated that 166 residential sites would be yielded (Commission file).

3.5 Negotiations between the Kipi Development Committee, the Borough of Pinetown and the Marianridge Development Committee

The existing residents of Marianridge developed on the Kipi area organised themselves into the Marianridge Residents Committee (MRC) and also pursued housing development initiatives of their own for vacant land in the same area (Interview with Councillor Hoorzack, 02/06/2000).

At this stage, the KDC, who represented the former Kipi residents, approached the Marianridge Development Committee (MDC), a civic organisation pressuring the BoP on behalf of the Marianridge residents for inclusion in the larger housing project (Commission file).

This idea was rejected by the MDC as they asserted that they also were “victims of the Group Areas Act and were relocated to Marianridge against their will” (Commission file). The MDC

also pointed out that the Kipi Community had already been allocated 68 sites in Marianridge at the proposed Mazakhele development. Other reasons advanced in rejecting the KDC's proposal were that the community at Marianridge was currently experiencing severe overcrowding in the flats and that these people needed to be attended to prior to any allocation to the former residents of Kipi (Commission file).

It was proposed to the KDC that they seek relief regarding their claim through the Land Claims Court and the Western Council of the BoP. The MDC requested the BoP to continue with development in the area and investigate further land for low cost housing developments (Commission file).

During July 1995 the Land and Housing Committee of the Western Council, after considering the representation of the MRC and the KDC, decided that the Marianridge housing development should continue (Commission file). In 1996, the KDC made a request to the PHB to stop the proposed housing developments in Marianridge. In turn, the PHB asked the local authority, the newly constituted DM Inner West Council (IWC), to mediate the dispute between the KDC and the MDC (Commission file). During 1996, the IWC established the Dispute Resolution Working Group as a mechanism to ventilate the issues and make proposals on the way forward.

The Western Council (the predecessor of the Durban Inner West Council) had been proactive in addressing and managing the land and development disputes in the broader Pinetown area. A number of community structures were set up to mediate differences and facilitate negotiated solutions to these issues. The Marianridge negotiation forum was one such structure. The Kipi land issue was first raised at this particular forum. The proposal that arose here was that the Western Council seek funding to facilitate the resettlement of the Kipi community in Marianridge. In pursuance of this the Western Council made application to the Port Natal Ebhodwe Joint Services Board for funds for the resettlement of the Kipi community (Commission file).

On the 6th of June 1995 the MDC called a public meeting at the Marianridge community hall to discuss the Kipi land issue. The resolution of the meeting noted that "we the people of Marianridge are also victims of forced removals and being in Marianridge is no choice of our own." The meeting resolved that the Kipi Committee take up the issue with the Western Council

and the Land Claims Court. It further resolved that the MDC ensure that development continue and work with the Western Council to investigate the land for low cost housing development (Commission file).

3.6 The Restitution Claims Process in the Kipi Claim

The claim for the restoration of the Kipi area was formally lodged with the CRLR on the 15th of July 1995 on behalf of the former residents of Kipi by Mr Zaba Dube, who was acting in his capacity of deputy secretary of the Kipi Development Committee (Commission file; Interview with Dube, 01/02/2001).

The KDC on the 19 June 1995 informed the Western District Town Council that after unsuccessful discussions with the MDC to resolve the Kipi land claims issues it had lodged a claim with the Commission. In view of the claim the KDC requested the Western Town Council to halt all development on the claimed land (Commission file).

During 1996 very little progress was made on this claim as a result of a number of compounding factors. Only in mid 1996 was a researcher appointed to investigate the validity of land claims in the Pinetown area. Further the researcher experienced difficulty securing access to the historic files from the Durban Intermediate Archives Depot and the Marianhill Mission Archives, which held files detailing the removals (Commission file; Interview with Ramballi, 10/11/2000). The Commission also experienced problems identifying the land being claimed, as the claimed area did not coincide with any formal boundaries. This was the case because the farm Zeekoegat had been subdivided into several hundred lots after dispossession occurred. The Commission used the services of a qualified surveyor and experienced deeds researcher to correctly identify the claimed land (Interview with Ramballi, 10/11/2000).

By September of 1996 the KDC wrote to the Regional Land Claims Commissioner raising concerns that the MDC and the Inner West Council were proceeding with the housing development project and excluding the KDC. The KDC also indicated their concern that the Kipi land claim had not as yet been accepted as complying with section 11(4) of the Restitution Act and had not been published in the Government Gazetted (Interview with Walker, 02/06/2000).

3.7 The Challenges and Problems Posed by the Publication of the Claim in Terms of Section 11 of the Restitution Act

On the 14th of February 1997, the Kipi land claim was accepted as being compliant with section 11(1) of the Restitution Act (Government Notice No. 305 of 1997). Section 11 of the Restitution Act provided the Commission with a number of critical challenges in processing the Kipi claim. The first problem was that publication of the notice placed a legal onus on the RLCC immediately to advise the owner of the land in question and any other parties that might have an interest in the claim; and (b) refer the owner and such other party to the provisions of sub section (7) (Restitution Act).

Section 11(7) states that “once a notice had been published in respect of any land- (a) no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the Regional Land Claims Commissioner one months written notice of his or her intention to do so, and where such notice was not given,” and the prohibited action was not done in good faith then the land claims court may set aside the transaction (Restitution Act).

The net effect of the notice was to make all property sales and development transactions within the claimed area subject to the written approval of the RLCC. The RLCC had to ensure that the affected owners were informed. This was done by distribution of the notice and an explanatory pamphlet and by advertisements in the local newspapers. The publication of this notice precipitated a flood of enquiries regarding the effect of this notice for the numerous property holders in the area and their lawyers (Ramballi, 1998). This experience gained by the implementation of the Kipi land claim was used to inform an amendment to the Restitution that removed the requirement of notification where there was no or little prospect of restoration.

3.8 Negotiations between the Kipi Development Committee, the Durban Inner West Council and the Marianridge Development Committee on the Disputes Working Group

During 1997 the Durban Metropolitan IWC, the successor to the Western Council of the BoP, set up a Disputes Working Group to facilitate a resolution to the land dispute between the Kipi and the Marianridge communities (Interview with Walker, 02/06/2000). It was within this forum that the principles that would form part of a final settlement were negotiated.

The land dispute arose when the KDC approached the BoP and the MDC for inclusion in the larger housing development consisting of some 150 sites which was initially planned to accommodate members of the Marianridge community. The KDC suggested that the Mazakhele development and the Marianridge development be consolidated and proposed a 50/50 split in the total number of residential sites in Marianridge (Interview with Dube, 01/02/2001). The MDC rejected this idea citing the severe overcrowding and housing shortage of the Marianridge community (Interview with Hoorzak, 02/06/2000).

After several tense meetings of the working group, the KDC and the MDC agreed in principle to a proposal that the Kipi community accept the 68 sites at the Mazakhele Development and sites contiguous to Marianridge (Interviews with Dube, 01/02/2001; Interview with Hoorzak, 02/06/2000). The working group also requested that the local council conduct an audit of vacant land in the area with a view to locating suitable alternative land for the Kipi community. The IWC, through the Disputes Working Group process, committed itself to providing the sites and also to providing services and houses in this area (Interview with Hoorzak, 02/06/2000). (See figure 1.)

The KDC indicated to the Commission that it would prefer inclusion in the Marianridge housing development as appropriate relief in their restitution. Should this not be possible then the Kipi community would require alternative land suitable to the needs of the community and well located. If neither inclusion nor vacant land were possible then the community would, as a last resort, opt for financial compensation (Interview with Dube, 01/02/2000).

The Marianhill Mission Institute was invited to participate in the land claim process by the

Commission. This was primarily because the Marianhill Mission Institute was still a major landowner in the area (Interview with Ramballi, 10/11/2000). The claimant community also felt that the Marianhill Mission Institute had a role to play in the resolution to the issue (Interview with Dube, 01/02/2001). The Commission facilitated a number of tense meetings. During the course of these meetings the issue of the Marianhill Mission Institute donating additional land for the settlement was raised (Interview with Dube, 01/02/2001). The position of the Marianhill Mission Institute was that after the farms around the Mission were acquired the Mission made the land available to African converts on easy terms or a tenancy basis. They further acknowledged that these communities were allowed to practice agriculture on the mission land. The view of the Marianhill Mission Institute was therefore that these individuals always occupied the farm as tenants and at no stage had been granted the rights of ownership. It was further argued that this situation persisted until the Group Areas removals in the 1970's (Commission file). The Marianhill Mission Institute argued that if the Kipi community is entitled to relief, they could at best claim restitution of a right of tenancy only. On this basis it was submitted by the Marianhill Mission Institute that any monetary compensation must be calculated on the basis of a tenancy right only (Commission file). The Marianhill Mission Institute further argued that the Kipi community could not claim ownership rights to the land as the initial "dispossession" was prior to 19th June 1913. It was put forward by the Missions' attorneys that even if the Kipi community's forebears did possess any land rights, including those of ownership, they were dispossessed of such rights when the first deed of grant to the land was granted to Laas in 1851. The Mission was therefore unwilling to negotiate the donation of any land and negotiations broke down (Interview with Dube, 01/02/2001; Interview with Ramballi, 10/11/2000). It is argued that by failing to engage pro actively in the restitution process the Marianhill Mission Institute "lost an opportunity to be at the centre of people emancipation, liberation and empowerment (Interview with Dube, 01/02/2001)."

The IWC, as the local authority and the housing developer for the claimed area, emerged as a key figure in the discussions towards the successful resolution of this claim (Interview with Walker, 02/06/2000; Interview with Ramballi, 10/11/2000). Initial correspondence from the council outlines the council's various housing development projects, which were at advanced stages of township development. In relation to these areas the IWC indicated that its view was that blanket restoration would be highly problematic (Commission file).

The IWC was firm in its stance that the restitution process should not place a freeze on housing developments, especially where bulk infrastructure had been installed and where the Provincial Housing Board had approved subsidies. This was because the delays often resulted in the deterioration of the infrastructure, or the withdrawal of funds where these were unlikely to be expended (Interview with Benson, 02/06/2000). Another reason for council's opposition to halting development was the high potential for land invasion by people who were desperate for housing (Interview with Hoorzak, 02/06/2000; Interview with Benson, 02/06/2000).

As far as the Kipi development was concerned the IWC committed itself to playing a nonpartisan yet proactive role towards the negotiated resolution of the matter (Interviews with Hoorzak, 02/06/2000; Interview with Walker, 02/06/2000; Interview with Jama, 10/11/2000; Interview with Ramballi, 10/11/2000). This role was achieved by councillors convening and participating in representative formal structures which were politically accountable such as the Kipi Development Committee, the Marianridge Development Committee, the Marianridge Negotiations Forum and the Disputes Working Group (Interview with Walker, 02/06/2000). Despite the relative success of the forum it was hampered by the constant changing of representatives by the parties (Interview with Benson, 02/06/2000).

The role of the Commission, as it was then defined by the Restitution Act was to receive claims before the 31 December 1999 cut off date, investigate such claims, facilitate negotiations on the claims, refer claims to the Land Court and finally monitor the implementation of the court agreements (Restitution Act). Therefore the Commission was responsible for investigating and accepting the Kipi claim. However, once the claim had been accepted, the Commission had the responsibility of facilitating negotiation towards the settlement of this claim. In order to facilitate a resolution to the matter the Commission convened and chaired a number of meetings during the course of 1998 with the KDC, the DIWC, the Land Affairs and the MMI (Interview with Ramballi, 10/11/2000). Many of these meetings were attended by the RLCC herself and this brought a high degree of authority to the process and claimants perceived their matter to be receiving high priority (Interview with Jama, 10/11/2000). The inclusion of the Land Affairs representative on the Disputes Working Group was important and significant progress was made as a result.

By April of 1998 discussions were in full swing with firm commitments and offers on the table which were endorsed by all parties working in the spirit of cooperation. The IWC had committed itself to a current market valuation of the vacant sites in Marianridge, the Land Affairs had made an initial settlement proposal motivating that each claim would be worth R 14 500 per verified claimant household and the KDC indicated that it would provide motivation that this be increased (Commission file). Further to the initial negotiation the Commission convened a follow up meeting and on the 25th November Land Affairs made a formal offer to the claimants regarding the total monetary value of their claim (Commission file). This transition from a situation of tension to a more cooperative negotiation was largely the result of behind the scenes bilateral discussions coordinated by the Commission (Interview with Walker, 02/06/2000).

The role of Land Affairs as defined by the Restitution Act in this period was to represent the state and to act as a respondent to the claim (Act no 22 of 1994; Interview with Ramballi, 10/11/2000). Land Affairs became a crucial role player as its position towards the claim shaped the negotiations towards settlement. Land Affairs was notified of the claim when it was formally accepted by the RLCC as having complied with Section 11(1) of the Restitution Act. In 1997 a preliminary report was completed and circulated to all interested parties including Land Affairs. From this point Land Affairs was increasingly drawn into the claim. Land Affairs' formal position in this claim was that it accepted the outcome of the RLCC's investigation into the validity of the claim and therefore did not contest or question this aspect of the claim during the negotiations. Further Land Affairs was intent on settling this claim out of court in the context of a negotiated settlement (Commission Report 1). At negotiations held on the 25 November 1998, Land Affairs proposed that the parties agree on a total monetary value of the claim in lieu of the rights that were historically enjoyed. Land Affairs put forward the position that the claimants lost a residential use right as well as an agriculture use right (Commission Report 1; Commission file).

As there was no formal policy in this regard Land Affairs formulated the following negotiation position. Land Affairs accepted the fact the Kipi community enjoyed beneficial occupation rights that were unregistered rights to the claimed land. It was also noted that the land was peri urban in nature. The Land Affairs proposed that the rights historically enjoyed for the purposes of the negotiations be equated with an opportunity to be included in a site and service development in the area subject to the claim. It was noted that a serviced residential site in the IWC area was

valued at R 14 500.00. In addition to this Land Affairs proposed that the monetary value should also include a component for grazing rights previously enjoyed by the claimants, which was valued at R 2 681.00. Therefore the total sum of the restitution award proposed was R 17 181.00 (Commission file; Daily News, 19/07/1999).

Further to this proposal the Land Affairs representative Mrs Maria De Vos informed the claimants' representatives that they could also apply for the departments' restitution discretionary grant of R 3000 through the Provincial office of the Department of Land Affairs (PDLA). However, it was also explained that this amount was not formally part of the settlement proposal and was not guaranteed (Commission file).

3.9 The Negotiated Agreement

The seeds of the Kipi land claims settlement were sown and nurtured over a period of 8 years. This persistence and unrelenting spirit was rewarded in 1999 when the community leadership in the form of Mr Dube concluded the bitter struggle for the restitution of the Kipi communities land rights by accepting Land Affairs settlement offer.

All parties agreed that the settlement package for this claim should be captured in two separate settlement agreements (Commission Report 1). The initial or founding agreement was between Land Affairs and the Kipi Community's representative Mr Dube of the KDC. This landmark settlement, signed on the 26th of February 1999, recorded, amongst other things, the fact that Land Affairs and the Kipi Community had reached agreement on the total financial value of the claim and the monetary value of each individuals' entitlement (Commission Report 1). The second agreement was between the Kipi community and the Inner West Council. This agreement involved the Council acting as a housing developer for the claimants (Afra, 2000:5).

The initial agreement recorded that the Kipi community lost unregistered rights inland in respect of Sub 150 Marianhill of the farm Zeekoegat No 937. While the parties agreed that the restoration of the exact piece of land claimed was not feasible it confirmed that the claimants indeed had a right to restitution as a group of individuals who had previously enjoyed beneficial occupation rights to the land which was formally owned by the Marianhill Mission Institute (Commission Report 1).

This agreement provided that those claimants who did not wish to participate in the housing development would receive cash compensation in lieu of restoration. It also provided that claimants who wished could use their compensation to participate in the local council housing developments known as Mazakhele and Nazareth Island (Commission Report 1).

The outstanding feature of this agreement was that it was one of the first restitution awards that packaged the restitution award to enable the claimants to access compensation from the state and to provide for the opportunity for claimants to participate in a housing development by the local council (Sowetan, 19/07/1999). The agreement was also unique in that the parties agreed to settle the claim via section 42 D of the Restitution Act by which the Minister of Land Affairs could ratify agreements arrived at by negotiations. This was crucial because it obviated the need for the agreement to be referred to the Land Court for ratification. Thus the Kipi land claim was one of the first claims to be processed entirely through a speedier administrative process as opposed to mechanically follow the more time and resource heavy court process. The second agreement, which was between the IWC and the Kipi community, provided that the IWC would make available 68 sites in the Mazakhele development to claimants who wanted to use their monetary compensation and be included in the local council development. For those claimants who could not be accommodated in the Mazakhele development but require and desired housing the IWC committed itself to investigating potential housing opportunities within the greater Marianridge area.

3.10 Conclusion

The struggle for the restitution of the Kipi community's land rights was long and bitter, played out over a period beginning in early the 1990's (Mercury, 19/07/1999). The beginnings of the eventual settlement were negotiated as early as 1995 with the KC, the group who initiated the process. At first the communities' efforts were largely uncoordinated, fragmented and characterised by poor communications with the broader community. The process was then consolidated and taken further under the KDC that was a representative of the Kipi community. The enactment of the Restitution Act and the establishment of the Commission not only provided a legal basis for the claim but also introduced a number of new players to the process. Although the Commission took some time to formally accept the claim, it took over the critical role of facilitator to the negotiations and infused the process with urgency and authority.

CHAPTER FOUR

CONCLUSION

4.1 Introduction

The Chief Land Claims Commissioner Adv. Wallace Mgoqi has noted that, “behind every restitution claim there is a human story that cries out to be told (DLA, 2000a).” In the context of South Africa, land is not simply a physical asset but it fulfils a valuable social and symbolic role as it is the source of painful memories of community destruction through evictions and forced removals. The struggle for access to and rights to land have historically played an important role in shaping political, economic and social processes in South Africa (DLA, 1997:7). The systematic dispossession of land for racially based motives was one of the linchpins of the apartheid system and caused untold hardship to millions of victims (Platzky and Walker, 1985). In many cases structures of local government played a pivotal role in effecting or supporting forced removals (SALGA, 2001).

Land reform was one of the important issues that dominated negotiations around South Africa’s constitutional framework. The outcome of these negotiations was that land reform and land restitution were enshrined in the constitution; however this was counterbalanced by the inclusion of a property clause (Jaichand, 1997). It has been noted that of all the evils of apartheid, restitution is the only evil for which a remedy is provided for in the constitution (DLA, 2000a: 23).” The transition to democracy has meant that the land issue in South Africa has received much more attention at the political level (Maharaj, 1999).

The mechanisms of land reform and land restitution are critical in that they can contribute significantly to fostering redress and reconciliation. Secondly they also support the economic imperatives of poverty alleviation and economic growth (DLA, 1997). The primary objective of land reform is to effect a radical shift in the land ownership patterns and power relations in favour of the disadvantaged majority (Khosa, 1994). Land restitution is a tangible programme aimed at delivering a defined product – land, is an economic asset, which can be used productively and profitably and is a source of security and dignity for its owner.

The legacies of apartheid planning in the urban areas are numerous. The challenges include the need for spatial and racial reintegration of South African cities. This reshaping is aimed at compacting the city such that the present rigid divides between business, industrial and residential space is diminished. One of the most significant challenges facing local authorities in highly urbanised areas is the need for massive housing delivery. Other challenges include spurring local economic development and effective land restitution (DLA, 1997). It has been argued that development in South Africa needs to take cognisance of the history of locality (Ramballi, 1998). Urban land restitution is an appropriate and legitimate strategy to adopt to ensure the spatial and racial reintegration of the apartheid city.

A critical issue that will require consideration in the resolution of urban claims is that of balancing the needs of people dispossessed of land in terms of racial laws and who have a legitimate right to make a claim, with the needs of people without shelter (Dawood, 1995). This situation has set up an apparent conflict between the urban restitution process and urban development (Ramballi, 1998). Given the experience of the Cato Manor land claims, the danger exists that local authorities may not creatively and flexibly engage the opportunity of restitution and as a consequence opt for the legal route, opposing land restoration by utilising section 34 of the Restitution Act (Ramballi, 1998). This has given rise to a absurd situation whereby claimants who have chosen to appeal the 34 agreement have been ordered to pay the costs of the second trial (Singh and others Vs North and South Central Council Local Councils and Others 1999 (1B) ALL SA 350 LCC). The other extreme position is that the Commission in its effort to demonstrate speedy resolution of land claims may resort to chequebook restitution. It is important that care is taken to carefully evaluate all the constraints and the opportunities presented by this dynamic situation.

The engagement of all parties in out of court negotiations with a view to including claimants in proposed housing schemes or other development opportunities should be the first option in resolving land claim disputes. On the other hand, developmental solutions are often time and resource intensive processes requiring clear policy, defined procedures, competent and skilled staff and most importantly political will to see the process through to its conclusion. The successful resolution of the Kipi land claim in the Durban Inner West Local Council area demonstrates that restitution can be integrated together with housing delivery. Restitution can be regarded as a valuable opportunity that must be tapped into by local authorities.

This chapter presents the findings of the study. It provides an overall assessment of the land reform programme. It focuses on synergies between the housing and restitution processes in the case of the Kipi land claim. This is followed by an analysis of the principles that informed the Cato Manor land claims. The unique features and the similarities and the differences of these two cases are discussed. The chapter concludes by providing possible policy recommendations by highlighting the principles that informed the settlement in the Kipi land claim.

4.2 South African Urban Land Restitution

In the early 1990's it was realised by the state that it would have to provide redress for the appalling policy of land dispossessions. Initially the Nationalist Party regime initiated a halfhearted attempt at land restitution under ACLA and COLA. However these bodies had a limited mandate in that the ACLA was merely an advisory body while the COLA was only concerned with rural land claims in relation to state land.

Land restitution in South Africa was one of the first pieces of legislation that the GNU put in place. As noted by the CLCC this is the only constitutional measure aimed at providing concrete redress for specific acts under the apartheid system. The legal, policy and institutional framework put in place by the enactment of the Restitution of Land Rights Act included provision for a Commission on the Restitution of Land Rights and a Land Claims Court (Restitution Act). This established a two tier system of administrative process and judicial review (Murphy, 1996).

As predicted by many observers this process proved to be legally complex, highly technical and slow and cumbersome (Khosa, 1994). Many local authorities and private developers viewed the process as backward looking and a major stumbling block to low income housing delivery. This view was born out by the North and South Central Substructure Councils' decision to launch a section 34 application in respect of the Cato Manor development (Ramballi, 1998).

There were numerous reasons for the slow delivery of land and the slow rate of resolving land claims. These included the confused roles of the various roleplayers, the contestation around policy making, the lack of coherent policy and numerous policy gaps, an inadequate budget, and the lack of resources, especially staff (Walker, 1996; Ramballi, 1998).

4.3 The Kipi Land Claim in the Durban Metropolitan's Inner West Council

No where are the historic and modern urban developmental challenges as stark as in the Durban Metropolitan area. The Kipi land restoration and housing process, which is located in the Durban Metropolitan Inner West Council, exemplifies this type of challenge and is a good example of a case where the potential conflict of policies were overcome.

The mushrooming of urban shanty towns is a serious current challenge for local municipalities (DLA, 1997). There is an urgent need for the rapid release of well located, well serviced land, which has been one of the major demands on local authorities since the late 1980's (Donaldson, 2000). These demands are acute within the DMA (Durban Metro Restitution Claims Strategy document, 1997). Land restitution provides an opportunity for the previously dispossessed to gain access to well located fully serviced land in close proximity to employment and markets via developed transport network. The DMA, in general, and the Pinetown/Marianridge area, in particular, present myriad opportunities for land release and housing development. These areas are, in the main, well serviced with a superb road system and transportation networks within a thriving industrial sector.

This area as a whole is the subject of some 8000 land claims, mostly by individual former land owners and some groups of individuals, with a handful of community claims (Durban Metro Restitution Claims Strategy document, 1997). KwaZulu Natal, and the DMA in particular, has one of the highest concentration of urban land claims in the country (Commission Annual Report 2000/2001: 14).

The present Kipi community has a longstanding relationship with the claimed land that stretches back to as early as the 18th century, prior to colonial occupation. From the arrival of the missionaries there was a process of incremental dispossession, that transpired over a drawn out period, resulting in a situation where the Kipi community were regarded as tenants of the Marianhill Mission until the apartheid dispossession in 1966. The Kipi community was relocated to KwaNdengezi and KwaDabeka and continued their struggle to reclaim their land rights. The Kipi Committee, formed in 1991, initiated discussions with the BoP. In terms of these discussions the BoP agreed to allocate Lot 6897 to the KC group who named the area Mazakhele. During this process the Restitution of Land Rights Act was enacted and other individuals who

were dispossessed from the Kipi area heard of the redevelopment initiative of Mazakhele. A new committee known as the Kipi Development Committee formally lodged a claim with the Commission. While the restitution process did delay the housing development it allowed for these initial negotiations to be consolidated and provided a process whereby all members of the Kipi community to participate and benefit from the resolution of the land claim.

The restitution process allowed for the Commission to facilitate an out of court negotiation process with the DLA, Durban Metropolitan Inner Council, and the claimants. These negotiations took place within the context of a newly created forum known as the Disputes Working Group, which had a clearly defined terms of reference and representatives from all concerned and affected parties. This forum assisted by creating an informal environment where the issues could be constructively addressed. A further benefit of this forum was that it brought together various officials and politicians to work on the issues. In the case of the Kipi land claim this forum also assisted to create an environment of cooperation, particularly on the part of the IWC.

The seeds of the Kipi land claims settlement were sown and nurtured over a period of 8 years. The landmark agreement that was signed on the 26th February 1999 between the Commission, the DLA, the IWC and the KDC representatives and involved the acknowledgement that the Kipi community was entitled to restoration and compensation for the 1967 dispossessions. It noted that the Council would act as the housing developer for the claimants (Commission Report 1). This agreement demonstrated that restitution and housing development were not incompatible and could be packaged in a manner that was complimentary to both programmes. It demonstrated that restitution is an appropriate strategy that can support the reintegration and reconstruction of the apartheid city locating the formerly dispossessed closer to central areas and nearer to work opportunities. The Kipi land claim was one of the first claims to be processed entirely through a speedier administrative process as opposed to having to mechanically following the more time and resource heavy court process. As noted by the Minister of Land Affairs, the Kipi land claim settlement, “balanced the needs of the different claimants because there were those who felt strongly that they wanted to go back’, ... and, there were others who felt they could continue making a living where they were (Afra, 2000: 5).” Therefore land restitution can only be successful if there is a social contract between organs of government, on the one hand, such as the Commission and the municipalities, and claimants and civil society organisations, on the other (SALGA, 2001:5).

4.4 The Kipi and Cato Manor Land Claims in Comparative Perspective

Whilst there are significant differences between the Kipi land claim and land claims in respect of Cato Manor, Durban a comparative analysis of these two areas highlights some valuable policy lessons.

Despite the pressures for delivery on the CMDA and the North and South Central Councils, “there was an enormous failure of imagination in Cato Manor to harmonise the two programmes”, namely the need for housing and the aim to restore land to those who had been dispossessed thereof (Interview with Walker, 2/6/2000). The CMDA’s plan to integrate the apartheid city using large social contracts were mobilised but were not followed through in negotiating a balanced settlement. In short the CMDA started out with a certain set of prejudices and inflexibilities whereas the INWC in the handling of the Kipi land claim was more flexible (Interview with Walker, 2/6/2000). This can partly be explained by the widely differing scales of the two projects. The CMDA had the enormous pressure of managing the expenditure of government and donor loans and funding. This issue did not feature as strongly in the Kipi Housing project (Interview with Walker, 2/6/2000).

At a community level one of the biggest challenges that faced Cato Manor was that there was no cohesiveness amongst the claimants. The lack of strong organisation and a body that could engage and negotiate with the council presented a huge challenge. The organisation that existed in Cato Manor that claimed to speak on behalf of landowners was very fractious, not strong, and fell apart (Interview with Walker, 2/6/2000). This was exacerbated by the role that lawyers played in the section 34 court process (Interview with Ramballi, 10/11/2000), with different lawyers representing different splinter groupings and pursuing different strategies. The lawyers also mediated communication between parties and this sometimes resulted in miscommunication. This situation can be directly contrasted with the Kipi case where there was one coordinating group with no legal representative. The Kipi group was also smaller and more cohesive with a stronger sense of shared vision (Interview with Walker, 2/6/2000). The Kipi land claim was taken forward by a representative committee. While many members were inactive, “Mr Z Dube was key to the settlement of the claim (Interview with Jama, 10/11/2000).”

In Cato Manor the claims were dispersed over a wider area while in Kipi there was one broader

historically occupied area. Therefore in Cato Manor there was a strong sense of individual title where as in Kipi the idea of group ownership prevailed. In Kipi the idea of group ownership historically was supported by a strong sense of communal ownership. However in the end the Kipi claims were individualised. While in Cato Manor there was a strong sense of community this did not translate into broader demands for group ownership or community ownership (Interview with Walker, 2/6/2000). An important difference between the two was that Cato Manor dealt with individual claims by individuals or families for freehold erven while the Kipi claim was classified as claim by a group of individuals in respect of a broader area which they occupied as a community (Interview with Ramballi 10/11/2000). This meant that the research and investigation of these two sets of claims was addressed differently. The Cato Manor claims had to be validated and investigated one by one while in the Kipi Claim the claim was more streamlined and only one gazetted notice was needed to validated the claim.

In many ways the Kipi community were more accommodating of the councils plans. The way in which the communities' aspirations were articulated and communicated to the other stakeholders was more coherent. It can be argued that the organisation in Kipi was more cohesive (Interview with Walker, 2/10/2000).

Another area of contestation is between the Commission and agencies tasked with the implementation of low income housing. The Commission and Durban Metro Housing agencies are often in direct competition for the scarce and valuable resource of vacant land. In areas such as Cato Manor, Kipi in Pinetown, Newlands, Malacca Road and Block AK the Commission has argued for the restoration of land where this is practically possible, technically feasible and desirable while the Durban Metro Housing Department has identified this same land for low income housing developments. In the Cato Manor case, as with the Kipi land claim, two major areas of policy restitution and housing were in potential conflict. However the overlap of housing projects and planned low income housing developments is not necessarily a negative and untenable situation in and of itself. The resolution of the Kipi land claim in the Durban Metropolitan Inner West Council has proven that there remains a great potential for the successful integration of the two programmes. The following table analyses another set of urban claims in the Durban Metropolitan Inner West Council area that are currently being packaged in a manner that does not frustrate low income housing projects but rather achieves integration and adds value to these developments.

Table 8: Land claims in the Inner West Council Area

Claim Name	Nature of the Settlement Package	No of land claimants	Total number of beneficiaries
Kipi	Financial Compensation Land Restoration and Housing Development	188	1222
Burlington	Land Restoration and Housing Development	403	2621
Nazareth	Land Restoration and Housing Development	250	1625
Klaarwater	Land Restoration and Housing Development	200	1300
Emmaus	Land Restoration and Housing Development	250	1625

(Source: Commission on the Restitution of Land Rights claims settlement projections 2000-2003)

While there remains a great potential for land restoration to the former dispossessed in Cato Manor, no restoration has been effected to date (Interview with Ramballi 2/2001). This is because the Durban Metro North and South Central Councils chose to oppose any restoration of land to former land owners via a section 34 court application on the basis that it would stall the housing development planned for Cato Manor. “The court process made it difficult to get an effective working relationship going” between the parties; “The section 34 route was not the most appropriate way to approach the restitution issue in Cato Manor. The section 34 was a legal process and was not the most effective process to settle claims (Interview with Walker, 2/06/2000).” It can also be argued that the final agreement which was negotiated by the parties was very complex and proved very difficult to implement (Interview with Ramballi, 10/11/2000). A further factor that aggravated the process and led to tensions between the Commission itself and the claimants was that huge delays in the implementation of the final agreement. Several factors contributed and compounded these delays. These included the lack of sufficient full time

staff, the lack of a work centre in Durban and the logistic difficulties of contacting and coordinating mediation proceedings for the claimants and their lawyers.

During the course of the court proceedings and in affidavits to court, an argument advanced by the CMDA was that the housing project was in the broader public interest and would lead to the densification and “reintegration of previously disadvantaged groups into the apartheid city” (Interview with Walker, 2/06/2000). However the settlement ruled out restoration of land to claimants and set up a mediation and arbitration process which would *explore* the possibility of land restoration only for those few claimants who had chosen to oppose the Metro’s section 34 application (Interview with Ramballi, 2/2000 *my emphasis*). This agreement was later ratified by the Land Court (Ramballi, 1998). The overall outcome was that the redevelopment of Cato Manor and the restitution process were effectively compartmentalised with very little opportunity for the development of synergies or partnerships. “Despite the pressure on the CMDA and the North and South Central Councils there was an enormous failure of imagination in Cato Manor to harmonise the two programmes” (Interview with Walker, 2/06/2000). Claimants also felt cheated by the process as many felt that this was a second dispossession by the Metro (Ramballi, 1998).

Ironically, the first settlement in Cato Manor was an award of financial compensation rather than restoration. Mrs Moodley was the first Cato Manor claimant to receive compensation. She accepted an out of court settlement offer of R 64 000 from the state (Walker, 1999:9). Such an outcome raises concerns: the South African state, which faces huge challenges of addressing backlogs in basic service delivery, can ill afford to direct its resources at a financial disbursement process to land claimants. The critical issue here is uncertainty whether financial compensation will have any developmental impact on the lives of the claimants (Walker, 1999: 9).

Lahiff noted that the cost of restitution is a major challenge (Lahiff, 2001:4). Based on an average award of R 50 000 Walker, (1999) has calculated the estimated cost of compensation for the former landowners of Cato Manor alone to be R 50 million rands. For the 6000 urban claims in the Durban area this figure mushrooms to R 300 million rands. Although this amount would most probably be phased in over a number of financial years it is still enormous. It also begs a further question: “Is this the best use of the state’s resources?” (Walker, 1996: 9). Especially given the fact that there are equally pressing social justice issues of no or inadequate schools, clinics, other

social services and programmes which would benefit from this money. One of the largest threats to the restitution process is the lack of finance and competing demands over public funds (Jaichand, 1997: 119).

Another spinoff of the Ministerial restitution review was the emergence of a debate within the Commission and some NGO's of how and whether the focus of restitution settlements should adopt a developmental approach (Restitution Review Report, 1999). Such an approach, although it has not been adopted by the Commission as formal policy, has been endorsed by the Minister of Land Affairs in a policy statement issued at the end of February 2000 and in subsequent interviews. This statement notes that restitution must assume a developmental approach to resolving claims. It further underlines the view that the resolution of restitution claims should be done in a manner that integrates settlements with other departments' initiatives. It is noted that this integration should occur at the policy formulation and implementation levels (DLA 2000; Afra 2000:4). Although a closer analysis of the Kipi land claim shows that a combination of a financial compensation and restoration settlement awards was not without its problems, it stands out as a model of a restitution settlement package that respected the claimant's rights to restoration while at the same time incorporated development opportunities that would be implemented by a local stakeholder, the Durban Inner West Council. In the case of the Kipi settlement the development opportunity was around housing development (Afra 2000:4).

Given that land claims are contested, it may be argued that there should be more legislative mechanisms to compel local authorities to factor land claims into their local development plans (Interview with Walker, 2/6/2000). Besides legislation a lesson that may be drawn from the Kipi Land claim, is that attention needs to be given to the management, alignment and coordination of the different budgets between the housing and restitution programmes. The development of communication networks within and between various government departments at all levels is also important (Interview with Walker, 2/6/2000). One of the biggest challenges that needed to be overcome in the Kipi claim was the perception by certain officials that the validation of the restitution claim and the integration of the housing project amounted to double subsidisation. However after drawn out negotiations it was eventually accepted that with restitution we are dealing with a specific set of historically based injustices (Interview with Ramballi, 10/11/2000).

4.5 Integrating Restitution and Housing Development

A successful restitution programme is essential to foster an environment of peace, stability and development (SALGA, 2001:4 and Ramballi, 1998). The integration of the restitution programme and development, specifically that of low income housing development is a crucial challenge in the post apartheid era. Given the early experience of restitution implementation there have been justified fears on the part of local authorities and private developers that restitution would paralyse the development process. The “freezing” of vacant land by restitution arises from a lack of understanding and proactive engagement on the part of local authority’s and private developers on the one hand and the retarded rate of policy development and processing of claims by the Commission. A further issue that has often compounded the situation is that claimants have correctly been sceptical of development processes that seek to exclude them while seeking to exploit development opportunities on land which they have struggled decades to reclaim. This situation has often created an atmosphere of suspicion and has set up potentially antagonistic negotiations. Therefore the Commission, in fulfilling its mandate, has to balance the rights of the claimants with that of the broader public interest (Walker, 1996).

The similarities and the differences between the Kipi and the Cato Manor land claims process and various agreements that have arisen as a result are instructive to future restitution policy, procedure, practise and implementation.

In both of these cases the local authorities were under enormous pressure to deliver housing to people without shelter. In the case of the North and South Central Council it chose not to engage the claimants but to oppose their claims for restoration. This led to a heightening of tensions through a time and resource intensive court process. In the case of Kipi, the IWC chose to proactively engage the claimants and other interested parties through more informal representative forums. While this process was also slow it ensured that claimants had the option of buying into the development initiatives of the Council. The Kipi land claim and housing development process resulted in a partnership between the Commission, the Council and the claimants whereby the land would restored could be used as a platform for sustainable development (SALGA, 2001).

The Kipi land claims process has shown that there can be a symbiotic relationship between restored claimants who will need services and the municipality, which will have a new revenue base. It also demonstrates that local solutions can form the basis for an integrated approach to development planning while top down planning models can often lead to a situation where key stakeholders, such as land claimants in the case of Cato Manor, are marginalised from developmental processes.

4.6 Lessons for Policy Making and Implementation

Some of the important principles that may be gleaned from the outcome of the Kipi land claim are that:

Principles relating to land restitution implementation in South Africa generally.

The Land Restitution process cannot and such not be viewed and implemented in a mechanical manner. Due regard should always be given to the unique features of each claim.

- ◆ Despite this caveat, there is still room for implementers of land reform to formulate and follow broader principles and approaches that will guide them in the preparation of land claims settlements.
- ◆ The engagement of all parties in a out of court negotiations with a view to including claimants in proposed housing schemes or other development opportunities should be the first option in resolving land claim disputes.

Principles in resolving community or group based claims.

- ◆ Some of the preliminary issues to be considered are: what are the needs and aspirations of the claimant community? What other governmental programmes and projects are there in the claimed area? Can these add value to an overall settlement? How can these processes best be coordinated such that the claimant community can obtain maximum benefit from the claims settlement package? What is the attitude of the role players at a local government level and are they in favour of such a partnership?

- ◆ A thorough but speedy research and investigation process must be undertaken
- ◆ Claimant verification is a slow process and should be commenced as soon as it has been determined that the claim is compliant with the provisions of the Restitution Act. A number of tools such as old aerial photographs and archival lists should be employed to crosscheck the information obtained orally.
- ◆ Community consultation on settlement options is essential
- ◆ Working committees and steering committees are useful tools to drive and coordinate stakeholders and various processes
- ◆ Other interested parties should also be consulted and drawn into the negotiations process.
- ◆ Mediating tensions in the community leadership should be catered for.

Principles in approaching claims at a local municipality or district municipality level.

- ◆ It is critical that there is a coherent communication system between the various Commission regional offices and the local municipality's in whose areas they operate. This system should include the local authority having viewer only access rights to the Commission database of land claims.
- ◆ All restitution claims information has to be consolidated within the context of the Integrated Development Planning (IDP) process. In this regard the Commission together with the Durban Metropolitan and other municipalities need to devise a restitution delivery strategy that would be articulated within the context of the Metropolitans IDP's. This document would identify joint development projects that would be funded by the various institutions. Ideally these projects should be clustered, as is the case with the group and community claims in respect of the IWC area. See table 8 at page 53.
- ◆ This IDP process should revise, operationalise and coordinate the various agreements and forums that the Commission has initiated within the IWC area and the North and South Central area. This would reduce the number of meetings and centralise accountability with regards the resolution of land claims.

Principles in relation to the DMA.

- ◆ A restitution unit should be established within the Durban Metropolitan Council to coordinate and involve the various metropolitan service units, bringing about synergy between restitution and other developmental processes at the metropolitan level.
- ◆ All claims on vacant land in the municipal areas should be mapped in geographic information systems. This would facilitate the overlaying of information, especially developmental project such as housing development, allocation of business and industrial land. This would facilitate communication and allow for an early warning system such that developmental projects are not stalled. This would also provide the Commission with critical information with regards to potential developmental restitution options. This system could facilitate the Commission being informed of municipal land that is not suitable for development as low cost housing.
- ◆ An important issue that requires policy clarity is where the Commission has to purchase land from the Durban Metropolitan Council at market value. Well located land is often high in value, which therefore makes it prohibitive for the state to effect restoration. The principle of land donation for restitution purposes needs to be clarified and established as policy. This would bring the municipalities into compliance with similar policy with regards to the acquisition of state land for restitution purposes, in the case of state land the Commission does not pay the custodian of the state's land, the Department of Public Works, but requests a donation for restitution purposes.

These recommendations regarding policy and implementation are made in the light of the positive outcome of the Kipi land restitution and housing process. This settlement demonstrates that restitution does not necessarily hinder developmental processes but can support higher quality services as a result of the funding that can be leveraged by the land restitution process. This experience points in the direction of local solutions that draw on participative processes to identify the aspirations of claimants and to make claimants part of a process that promotes social justice and urban renewal in South Africa.

If South African land restitution is to be successful the following will have to be addressed:

1. Additional resources need to be deployed to support the process. These include human and financial resources.
2. Policy clarity around the key issues:
 - i. land owned by the municipalities,
 - ii. the role of municipalities with regards to restitution.
3. The development of information system to ensure coherent planning for claims in relation to development opportunities.

Land restitution is not a mechanical process. It is a programme that seeks to address critical issues of social justice by enabling citizens with the opportunity to regain lost rights in land on an equitable basis. It provides for a process whereby citizens can regain their human dignity and lays a foundation for national reconciliation, peace and sustainable development. Land restitution in South Africa is politically charged, as a result its implementation is essential for political stability.

Urban land restitution is an important strategy that can play a major role in the reconstruction of the apartheid city. It is an important tool that can restore well located, well serviced and high value land to those who were dispossessed. This process can be carried out in tandem with processes aimed at providing low income housing for those who do not have access to shelter. This study has outlined some of the early experience of the urban land restitution process. The case of the Kipi land claim has added to our knowledge and understanding of urban land restitution. It has exploded the myths that restitution is incompatible with and poses a serious threat to development. However if the potential developmental impact that land restitution has to offer, making a fundamental impact on the allocation of high value urban land, is to be fully exploited then a radical change in strategy and approach is required. This study suggests that restitution should be factored into metropolitan wide integrated development plans. Information systems must be upgraded and interlinked to allow for a free flow of baseline information that would facilitate decision making, inform future planning, provide an early warning system and identify further areas of opportunity, synergy and partnership.

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APPENDIX A

List of interviews

Name and Surname	Designation/Affiliation	Date of Interview
Ms B Benson	Planner Durban Metro IWC	02/06/2000
Ms Gordon	Claimant from surrounding area	02/06/2000
Ms Hoorzak	Councillor for Marianridge	02/06/2000
Ms C Walker	Former Commissioner	02/06/2000
Mr K Ramballi	Project Manager Urban Claims	10/11/2000
Mr K Ramballi	Project Manager Urban Claims	2/2001
Ms V Jama	Community Liaison Officer	10/11/2000
Ms R Ramdas	Cato Manor Researcher	15/11/2000
Mr Z Dube	Secretary of Kipi Committee	01/02/2001

APPENDIX B

List of newspaper articles used

Name of Publication	Title of article	Date
The Daily News	Back to where we belong	Monday 19 th of July 1999
The Highway Mail	Landmark settlement for Kipi community	Friday 16 th of July 1999
The Mercury	Joy as community is compensated	Monday 19 th of July 1999
The Sowetan	Kipi residents back to where they belong	Monday 19 th of July 1999
The Sunday Tribune	They still waiting for a home	Sunday 18 th of January 1976

APPENDIX C

List of government notices and laws consulted

Title of Law/Notice	Number	Year
Gazette for removals	No. 1432	1966
Interim Constitution Act	No. 200	1993
Restitution of Land Rights	No. 22	1994
Gazette for township establishment	No. LGMN175	1995
Constitution Act	No. 108	1996
Housing Act	No. 107	1997
Gazette Notice ito sec 11	No. 305	1997
Municipal Structures Act	No 117	1998