

**“Having a second bite at fixing Elandskloof and other dysfunctional sets of ‘new’ land reform group land hold and management arrangements”<sup>1</sup>**

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<sup>1</sup> Kobus Pienaar, LRC attorney, has written the paper in its current form. The final version may include the following authors on whose work this paper is based, namely: Charlie Martin, sub-contracted consultant who is at present working on the Elandskloof case; Dawie Bosch who has reviewed the work of the LRC as noted at paragraph 0; Henk Smith, LRC attorney, and legal representative of the Elandskloof community during the period of preparing, lodging and settlement of the claim.

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## **1 The main point: The rights of members have not been determined and allocated**

To date an estimated 2 000 'community' entities / Communal Property Institutions (CPIs) have been established to own just less than 3 million hectares of land.<sup>2</sup>The main cause for problems in such projects is that membership and the rights of individual members to benefit from and/or use their land have not been determined.

Ongoing support and assistance, access to markets and training is important, but if the membership and rights are not determined, the community is incapable of acting – it cannot receive support, even if it is offered.

Rights of members, to the 'inside' of projects, are in most cases non-existent, and if in existence, they are insecure.

Opportunities to use land and/or benefit from the resources have in most cases been seized through self-help by a minority of members. The result (and the problem) is that the distribution of opportunities is in most cases highly inequitable.

The rights do not exist because they have not been determined and allocated. They have not been determined mainly because planners and implementers have simply not given attention to doing it.

The SA Constitutional objectives for land reform are to ensure equitable and secure access to land, in particular to previously disadvantaged persons.<sup>3</sup> It is apparent that these objectives are not being achieved in the restitution and redistribution land reform projects.

The state is obliged to ensure that the objectives that are set in the RSA Constitution are achieved. This means that state is obliged to intervene and fix projects to ensure that members of the projects are assured of secure and equitable access. The state is also obliged to ensure such access in land reform projects to be established in future.

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<sup>2</sup> The statistics are explained in **ANNEXURE A**. The 2 000 projects include an estimated total of 160 to 180 community land restitution projects where rural land has been restored.

<sup>3</sup> The objectives of land Reform and Restitution and the role and function of the Commission will be dealt with in the paper by Alan Dodson.

## 2 We focus on “greenfield”<sup>4</sup> redistribution (SLAG, LRAD, Municipal Commonage) and restitution cases

Our paper focuses on redistribution cases (SLAG, LRAD and Municipal Commonage) where rural land has been transferred in (private) ownership to trusts, CPAs (CPIs) or to Municipalities to own and manage the land on behalf of groups of land reform beneficiaries.

We are therefore not focussing on SLAG and LRAD cases that are referred to as “tenure cases” where the land has been transferred to people who have been in occupation for generations. Such cases make up a mere 100 175 ha or **4%** of the total of land that has to date been transferred in terms of the land reform programme.<sup>5</sup>

We are focusing on projects where groups of people were not resident on the land, prior to the transfer of ownership of the land. In these projects the land has been transferred to a single legal entity and is not communal land or communally owned. We define what we mean by “communal land” in **ANNEXURE D**.

We are in other words not focusing on section 25(6) of the Constitution and the 13 million people and areas of land that will be covered by the Communal Land Rights Act 11 of 2004 (CLARA). We are also not referring to or dealing with CLARA. In this regard, please see **ANNEXURE C**.

## 3 Using Elandskloof CPA as a case study and the aims of our paper

In this paper we use the Elandskloof CPA as a case study to:

Illustrate the commendable role that the DLA is at present playing by intervening and taking over the administration of the CPA in an effort to get the Elandskloof CPA back on track;

Illustrate how it happened that the rights of members were not adequately determined and allocated, what the results have been and what it may take to remedy the current state of affairs;

Illustrate with reference to recent larger scale reviews why the situation at Elandskloof is not an isolated or peculiar case, but representative of what is to a lesser and greater degree occurring in most redistribution and restitution land reform projects nationally.

Better get the message across about the central role that rights may play in securing (and perhaps enhancing) livelihoods and, to at the same time show how slow, incremental and cumbersome the process is for securing rights in new, predominantly greenfield projects.

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<sup>4</sup> The term “greenfield” is a troubled one. Many cases can be described as “greenfield” but many not entirely, or only partly so. A LRAD case where a group of people club together to form a legal entity to continue a commercial farming operation is, for the purposes of our definition, ‘greenfield’. Elandskloof where land use is resumed by the community after 40 years and the main portion of the land has changed to citrus orchards is probably also greenfield. “New” municipal commonage projects are ‘greenfield’. The concept does need more work and a better name!

<sup>5</sup> See **ANNEXURE A**

#### 4 Sources used in this paper

Our findings and conclusions presented in this paper are borne out by the following reviews reports and policy proposals:

A national review undertaken by the CSIR on instructions of the DLA of Communal Property Institutions, (CPIs) completed in May 2005;

A legal technical review of CPIs undertaken by Dawie Bosch as part of the CSIR review, completed in December 2005;

A legal technical review by Dawie Bosch of 43 CPIs that were established by the LRC since 1993, completed in October 2003;

The DLA's national review of municipal commonage projects of March 2005;

The new Municipal Commonage Manual (still in draft) as approved by the DLA in December 2005;

Transformation of Certain Rural Areas Act reports from Namaqualand 2001 – 2003;

A key finding in the reviews has been that while the tenure of the land owned by CPIs and the Municipalities are secured due to registration in the Deeds Office, the tenure of the individuals who use the land have simply not been secured.

As a general trend, no or insufficient steps have been taken to ensure that the rights of individual users are determined and secured by agreement or municipal regulation. In most cases reviewed, Municipalities simply made portions of land available to emergent farmer associations (with undetermined or loosely defined membership) without determining the terms and conditions subject to which individuals may use the land.

User groups (who often only constitute a minority of members) simply asserted land use, without any preceding process for application and allocation. In CPAs where commercial ventures (such as plantations or dairy farms) were taken over, even on basis where the concerns were leased to generate income, ordinary members had no determined rights to share and did not benefit from the ventures or leases.

The LRC actively participated in and co-authored key sections of these reviews in efforts to find solutions for better establishing new CPIs and for fixing existing ones.

Findings and recommendations in this paper are also based on our experience in working with NGOs such as SPP, SCLC and FARM-Africa<sup>6</sup> to secure rights of land reform beneficiary groupings in the Western and Northern Cape. A main source comes from work done by the LRC in representing a range of rural land claimant communities.

For the final paper we will prepare a resource bundle which will include key documents such as proposals for amending the current CPA regulations to better establish land reform land holding and management arrangements; example agreements for irrigated allotments; dryland allotments; and garden allotments, etc. We will place these documents on the LRC's website.

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<sup>6</sup> In particular with regard to FARM-Africa assisting with facilitation work to prepare a new constitution for the Khomani San. The work was done with the support of Commission, David Grossman, Phillipa Holden, Dawie Bosch and Roger Chennells.

## 5 Why is it so difficult to get the main point across?

It is difficult to get the message concerning the root cause for the problems within new / 'greenfield' land reform projects across to stakeholders. In this paragraph we present an extract from the CSIR report on the issues and we then present a set of reasons.

### THE MAY 2005 CSIR REPORT: AN EXTRACT

"It could be said that a CPI works if it works in the eyes of the beholder – A purpose of the law and rules is to provide certainty and predictability in the behaviour and actions and responsibilities of parties.

If a CPI member is satisfied that she can reliably predict the actions of her neighbour and other rights users then the CPI works for her. If outsider local stakeholders and outsider parties (or even members or groups of members, for that matter) are happy that they know what kind of transactions and actions to expect of the body corporate, then the CPI model works for them (quoted from Henk Smith per com).

The following two factors are considered as core to functionality of CPIs and should encourage certainty and mutual respect amongst members (concerning '**ordinary**' **land use arrangements**) and externally in relations with external parties (which may include members, concerning extraordinary land use arrangements).<sup>7</sup>

- a) legitimate and functional decision-making bodies (such as the general meeting of members and CPI the committee), and
- b) clear rights, responsibilities, powers and procedures for members and the decision-making bodies.

A purposive evaluation of the CPA model would acknowledge that the success or functionality of the model in terms of legal certainty and predictability of behaviour depends on a healthy balance of both components.

However, without clear rights, responsibilities, powers and procedures it is probable that a legitimate decision making body will not achieve effective land management.

**Thus there must be hierarchy of analysis.** An investigation with regard to governance issues becomes real or relevant only when it is done in relation to how resources are enjoyed and shared.

**The primary investigation must be concerned with** how initial allocations were made, transactions happened and whether records of the use and sharing and transactions, have been maintained.

This does not imply that management of the committee, compliance to notice procedures, etc. are irrelevant. However, such activities are of little consequence unless there is a system in place concerning the allocation and sharing of assets and that this provides certainty and predictability in the behaviour and actions of the members.

A given CPI will not be healthy if a duly elected committee complied with all the formal requirements but failed to define or make rights work for members.

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<sup>7</sup> Of critical importance, yet not touched on, concerns the powers and procedures for CPAs to engage with outside parties. Recommendations in this regard are made in the CSIR report at XX based on proposals prepared by the LRC during the TRANCRAA process.

Similarly, a CPI can survive without a fully functional committee if individual members and the body corporate are confident and secure about their predetermined tenure rights and their use and occupation is not dependent on imminent transactions that must be facilitated by the committee.

In situation where people respect each others' land rights and uses, despite this not having being formalised through formal arrangements, it could be argued that, 'things are working out'. While this may be effective in the short term, trouble will come if there is pressure on the resource, or if a portion of land is exploited for lucrative commercial purposes.

In any diagnosis of the health of the CPA/CPI model and measuring the performance of the individual CPAs/CPIs, the distinction and interdependence between the institutional component and the rights component are therefore crucial.

Section 8(2)(c) of the CPA Act notes that an Association shall qualify for registration if the constitution adopted by it complies with the principles set out in section 9 which concern:

- equity / equality of membership rights;
- democratic processes;
- accountability and transparency;and
- inclusive decision-making processes

Based on the above, drafters of CPA constitutions emphasise the democratic institutional side of CPAs extensively, and at the same time leave the land use rights too open-ended, relying on the general meeting and the CPI committee to develop and define use rights of members.

The allocation of substantive rights to use land is a basic requirement in the act. As noted, for the constitution to qualify for registration it must comply with, the principles and rules contained in the constitution concerning *fair access to the property of the Association*. In this regard section 9(1)(d) requires the following:

- the association must manage property for the benefit of the members in a participatory and non-discriminatory manner;
- a member may not be excluded from access to or use of the association's property which has been allocated for such member's exclusive or the communal use unless the exclusion is done in accordance with the procedures of the constitution.

Section 8(6)(c)(ii) of the CPA Act provides that the association may, subject to the provisions of its constitution, encumber its land by mortgage, servitude, or lease or in any other manner, while **section 12(1)** provides that it may not dispose of or encumber the land or conclude any prescribed transaction in respect of the land without the consent of the majority of members present at a general meeting of members.<sup>8</sup>

The only requirements concerning the allocation of rights are found with reference to the section 8(2) requirement that the constitution of a CPA must deal with the matters referred to in the schedule to the Act. The items listed in the schedule that must be addressed for a constitution concerning property, before the constitution qualifies for registration, are as follows:

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<sup>8</sup> In terms of section 12(2) such consent may however be given in respect of a series of transactions, without identifying each individual transaction. Section 12(2) therefore provides that allocations of rights in the normal course of community business (such as the reallocation of a grazing right or a right to an allotment) could be blessed by community resolution for a committee to effect.

The rights of members to the use of the association's property (item 7).

The purposes for which the property may be used, and the physical division and allocation of the property (item 10).

Whether members may sell their rights and, if so, to whom (item 11).

What happens to a member's rights on his or her death (item 12).

However, neither the Act nor the regulations set guidelines or requirements for:

defining the nature and content of the rights to different types of land use (including 'ordinary' ones such as housing, grazing, allotment etc;

processes and procedures for allocating 'extraordinary' land use rights and opportunities (such as joint ventures, high value tourism facilities etc), as opposed to the rights of members;

the process for the allocation of different types of ordinary land use rights to members in accordance with different sets of criteria;

the administration of 'ordinary' land use rights;

the sharing in benefits and other opportunities, such as the right to share in the profits or employment opportunities of a project, the payments of dividends and determining how communities may share.

The functionality of the CPA model cannot only depend on the effective functioning of the committee and the general meeting. The CPA functionality must include a proper separation of powers (legislative by way of the general meeting; and executive by way of the committee) and allocation of rights and powers including substantive rights of members.”

One of the main recommendations as capture in the executive summary of the CSIR report, proposes that:

“DLA’s core business cannot be only transferring land, but if it intends to achieve secure tenure rights for individual within CPIs, then an ongoing departmental function must be about supporting group tenure systems and land administration”.

**The following may be some of the reasons why the main point about the lack of determining membership and the rights of members is simply not getting across:**

As a general trend policy, law and implementation focuses on the broader institutional issues and do not require that individual rights to benefit must be determined as noted from the preceding extract with regard to CPA Act above. The Restitution Act merely requires that access must be fair and non-discriminatory at section 35(2) and 42D(3).

To determine rights, to provide for their allocation and to ensure that a range of steps (including public administrative support) is provided to uphold and promote newly allocated rights, requires meticulous care and takes time. We assert in general that “the institutions must be robust” but we do not get into the detail on exactly how different types of rights to use or different types of rights to benefit are defined and by virtue of which criteria and procedure they are allocated (and practically enforceable remedies).

If we do rights, we must be able to see them being exercised in practice – otherwise we are writing recipes for bread and never getting to eat it. We have to be able to walk the land and see that, on the basis of her right, Janet received access to 0.5 hectares of land to cultivate and 6 000 m<sup>3</sup> of water per annum. In five years time we need to be able to walk the land again to see whether Janet’s right, in relation to the other 19 allotment holders has been honoured. If in four years time there are only three of the 20 initial allotment holders left, the one with 17 hectares, the other with 2.5 and the third (Janet) with 0.5 ha, the project has not been a land reform success in relation to Constitutional objectives. The 17 hectare farmer then wins the prize for the best woman farmer of the year in the province.

The most immediate response to an assertion that the land user rights of members and or their rights to benefit are not only insecure, but they do not exist, is the response that: "the tenure is secure, the community owns the land, their ownership is registered in the deeds office."

Arguing about the fact that rights have not been determined and allocated is received as an insult in certain quarters, because it is asserted that groups or communities who settle on to new land ascribe to a land tenure system according to which procedures for allocation and the terms and conditions for use are determined. Such systems do indeed exist, but for such a system to be activated in a greenfield case requires the taking of a set of steps to determine "who gets what" subject to clearly defined and practically enforceable terms and conditions. Many new land reform projects do not concern farming practices that may or may not be governed in terms of African customary tenure, but concerns commercial ventures and the payment of dividends to shareholders.

The type of rights support that people who have been resident on land for generations require are very different to the steps and interventions that need to be taken if a new piece of land is allocated for the use and benefit of a newly formed group of people (in LRAD or Municipal Commonage cases) or to a group that had been in existence for many years (in Restitution cases).

As an example: Almost all the DLA supported municipal commonage projects (which amounts to **33%** or **519 000 ha** of land reform land transferred), where "new" previously white owned land is transferred to municipalities are used for grazing purposes. Since the land is owned by the Municipality, the Municipal Systems Act and Municipal Finance Management Act determines the terms and conditions subject to which grazing lands may be made available and the basis for determining grazing fees or rentals.

Linked to the assertion that ownership by the community in itself brings security, is a deep-rooted distrust and discriminatory view of land user rights, as opposed to ownership. It has to do with our history where the former public supported system gave black people permit based inferior and discriminatory land rights that could be cancelled without recourse. It also has to do with the extent in which our every day life is ruled by the market.

Ownership (freehold) in the form of title is what we all strive for. Any thing else is branded as inferior.<sup>9</sup> See paragraph 16 below

Our sense is that at the bottom of it all lays a simple message: the rights of poor people do not count.

Intricate common property rights and determined individualized user rights forms the foundation for modern city complex development. The users of the V&A Waterfront shops and restaurants do not have title. They do have secure and protected user rights to areas for: exclusive use, exclusive shared use; and 'public use'. The market drives the rights in the same way as it drives the ownership to the residential properties that the majority of the participants at this conference, own.

One option is to assert that rights of poor people are not working because the market is not driving them. The question is will market driven rights work for poor people?

The approach to getting the market's help seems to be finding resonance. The July 2005 Land Summit document introduces the chapter on the implementation of Communal Land Rights Act with the following quote: "Property informally held by people in the third-world is dead capital because it can't be leveraged to produce growth", Hernando de Soto, Peruvian Economist."

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<sup>9</sup> Van Der Walt A.J., Koers 2001. Property rights and hierarchies of power: A critical evaluation of land reform policy in South Africa. Personal Communication.

Also See PLAAS Policy Brief No 18 October 2005: Will formalising property rights reduce poverty in SA's 'second economy': Ben Cousins, Tessa Cousins, Donna Hornby, Rosalie Kingwell, Lauren Royston & Warren Smith.

We hope that the proposals we are making may assist in making rights real for members in Restitution and Redistribution projects.

## 6 Elandskloof: The removal and the restoration<sup>10</sup>

The community of aboriginal people from the area ended up settling in the secluded little valley in the mountainous terrain of the Cederberg during the mid-1800. The Dutch Reformed Church acquired the initial portion of 'inner' Elandskloof land of 718 ha on 12 June 1862 and the surrounding mountainous portion of 2 421 ha in 1900.

Families lived on the land in homes that had been constructed and maintained over generations. They practiced individualized subsistence farming on allotments and kept animals (579 LSU or (x 6) 3 474 SSU).

The amount of land used for cultivation purposes encompassed a guessed / estimated amount of 25 hectares, though the potential is stated to be up to six time more. Livelihoods were enhanced by remittances earned from working on neighbouring white owned farms. The community had a well constructed school, church, manse and office. Prior to the removal the 200 children attended the Mission school and received education up to Standard Six.

During 1962 the community that consisted of 76 families (600 people)<sup>11</sup> were brutally turfed out and scattered to the wind. A small group of 20 families were granted a toehold on land close to Elandskloof called Allendale. The owner, Mr Du Plessis who granted them the rights to reside, attended the school at Elandskloof as a kid.

Ever since their removal, a core group of community members continued to rally together and actively associated in efforts to reclaim their land.

At the time of the ACLA application community members lived on 12 farms in the region of Elandskloof and at 23 different towns, including Wupperthal, Citrusdal, Piketberg, Atlantis, Cape Town, Somerset West and George. Keeping community unity was a hugely expensive affair, apart from it being a logistical nightmare.

On 7 July 1992, with the support of the LRC and SPP, the community submitted an application to the Advisory Commission of Land Allocation for the return of Elandskloof. The community also issued Supreme Court summons for the return of the land. The matter was thereafter registered with the CRLR after its establishment. The Commission in turn referred the community's claim to the Land Claims Court in terms of section 14 of the Act on the basis that a settlement agreement had been reached between the State, the claimant community and the landowner.<sup>12</sup>

On **15 October 1996** the Land Claims Court ordered the restoration of the land as the first ever Land Claims Court judgement for the restoration of land. In addition the Court also ordered that:

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<sup>10</sup> The information is taken from the ACLA Application prepared by Henk Smith (LRC) and Megan Anderson (SPP) of 7 July 1993.

<sup>11</sup> ACLA Application E13, from Die Burger, 11 September 1961, according to PW Botha, Minister of Coloured Affairs.

<sup>12</sup> Note that settlement was achieved prior to the amendments to the Act that empowered the Minister to settled claims without the intercession of the Court in terms of section 42D.

The DLA DG must ensure that the community's CPA constitution (which had not yet been registered with the DLA in terms of the CPA Act) complies with the provisions of

**Section 35(3)** of the Restitution Act that requires that members should have access to land on a basis that is fair and non-discriminatory.<sup>13</sup>

A recommendation be made to the Minister that the community should be given preferential access to 'state resources' for the allocation and development of housing and other infrastructure on the land, which may be necessary to replace the housing and infrastructure that was destroyed at the time of dispossession and for which no compensation was paid.

Though **Section 35(1)(d)** of the Act provides that Court may order the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land, the Court merely made a recommendation. We return to this point at paragraph 20 below.

The Court order confirmed an initial list of members and confirmed criteria for future membership discussed at paragraph 11 below.

The Elandskloof CPA was duly registered with the DLA on **13 November 1996** with the registration Number: CPA / 96 / 0001: the first CPA to be registered in terms of the CPA Act.

The transfer the 3103 hectares of land was registered in private ownership in the name of the CPA on **13 December 1996** pursuant to the conclusion of an agreement of sale for an amount of R 4.5 million. At the time of restoration, all the houses of the inhabitants had been demolished. The fields they had used for allotments were replaced by irrigated orange and pear groves.

On 16 December 1996 the Minister of Land Affairs handed over the title deeds to the community at an internationally televised auspicious ceremony held at Elandskloof.

**The basis of the claim:** A single claim was brought on the basis that the people who were dispossessed constituted a "community." In other words, their rights in land (at the time of their removal) were derived from shared rules determining access to land held in common by such group.<sup>14</sup> The case was not pursued on the basis of a multiplicity of claims instituted by individuals who were dispossessed, or their direct descendants, in the event that a dispossessed antecedent had passed away. The issue is further discussed at paragraph 15 and in **ANNEXURE B**.

## **7 Resettlement of the first and subsequent families and deterioration**

After the handover ceremony, members of the community were not permitted to settle on the land. The ACLA application (E10) noted that a range of service providers, including SPP and FSG were investigating how many people would want to return and how they would use and develop the land.

The application noted that while it was unclear whether everyone who says that they wished to return, will in fact return, they were driven by a deep sentimental desire. The report noted that in all likelihood those with the least security, who do not have secure jobs and family commitments, were most likely to return first.

During January 1997 it was no longer possible to stave off eviction of the small group that had squatted at Allendale. The group had by then (35 years later) grown to 24 families. Since

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<sup>13</sup> It is important to note that **Section 42D(2)** repeats section 35(3) to provide that: If the claimant is a community, the [*settlement*] agreement must provide for all the members to have access to the land, on a basis which is fair and non-discriminatory towards any person . . .

<sup>14</sup> Section 1, definition of "community", Restitution Act.

services and homes had not yet been planned for or constructed, the group was obliged to squat on the land at Elandskloof.

Shortly after the resettlement of the first families, relationships within the group started deteriorating. Despite best efforts and ongoing support from NGOs and other stakeholders the committee simply could not cope. It was not for want of trying. Regular meetings were held, procedures for application of rights determined and mediation assistance was provided.

The community however split into factions between the families living at Elandskloof and the majority of members who live elsewhere in "regions". Community meetings became violent and eventually stopped taking place. Infrastructure on the land went to wrack and ruin. The church, school and manse were vandalised up to a point where it cannot even be used as shelter or as a meeting purposes. The agricultural land and water has been seized on the basis of self-help. The orchards stopped producing and trees have started dying. Implements and vehicles are either lost or in a state of disrepair.

These disputes, which primarily turned on who the members were and what rights and entitlements they qualified for, scuppered plans to establish a serviced residential area and efforts to manage the farm profitably from the outset.<sup>15</sup>

## **8 Elandskloof placed under the administration of the DG in terms of Section 13**

The situation at Elandskloof continued to deteriorate. During 2003 the DLA decided to apply to the High Court for an order to have the CPA be placed under the administration of the DG in terms of section 13 of the CPA Act.

Section 13 provides that a Court may place the CPA under the administration of the Director-General of Land Affairs because of maladministration; or where it is unwilling or unable to pay its debts; or is unable to meet its obligations, or where it would otherwise be just and equitable in the circumstances.

In the main affidavit, the DLA Provincial Chief Director, Terance Fife, noted that the intervention of the Court was required because of the:

- History of divisions and mistrust among the Respondent's members and within the committee;
- Irregularities in the management of the Respondent;
- Failure of the committee to follow democratic process in decision making;
- Lack of skills and capacity among committee members;<sup>16</sup> and
- Failure to co-operate in development initiatives.

The CPA as respondent did not oppose the application. The inhabitants living at Elandskloof supported it.

On 8 November 2005 the CPA was placed under the administration of the DG by order court.

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<sup>15</sup> Apartheid's hangover! The complexity of management and tenure at Elandskloof" - Mayson, David; Cronwright, Rodney; Barry, Micheal: Elandskloof Land Restitution: Establishing Membership of a Communal Property Association.

<sup>16</sup> It is instructive to note that the Chief Director, on behalf of the DG of the Department of Land Affairs noted that: "It is also evident from the affidavits of individuals who have worked closely with the Respondent's members [the CPA] that the skills required to administer the association (with its considerable infrastructural and agricultural challenges) for the benefit of its members are not currently available among the members of the committee or the community. This skills deficit is directly attributable to the disadvantage suffered by members under apartheid and must be addressed by means of focussed skills development programmes.

The Provincial Chief Director (in terms of the powers delegated to him by the DG) appointed consultants as his agent to administer the affairs of the CPA.<sup>17</sup> The DLA also convened an Advisory Forum of government departments and other stakeholders to support the process.<sup>18</sup>

In terms of the order of court the DG was given the same powers as the CPA Committee has in terms of the CPA Constitution.<sup>19</sup> In terms of the CPA constitution, the Committee has the powers to secure: the resettlement of the community; the provision of appropriate infrastructure; housing and other social services; and the development of agriculture and other economic opportunities – BUT: the committee does not have the powers to:

Allocate (substantive) rights in land such as residential sites and rights to use land for agricultural purposes

Sell, donate or swap a piece of land, or take out a mortgage bond, grant a servitude; or

Sign off the steps for township establishment.<sup>20</sup>

Section 12(1) of the CPA Act makes it clear that it is only a majority of members present at a quorate and duly constituted general meeting that may take such decisions.

But for these restrictions the DG's agent has been given a free hand to go about the committee's ordinary business and take steps (hire, fire, etc) to achieve the objects of the CPA.

## **9 Administrative actions undertaken by the DG's agents & initial surveys**

Immediate actions undertaken by the service providers during early 2006 were to ensure that the community accepted their authority. They took control of service provisioning and gave immediate attention to water provision by fixing of the weir, reticulation pipes and reservoir. They established a fire-fighting plan and started with steps to sort out stock control and the presence of stock owned by non-members. They commenced and continued to hold regular meetings with senior officials from the local and district municipalities.

Their main task was to undertake a survey and audit on membership; land allocation (residential plots and agricultural land); water audit; 'rescue the orchards' and place it under proper management; town establishment and provision of basic services; stocktaking and recovery of implements and assets; and a financial audit.

In their first report the agents noted that the 'absence of clarity' in membership numbers and the rights of members constituted one of the major causes of the conflict and divisions at Elandskloof. They noted that unless membership and the rights of members are sorted out, Elandskloof will remain wracked with strife.

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<sup>17</sup>Terms of reference of the appointment of an agent for the Elandskloof: (WK5/5/WK/196R)

<sup>18</sup> The LRC had been instructed by community to advise them on the issues concerning the administration order application and to assist during the process. The LRC is a member of the Advisory Forum and it has throughout assisted the DLA appointed consultants with advice and with the drafting of their report.

<sup>19</sup> The Court Order is the same as the Order that placed the #Khomani-San CPA under administration on 8 November 2002. Except for Mmamahlola, we do not know of any other cases that have been placed under administration.

<sup>20</sup> This includes making application to the Registrar of Deeds for the registration of a general plan and the opening of a township register and transfer of residential sites so that roads and public places may by operation of law vest in the local authority.

They recorded that the reason why membership and rights needed to be resolved was that the uncertainty negatively impacted on the project as a whole. In keeping with the ACLA Application proposals of 1992, they stated in 2006 that, if one did not know how many people would be entitled to settle at Elandskloof as of right, it was impossible to plan.

#### **10 Preliminary findings from on resource allocation and tenure (the terms and conditions for use)<sup>21</sup>**

To date, 74 families of 341 persons (adults and children – on average 4.6 persons per family) or an estimated 20% of the (estimated) adult membership have settled on the land, in make-shift homes with rudimentary services pit latrines and standpipes for water.

Only 7 members have access to and use less than 10 hectares as allotments for agriculture. Approximately 25 people own 273 small stock units, with two persons owning 52% of the stock.

No evidence of due procedural allocations of user rights in keeping with the provisions of the Act and the CPA constitution could be found though a practice of lodgement of applications for erven to the committee had been established. Applications have however not been processed because there has not been agreement on the criteria for allocation. Persons resident on the land made applications as well as persons who had hopes of settling on the land at an undetermined future date.

The key and unresolved question is whether all members are entitled to residential sites, whether they come to live at Elandskloof or not.

Despite a serious effort by the SPP to propose different sets of user rules during 1998 / 99,<sup>22</sup> there is currently no evidence of sets of terms and conditions subject to which persons may use allotments, keep animals or harvest considerable growths of wild buchu. Persons who do not live at Elandskloof keep stock on the land. The wild buchu (which may earn more than R 70 000 per year) has been reaped and sold illegally by inhabitants.

The 20 hectares of orange trees and 5 hectares under pear trees have are in a state of distress and does not generate any income at present.

#### **11 Membership, the Court Order and the CPA constitution and the law**

The court order did not help matters. Instead of providing that the CPA constitution must comply with the provisions of section 35(3) that all members must have fair and non-discriminatory access to the land, it required that such access must be provided to the members whose names are on the list AND be provided to

“such further persons and their direct descendants who may prove to the satisfaction committee that they were dispossessed of rights to the land.”

The CPA constitution in turn followed the Court Order and provided that, apart from the members whose names are on the list, membership should be available to

“such other similar persons and direct descendants of such persons [of 18 years and older], who were dispossessed on a similar manner of rights in land and who satisfied the committee that they are entitled to membership”.

The full wording of the criteria are the following:

<sup>21</sup> Elandskloof Statistieke compiled by MTP: 2006 08 14.

<sup>22</sup> 2000 05 23: David Mayson and Elsbeth Engelbrecht: Apartheid's hangover! The complexity of management and tenure at Elandskloof. A paper looking at the development and practice of tenure arrangements at Elandskloof.

- 6.1 Die Lede verteenwoordig die persone van die ouderdom agtien (18) jaar oud of ouer, wat daarop geregtig is om voordeel te put uit die bates, hulpbronne en projekte van die Vereniging, en bestaan uit die volgende:
- 6.1.1 Alle persone en direkte afstammeling van persone wat deel was van die Elandskloof gemeenskap wat ontbering en benadeling ondergaan het en ontneming van regte in grond en ander bates gelyk het en wie se name verskyn op die aangehegte lederegister 'aanhangsel A';
- en ander soortgelyke persone en direkte afstammeling van sodanige persone, wat op 'n soortgelyke wyse van regte in grond ontnem is en wat die Komitee tevrede gestel het dat hulle op lidmaatskap geregtig is; [Hierna "die Primêre Lede" genoem]
- EN
- 6.1.2 Sodanige ander benadeelde persone as wat die Komitee in volgens sy alleendiskresie van tyd tot tyd besluit om in te sluit op grond van 'n bloedverwantskap of huweliksverwantskap met een van die Primêre Lede; en
- 6.1.3 Sodanige ander persone as wat die Algemene Vergadering van tyd tot tyd besluit, op grond van die vermoë en gewilligheid van die betrokke persone om die een of ander waardevolle bydrae te maak tot die bedrywighede van die Vereniging en die welsyn van die Lede. [Hierna "die Sekondêre Lede" genoem]

The intention was to permit all persons as members if they were direct descendants of 18 years and older at the time of the court order, but missed the boat by getting their names on the list.

The constitution contains two sets of further criteria. The one which permits persons who become direct descendants in future who may to apply for membership subject to the approval of the committee and another set that permits persons who make a special contribution to the community, to apply for membership at a general meeting.

The 'direct descendant' formulation for persons who did not make the list unfortunately saddles the community with members on a mechanistically determined basis - whether or not such persons actively associated themselves with the community. Persons who were not born at Elandskloof, who never associated with the community, may at some stage in future pitch at a meeting and demand to vote and participate in the affairs of the community. See **ANNEXURE E**.

On the basis of the formulation, the membership may as a result become far larger than it would have been, had the community remained at Elandskloof.

During the decades of occupation of Elandskloof prior to the forced removal, the people who lived at Elandskloof conducted their affairs as a community. Persons who grew up on the farm and who moved from the land to go and live elsewhere may have remained part of the community, or they may have become a part of another community. The fact that they were direct descendants of people living at Elandskloof may or may not have given them the right to participate in the conduct of the affairs of the community.

If any of those direct descendants at a later stage asked to live at Elandskloof, the community may have considered the request or they may have rejected it.

The following is an extract from an Opinion by Geoff Budlender dated 25 August 2005, on the question:

"As the Land Claims Court has repeatedly recognized, membership of a community changes over time. The fact that one's ancestor was a member of a community in (for example) 1962 does not make one a member of that community in 2005. Whether one is a member in 2005 depends on the rules of the community, and the facts existing in 2005.

That this is so, is obvious when one looks at the position of a person who is a member of the community in 2005, but whose ancestors were not members. It could not be contended that the person concerned has no right to membership in 2005, because his or her ancestors were not members 45 years ago.

The right to membership at any time therefore depends on the rules of the community, and the facts which exist at the time when membership is to be determined.'

The bottom line is that the community and not any outside party has the power to determine the rules for membership.

## 12 Membership, numbers, criteria and perceptions

The compilation of the register grew from 125 families listed in the 1992 ACLA application to the list of 604 adult members on 15 October 1996.

Mayson and Engelbrecht<sup>23</sup> community support workers from the SPP noted that:

“As the negotiations proceeded and it became clear that the land would be returned, many more Elandsklowers heard of the claim and became interested in returning.

The list started growing. By April 1996, there were 208 families on the list, by August 1996, 308 families, and then by January 1997 there were 350 families on the list”.

Taken at 4.6 persons per family, it amounts to 1610 persons and if 2 adults per family, it means 700 members of 18 years and older.

Without any reference to the constitution, and with the support of service providers and planners, **membership became recorded as ‘families’**. This clearly had to do with the fact that DLA settlement support and planning grants were allocated on the basis of a ‘household’ count.<sup>24</sup> (Which may have (or most likely did) created an impetus to beef up numbers).

According to Mayson (2000) and as confirmed by inhabitants during 2006, the perception exists that that the following categories of persons may qualify for membership as of right:

- “Those who were dispossessed in 1962;
- Those who left before 1962 as a result of pressure from the Church;
- Those who left before 1962 in order to seek better working conditions;
- Those who were born there (at any stage);
- Those with family links to any of the above categories.”

In other words, all direct descendants antecedents of deceased persons who lived at Elandskloof would be entitled to membership.

Whether or not these criteria were formally adopted makes little difference now, what matters is that the disputes surrounding membership criteria scuppered development from the outset and it continues to do so today.<sup>25</sup>

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<sup>23</sup> Mayson & Engelbrecht.

<sup>24</sup> The DLA’s Grants and Services of the Land Reform Programme (Version 7: July 2001) and the September 1997 White Paper.

<sup>25</sup> Mayson’s main finding in 2000 was that “the delay in finalising the most important question of who forms part of the such communities has major implications for community.”

### 13 Membership: what is to be done?

The Court Order of 15 October 1996 and the CPA Constitution limits membership to persons whose names appeared on the list and such other persons whose names were not on the list, but who were 18 years and older and who either formed part of the community at the time of the dispossession or were a direct descendant of such a person.

Whether or not the court order or the CPA created the impression that all direct descendants who ever lived at Elandskloof, for ever after, may qualify for membership as of right is irrelevant, a perception that membership is open and undeterminable exists.

At present our guess is that approximately 80% of the membership are not living at Elandskloof. Their vote determines what happens at Elandskloof. The situation is untenable at present. If non-resident membership increases, it may become even more untenable.

A similar position is experienced on Moravian Mission stations. The Moravian Synod has the ultimate say on how the land at the mission stations are managed – but over many years more and more church members started living in the cities, giving less and less say to the members who live on the mission stations. 'Mission Station' congregations are outnumbered 8 to 1 at four yearly synodal meetings. The Synod decides the rules for land allocation.<sup>26</sup>

As a first step a community process must be embarked to spell out the issues and the consequences of membership. Members need to consider negotiating and agreeing on realistic criteria for membership and rights allocation (in particular, rights to residency / 'inwonerskap').

Concerning membership the following suggestions are made that:

The initial set of members may only be the persons whose names appear on the list as endorsed by the judge and any of their direct descendants who are ordinarily resident at Elandskloof and who are 18 years of age and older.

In future new membership may only be allocated to persons who are lawfully resident at Elandskloof (in other words, persons and their families to whom residential sites have been allocated); and

The Constitution should be amended to reflect the above but with the retention of the set of criteria that any person may be admitted as a member who may make a valuable contribution to the affair of the community, on condition that such a person may qualify for residency.

Substantive rights to use land as allotments, grazing or to be entitled to reap buchu may only be allocated to members that are resident at Elandskloof.

### 14 Richtersveld: membership criteria as an example

The Richtersveld community, has subject to directions from the Land Claims Court, recently amended their CPA constitution to reflect their membership criteria as follows:

A person is a member if his or her name appeared on the list as confirmed by the court.

Any new member has to be resident on the land

**AND**

be a descendant of a person whose name appeared on the Court approved list;

**OR**

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<sup>26</sup> See: An Inventory and Description of the Historical Acquisition of Moravian Church Land: A Report Compiled for the Moravian Church of South Africa: A joint research project of the Surplus People Project and the Legal Resource Centre: June 2000. Electronic copies are available on request.

if not a descendant, must be ordinarily resident on the land AND must have, according to the discretion of the committee, made a valuable contribution to the welfare of the community.

The most important part of the 'new' criteria is that apart from the persons whose names were on the list at the time of the court judgement, no other person may become a member unless they live on the land.

At the time of the Court order in 2000, membership included people who were accepted as part of the Richtersveld community, after the dispossession had occurred without them being directly descended to anyone who formed part of the community at the time of the dispossession.

In the Elandskloof example, it would include persons who were accepted as part of the community at Allendale.

## **15 Membership, direct "descendency" and the proprietary consequences**

### **"Community membership does not vest substantive rights"**

The issue we are raising here does not only concern Elandskloof, but goes to the heart of the problem that the commission has with counting its community claims and the Commission's process of claimant verification.

The first point is that the Constitution and the Act does not distinguish between urban claims and rural claims. Section 25(7) of the Constitution notes that a person or a community is entitled to restitution. The distinction between a claim by a persons and a claim by a community, lays the basis for a theme that runs through the Act at sections 1, 2, 10, 35(2), 35(3), 38B(1) and 42D(2). We have included a short summary of the sections and the consequences of the distinction as **ANNEXURE B**. As noted the summary is based on an opinion prepared by Geoff Budlender for the LRC during August 2005.

The consequences of the distinction between claims by a person as opposed to a claim by a community has far reaching implications for:

- The manner in which the Commission has undertaken its 'verification process' nationally;
- The manner in which claims are counted and reported on;
- Budgets and plans for future completion of claims (based on the numbers of claims); and
- Implications for how community members view their entitlements and rights.

In a claim by a community, the community as single entity (who used land according to shared rules) was dispossessed of land. It was not a set of individual persons who each lost a set of rights and their direct descendants. If the latter were the case, there would have been a multiplicity of claims. Each claim would have been pursued by a claimant or by, as required at Section 2(1)(c)(i) of the Act, the direct descendants if the dispossessed person had passed away.

The Commission would have had to check whether each set of direct descendant claimants in fact met the criteria of section 2. The commission would be obliged to collect family trees and determine the particulars of the "ODI" (the originally dispossessed person).

Membership or "access to the land on a basis that is fair and non-discriminatory" does not vest a member with substantive rights in the land merely on the basis of their membership – being a direct descendant does vest such rights. A direct descendant is a co-claimant that is entitled to become a co-owner. Each direct descendant becomes the registered owner of an

undivided share in the property. The co-owners may apply to court in terms of a (Roman & ancient) common law action, the *actio communi dividundo*, for the division of the joint property according to the size of the shares. This position was confirmed in the Mayibuye I-Crimen case.<sup>27</sup>

In a community claim, the CPA is, in a manner of speaking 'protected' by the requirements that the access should be "fair and non-discriminatory." The point may be illustrated with the following two examples:

If the grazing land can only carry 100 cattle, and the rights to keep a set amount of cattle was allocated to 12 members on a fair and non-discriminatory basis in accordance with community rules, the CPA cannot allocate more rights to keep cattle, no matter how many members there are.

If the CPA decides, fairly and reasonably that it cannot develop more than 300 residential sites on the land the CPA cannot allocate more 300 residential sites.

The bottom line is that nobody gets anything, unless and until something is specifically allocated in terms of the procedures of the constitution or in terms of the constitution itself<sup>28</sup> - except for their very important procedural rights, "members stand naked"

**16 => more secure rights => reduction in vulnerability => improved livelihoods => less strife => more stability => less pressure on the committee => more functional CPA and CPA committee => more secure rights => . . .**

*"Secure rights to land underpin secure livelihoods and shelter by reducing households' vulnerability to shocks, guaranteeing a level of self-provisioning and supplementary incomes from basic foodstuffs and enabling easier access to basic infrastructure, employment markets and financial services."*<sup>29</sup>

Managing the whole operation (town management and service provision; the management of the orchards; the management and support of individual agricultural activities on the land) is a huge and impossible task for any committee. It is a particularly impossible task for a volunteer committee.

Future planning should as far as possible limit the functions of the CPA.

A volunteer CPA committee does not have the capacity to administer and enforce rights – no matter the extent of "capacity building".<sup>30</sup>

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<sup>27</sup> No. 28/96, judgment delivered on 21 November 1997.

<sup>28</sup> In LRAD redistribution cases membership is based on the extent to which the members contributed to the land purchase and / or secured a subsidy. The constitutions often determines that such a member then has a right to 'share' in the proceeds of the entity. A person who becomes a member automatically qualifies for a substantive right.

<sup>29</sup> Quan, Julian / DFID: Draft Paper: August 2003: Better Livelihoods for Poor People: The Role of Land Policy. Also see: Conway, Tim; Moser, Caroline; Norton, Andy; and Farrington, John "Exploring Policy Dimensions: Natural Resource Perspectives: Number 78, May 2002 (<http://www.odi.org.uk/nrp/78.pdf>).

<sup>30</sup> Committee members at Elandskloof are at present facing personal liability for the payment of legal fees in excess of R 20 000 in their personal capacity due to ill-conceived litigation that they became embroiled in. Counsel advised the institution of a Supreme Court interdict instead of approaching the Land Claims Court in terms of the series of remedies provided for in the Restitution Act and CPA Act (at the expense of the DLA). The Land Claims Court is

Private property rights of ownership in middle and upper class residential areas work because they have state administrative support. Secure rights limit opportunities for conflict over resources. Secure rights make the holders less vulnerable. User rights are branded as inferior to ownership. User rights are classed mere “personal” / “contractual rights.”<sup>31</sup> In land reform projects user rights have no support. (In shopping malls they do).

The state is obliged to provide administrative support to ensure that land reform beneficiaries have secure and equitable access to their land.

Determined and secure rights and the provision of municipal services should:

- Decrease the vulnerability of poorer Elandskloof inhabitants (as opposed to members in general); and

- Increase livelihoods and opportunities for income generation.

A reduction in vulnerability and increased livelihoods will in itself help strengthen rights, bring greater stability and consolidate and promote the interest of the Elandskloof community.

Addressing the above issues will considerably address the main causes for strife within the group and by so doing hugely reduce the need for ongoing, hands on and onerous committee management and intervention.

## **17 Getting the rights right, in relation to getting other systems and support right**

Income generation projects at Elandskloof will continue to fail if members do not have access to appropriate training and extension, credit and markets – as would any other commercial undertaking.

However, even if members resident at Elandskloof have access to such services and resources, the project will fail if rights to use or benefit from the land (including the water resources), and obligations in respect of the land or the rights of others, have not been determined, or if determined, cannot effectively be enforced.

We are not saying that “getting the rights right” is more important than other factors. We are asserting that rights constitute a foundation that needs to be addressed first.

When assessing whether Elandskloof as a land reform project is working, we are asserting that the primary investigation must concern “who got / gets what subject to what terms and conditions.”

Stated differently, there exists a hierarchy similar to Maslow’s typology: Unless some issues are addressed, others cannot follow. Our recommendations therefore emphasises that as a start, you have to fixt the rights first. If you have not done it, or do not manage to fix it, your best laid plans for modelling income generation and management of the orchards will come to naught.

We believe that these issues are not only pivotal to addressing problems in Elandskloof, but they are issues that are capable of being addressing.

Getting the rights right is not going to happen overnight. Leading international commentators note that the process for the realization of rights building and strengthening rights is a long and arduous process.

The article: Exploring Policy Dimensions: Natural Resource Perspectives: Number 78, May 2002, by Tim Conway, Caroline Moser, Andy Norton and John Farrington (<http://www.odi.org.uk/nrp/78.pdf>) notes that:

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most unlikely to order costs against bona fide litigants who are seeking the courts assistance to compel the DLA or Commission to intervene and assist.

<sup>31</sup> Van Der Walt: 2001

Rooting policy in universal basic rights may be the only way to reorient government priorities towards the poor.

Basing entitlements in rights rather than discretionary policy makes it easier to defend continuity of service provision, increasing the political sustainability of pro-poor actions.

By guaranteeing a minimum livelihood and discouraging extreme inequalities, enforceable economic and social rights also help to promote the social and political stability necessary for sustainable national development.

Rights on paper are a necessary but insufficient condition for pro-poor policy.

Highly marginalized groups lacking organization and resources may be unable to realize their formal rights: improving livelihoods may be necessary to give them the incentive and leverage to lobby for realization of rights.

Social capital, effective allies, and voice are thus essential.

**Struggles for the realization of rights require sustained action** in a variety of national and international for a. Donors can play an important role: in changing the incentives for government, in providing state and civil society actors with information on international human rights and advice on how to incorporate these, and in absorbing the upfront costs civil society groups face in developing a capacity to make use of their rights (e.g. assisting community forestry groups develop processing and marketing skills)."

## **18 Rights determination must occur prior to occupation / assistance to be provided as of right**

The most resounding lesson from the Elandskloof experience is that occupation of land and the resumption of the use of the land by community members should only have been permitted in accordance with a plan and in terms of due process / in keeping with the provisions of the constitution.

Resource distribution is a rude business with guaranteed negative social impacts that needs to be anticipated. Law and legal rules may serve as part of the solution.

The DLA together with the CPA should, prior to the occupation of the land, have:

- Determined the criteria for membership in a sound manner in keeping with the principles developed in recent case law and completed a fixed list of members. The general meeting and not the committee should be the body to allocate membership;

- Project planning and implementation may not be undertaken unless the nature and extent of substantive rights (the terms and conditions for use or beneficiation) from the project have been determined in clear and enforceable agreements; – this means devising rules and agreements to residential sites; to arable allotments (including water for irrigation); grazing and commercial ventures. It means devising enforceable provisions that take family interests into account upon the death of the holder of the right and community interests into account should the holder wish to the transfer the right to non-member;

- (Project planning and implementation to include the provision of extension support, training, marketing and access to credit: The point is that one can only start proposing the generation of models for marketing, sharing equipment, provisioning of credit or whatever type of support that may be envisaged, unless and until a degree of certainty is established with regard membership and with regard to the terms and conditions of the type of rights to use and benefit from the land);

Determined the criteria for members to be allocated different types of rights to use and or benefit from the land (each type of use may have its own criteria – in Richtersveld each member of the CPA will be entitled to a share in the Diamond mining concern (not automatically, but upon application, due consideration and allocation); in Elandskloof the proceeds that will be derived from the orchards are so small that any profit will go towards covering the costs to maintain and support infrastructure and buildings on the land).

Determined the process for allocating the difference types of rights;

Assisted in the actual process for the allocation of rights;

Ensured that ongoing, independent, public administrative support measures are put in place to ensure that records are maintained, transactions recorded and that effective action is taken against rule breakers, for example for non-payment of fees or over-stocking;

Assisted with the determination of user fees at a level to ensure that management takes place on a financially sustainable basis (management in terms of budget linked plans according to IDP requirements as defined in the Municipal Systems Act), while ensuring that poorer residents are able to maintain access to the land; and

Devised systems for the management support and maintenance of the land, through a structure suited to the requirements of each project, ranging from an informal advisory committee through to a formally constituted entities. For instance the establishment of a (community membership) municipal entity to undertake provide refuge removal and related services, or the establishment of a Buchu growers support (secondary) Coop.

Formally established a township for the area of denser settlement to ensure the provision of municipal services or access to indigent grants subsidies and devised arrangements for service delivery and support

We are asserting that this list does not constitute a wish list of items to be fulfilled on the basis of patronage and largesse (after the hassle factor and negative publicity about the decay in the project becomes unbearable). The list constitutes the minimum requirements that the State is required to meet in terms of its constitutional obligations.

Restitution is not just about giving the portion of land back to its rightful owners. Restitution is about land and community restoration. The Elandskloof community is entitled to post settlement support as of right.

It is on this basis that negotiations with the Department of Land Affairs need to be re-opened to ensure that support is provided to the community, not in terms of promises and favours, but in the form of enforceable agreements.

As a general rule, a community will be placed in a stronger position if the list of items formed part of the settlement agreement with the State (including the DLA and other departments from all spheres of government) in enforceable terms.<sup>32</sup>

**Small problem:** What does one do when the land has been invaded and opportunities grabbed?

## **19 Determination, confirmation and / or allocation of substantive rights of members**

As explained at paragraph 15, the rights regime as determined by the CPA Act and CPA constitution provides that nobody gets anything, unless and until something is specifically

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<sup>32</sup> As noted, section 35(1) of the Act empowers the court to order (d) the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land. In the judgement of 15 October 1996 the court merely made a recommendation to the Minister. See paragraph XX above.

allocated in terms of the procedures of the constitution (or in terms of the constitution itself, as in LRAD cases).

From the audits is clear that opportunities to use land and or benefit from resources at Elandskloof have in many, if not most, instances been based on self-help and on a “first come first served” basis, and if not on self-help, then on un-procedural allocations. If any procedurally correct allocations were made, they occurred as an exception.

The objects of restitution (as determined by law) are not being achieved under such circumstances. Such a state of affairs is in clear and flagrant breach of section 35(3) of the Act.

### **So what is to be done?**

‘Die voor die hand liggende’ remedy is to take steps to confirm current uses within reasonable limits.

This means undertaking a rude business of determining who has how much of what and to, at the same time, devise sets of rules for each use – beginning with housing and at the same time addressing arrangements for the management of the orchards; allotments; other projects; etc.

Draft sets of rules for grazing, wild boegoe harvesting, irrigable allotments and dryland allotment that have been prepared for communities in similar situations will be shared with the inhabitants during workshops for them to consider their options.

These steps will amount to “legalizing” and/or rectifying cases of self-help to land (within limits).<sup>33</sup>

Where possible, disputes with regard to land uses (residential sites, cultivation lands and grazing fields) between members need to be settled through mediation.

As a general rule the criteria for the allocation of each set of “ordinary” substantive rights must include that only members who are resident at Elandskloof may qualify, for instance, you may not keep cattle on the land unless you live there.

The general and major problem in greenfield land reform projects are that practitioners simply forget that different types of land uses (grazing, irrigation, dry land, commercial / large scale harvesting of wild tea and herbs) require meticulous and time consuming rights determination and allocation processes.

## **20 Asking the Land Claims Court to help with membership and other matters**

**The direct access Section 38B(5)** provides that: “Where all interested parties have reached agreement as to how the claim should be finalised, the Court may make the agreement an order of the Court.”

If the Elandskloof community cannot come to an agreement on the criteria for membership, or even if the majority overrules the minority view of a significant number of members the Court should be asked to help.

Ideally the parties should agree to approach the court by agreement. The problem is that an opposing faction will be very reluctant. The simple section 13 CPA Act application took almost two years and significant expenses.

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<sup>33</sup> ((?Where it is such that one has no option but to accept it as right, one should at least attempt to determine the limits of might – Kameri-Mbote: ‘where might becomes righth’)).

The Provincial Chief Director as appointed by the DG must give an undertaking that he will in consultation with the community and any dissenting parties approach the Land Claims Court for a ruling for a declaratory order on membership and membership rights.

One of the ongoing tasks of the Commission in terms of **section 6(2)** is to:

- (a) monitor and make recommendations concerning the implementation of orders made by the Court under **section 35**;
- (c) on notice to interested parties, apply to the Court for a declaratory order on a question of law as contemplated in **section 22(1)(cA)**;

**Section 22(1)** provides that the Land Claims Court has the power to:

- (cA) at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section 25 (7) of the Constitution or to this Act or to any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order;

**Section 35(2)** provides that the Court may in addition to the orders made in terms of section 35 (to restore the land, to order assistance, etc) -

- (e) give any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders;

**Section 38B(5)**, with regard to direct access cases, provides that: "Where all interested parties have reached agreement as to how the claim should be finalised, the Court may make the agreement an order of the Court."

In other words, one can revisit the court and ask for further direction, not only with regard to court orders, but also with regard to section 42D agreements.

The court could be requested to assist with the development of guidelines and criteria for determining membership and on questions of fairness and non-discrimination in the allocation of opportunities to access land.

BUT, take note, before one can go to Court, one has to first 'exhaust each and every internal remedies'. In other words, the CPA and the Community should be able to show the Court that they have tried and "exhausted" the considerable number of non court remedies that are provided in the CPA Constitution, the CPA Act and in the Restitution Act. An important remedy is provided by

#### **Section 11(6) of the CPA Act**

11(6) If a dispute arises within an association the Director-General may, of his or her own accord, or at the request of a member of the association -

- (a) undertake an enquiry into the activities of the association, in which event he or she shall take reasonable steps to ensure that interested parties are made aware of the enquiry and of its outcome;
- (b) advise the association and the members of their respective rights and obligations;

**Section 35(1)(d) of the Restitution Act** provides that Court may order the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land.

As noted at paragraph 6, the Court however merely recommended in its Order of 15 October 1996 that Minister that the community be given preferential access to 'state resources' for the allocation and development of housing and other infrastructure on the land, which may be necessary to replace the housing and infrastructure that was destroyed at the time of dispossession and for which no compensation was paid.

Before one considers going to court the Minister should have been formally requested to act on the recommendation with reference a well motivated budget linked time frame and plan.

If the Minister does not heed the request, the option for re-approaching the court for a directive in terms of section 35(2)(e) as noted above could be considered.

***Conclusion to follow:***

ANNEXURE A:	The number of CPIs and Community Rural Land Projects.....	<b>Error! Bookmark</b>
ANNEXURE B:	A claim by a community' as opposed to 'a claim by a person'.....	<b>Error! Bookmark</b>
ANNEXURE C:	Note on the Communal Land Rights Act 11 of 2004.....	<b>Error! Bookmark</b>
ANNEXURE D:	"Communal Land" and "Communal Land Tenure" .....	<b>Error! Bookmark</b>
ANNEXURE E:	Can you be a member without having your name on the list?.....	<b>Error! Bookmark</b>

### **ANNEXURE A: The number of CPIs and Community Rural Land Projects**

According to "Land and Agrarian Reform in South Africa: An "Overview in Preparation for the Land Summit, 27 - 31 July 2005" the DLA has embarked on a total of **1 893 redistribution projects** (740 SLAG and 1 153 LRAD).

These figures would seem to include 175 labour tenant projects and 35 ESTA projects initiated either under SLAG or LRAD.

In addition an estimated 128 municipal commonage projects has been embarked involving **519 731 ha** of land.<sup>34</sup> It would seem as if these projects form part of the 1 893 projects.

While the Cumulative statistics of the Land Claims Commission of 30 June 2005 report that 13 643 rural claims had been settled, it appears that **916 470 ha** of rural land at a cost of **R 1.893 bn** has been restored to 152 communities. We arrived at 152 by counting a claim by a rural community as one claim only in keeping with the distinction between claims by persons and claims by communities made at paragraph 15 and ANNEXURE B.

The cumulative statistics of 31 March 2006 (dating back from 1995) note that:

Total land cost (both urban and rural): R 2 419 577 028.29

Total land 1 067 152 ha

Research undertaken by PLAAS established that in 2003 rural land had in fact only been restored to 68 communities, amounting to 501 195 ha at a cost of R327 096 627.<sup>35</sup>

In each case that land is transferred to a group of people, the land needs to be registered in the name of a person or a legal entity.

This means that there may at present be an estimated **2 045 legal entities that have been established** through land reform, adding, SLAG & LRAD & Restitution projects.

The land reform statistics presented at the 2005 Land Summit notes that in total **3 100 000 ha** had been delivered under the following categories:

1 466 000 ha Redistribution and Tenure Reform programmes: **redistribution: 1 347 943 ha (43%)** and **tenure: 100,175 ha (4%)**.

The significance of the tenure redistribution split (**4% / 42 %**) is that the bulk of the land has been 'newly' acquired white owned land that had not been occupied by communities of groups of people.

<sup>34</sup> 2005 12 00 Draft Municipal Commonage Manual as approved internally.

<sup>35</sup> Ruth Hall: 'Rural Land Restitution in South Africa', prepared for PLAAS: 'Evaluating land and agrarian reform in South Africa: *occasional paper series*, September 2003. see: <http://www.uwc.ac.za/plaas/index.htm>

**Restitution** accounted for **916 470 ha (28%)** and State land transfers 772 626 (25%).

Again, the “greenfield” aspect of restitution cases plays a major role: in most cases the use of the land has been changed, often irrevocably – or, assumed, irrevocably. Whether the Community should accept the changed use, from homestead gardens and field, to mono cropped sugar cane; orange orchards; or tea plantations, is not an obvious answer.

LRAD: 1 153 projects, 30% of the land, 436 000 ha.

Municipal commonage: 33% or 519 000 ha.

SLAG: 391 000 ha.

LTA: 175 / 100 000 ha

ESTA: 36 or 3 500 ha.

The target is to redistribute 30% or 25 million of an estimated 82 million ha of white-owned agricultural land by 2015.

**ANNEXURE B: A claim by a community’ as opposed to ‘a claim by a person’<sup>36</sup>**

The starting point is sec 25(7) of the Constitution which provides that:

‘A **person** or **community** dispossessed of property ... is entitled ... either to restitution of that property or to equitable redress.’

In order to give effect to this constitutional right, sec 2(1) of the Restitution of Land Rights Act (the Act) provides that:

‘A person shall be entitled to restitution of a right to land if –

- (a) **he or she is a person** dispossessed of a right in land .....
- (b) it is a deceased estate dispossessed of a right in land ....
- (c) he or she is the direct descendant<sup>37</sup> of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who-
  - (i) is a direct descendant of a person referred to in paragraph (a); and
  - (ii) has lodged a claim for the restitution of a right in land; **or**
- (d) **it is a community** or part of a community dispossessed of a right in land ....’

<sup>36</sup> This section is based on a legal opinion prepared by Geoff Budlender during February 2005.

<sup>37</sup> Section 1: “a **‘direct descendant’** of a person includes the spouse or partner in a customary union of such person whether or not such customary union has been registered”; A direct descendant therefore does not include an heir who does not meet the requirements of this definition.

Section 2(4) therefore notes that: If there is more than one direct descendant who have lodged claims for and are entitled to restitution, the right or equitable redress in question shall be divided not according to the number of individuals but by lines of succession.

Section 2(3) makes is abundantly clear that direct descendancy’ (for the purposes of the Act) only concerns natural persons as opposed to legal entities (which includes a community).

The Constitution and the Act therefore both identify and recognize two different sorts of claims: a claim by an individual person, and a claim by a community **as a legal person**.

This distinction is of fundamental importance. It lays the basis for a theme that runs through the Act, namely the recognition of a community as an entity that has an existence and rights apart from those of its individual members. Thus, for example:

Section 10 of the Act deals with the lodging of a claim on behalf of a community and with the mechanism for resolving disputes over who represents a community.

Section 35(2) empowers the Land Claims Court, where the claimant is a community, to determine the manner in which the rights in land are to be held.

Section 35(3) empowers the Land Claims Court to make an order to ensure that all members of the community have access to the land.

Section 38B(1) again draws the distinction between a claim by a person, and a claim on behalf of a community.

Section 42D(2) is a repeat of section 35(3) with regard to the issues to be covered in a 42D agreement concerning access to land by members of the community.

These provisions do not pertain to claims by persons, but is aimed at ensuring that Court orders or 42D agreements address the nature and extent of the rights of the members of a community, once the claim is settled.

Section 2(1)(c) determines the nature and extent of the rights individuals who are the direct descendants of a person whose claim meets the requirements of section 2.

Unlike section 35(2), 35(3), 42D, etc. the Act makes no additional provision as to how a claim by a number of direct descendants of the original owner, to a particular piece of land, should be dealt with.

The reason is that such claims are 'claims by persons' that must be individually dealt with. By contrast, a claim by a community is a claim by an entity, not a claim by a person or a number of persons (as direct descendants), and the 42D agreement must therefore determine how the land is to be held on behalf of the community.

In the case of a claim by a number of direct descendants (to a piece of land) the land must be restored to the direct descendants, each in their individual name.

The issue concerning direct 'decendancy' and the fact that, if land is restored, in the case of a claim by a person, it must vest in joint or co-ownership is pertinently dealt with in the LCC judgment in the Mayibuye I-Crimen case (21 November 1997).

The issues concerning the composition of community membership are pertinently dealt with by the LCC's judgment in the Kranspoort community case of 10 December 1999.

The distinction between a claim by a person and a claim by a community is of fundamental importance to the counting of claims that have been settled and of huge importance for assessing the number of claims that still need to be settled.

A claim by a person or a group of direct descendants: In a claim where a portion of land (that is owned by one person) is to be restored to a number of direct descendants, each direct descendant is entitled to a share in the land solely on the basis of his or her status as direct descendant.

If the land is to be restored to five siblings (of equal direct 'descendancy') each descendant will be entitled to the co-ownership of a one fifth undivided share in the portion of land. A direct descendant is entitled to sue and enforce his or her claim as co-claimant. This has been made clear in the Mayibuye I-Crimen judgment on 21 November 1997.

A claim by the direct descendants, should count for one claim, despite the fact that there is more than one co-claimant.

Where the descendants are claiming more than one piece of land (owned by a different person) settlement may give rise to the conclusion of more than one 42D agreement. We suggest that because the claim involves more than one land owner, each 42D with each land owner, should not notch up a separate 'claim'. (There are further permutations)

Claimant 'verification' of direct descendants (must) involve the careful tracing and confirmation of the family tree of 'descendancy'. Each individual co-claimants will have to sign the 42D agreement, or give a person (which may include a co-claimant) the Power of Attorney to sign the 42D on his or her behalf.

Urban claims and rural claims: Claims by persons usually pertain to single erven in urban areas – but there are also claims by persons in rural areas (for instance in the Mayibuye I-Crimen claim). The Act does however not distinguish between urban and rural claims.

For the purposes of counting the claims, the distinction should not be between urban claims and rural claims, but between claims by persons and claims by communities. In the rare instances where rural land is restored to individual persons, the type of assistance and support that individual land owners require is very different to the types of support that needs to be given to a community as a land owner. The issue requires assessment.

A claim by a community: The claim is brought by one legal person / entity. The ownership of the land will vest in one entity that will hold the land on behalf of the community.

The members of the community are not claimants or co-claimants (plural). There is only one claimant (singular), the community. A claim by a community should count for one claim. It is on the basis of this approach that the assessment of the Commission's cumulative statistics of June 2004 caused us to arrive at the conclusion that at that date a total of 152 community claims where land had been restored were settled.

Where a claim by a community is lodged against different portions of land owned by different owners, separate 42D agreements may be required, unless all the owners agree to become co-signers of the agreement. Where more than one 42D is signed with regard to different portions of land claimed by one community, each 42D should not notch up a further settled claim.

### **ANNEXURE C: Note on the Communal Land Rights Act 11 of 2004**

We are not taking the Communal Land Rights Act 11 of 2004 into account. The Act has not yet been signed into operation and, even if it is signed into operation, it is not clear whether and to what extent (if any) the Minister may determine that CLARA is made applicable to restitution or redistribution land, and even if the act applies or is made applicable to such land, it will take a significant amount of time until a range of complicated steps have been taken in terms of the Act for the Minister to make a determination in terms of the Act.

Although the definition section of CLARA defines 'communal land' to mean "land contemplated in section 2 which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community";

And although section 2 provides that the Act applies to:

(2(a) and (b)) former Bantustan land ('TVBC' and KZN Ingonyama Trust land) and former SADT (scheduled and released areas) land;

2(c) land acquired by or for a community whether registered in its name or not;

2(d) any other land, including land which provides equitable access to land to a community as contemplated in section 25 (5) of the Constitution, to which the act may apply according to the determination of the Minister;

And although section 39 provides that the Act, read with the necessary changes, applies to beneficiaries of communal land or land tenure rights in terms of other land-reform laws.

Section 5(2) provides that land will only be divested from the CPA, Trust or other legal entity and vested in a community or person to once the Minister has made her determination in terms of section 18.

Section 18(5) provides that the Minister may not make a determination if the land is directly affected by a dispute until such dispute is resolved.

This means that a range of very complex steps needs to be taken before a determination may be made.

The complexity and costs involved for the implementation of the Act appears to be under re-consideration at present. This emanated from the briefing to the Portfolio Committee on Agriculture and Land Affairs on 29 August 2006 on the progress and challenges with respect to the Regulation and Implementation of the Communal Land Rights Act.

There are also opinions of considerable weight that assert that CLARA is not applicable to restitution and redistribution land and that the extent to which CLARA proposed that it should apply, or to the extent to which the Minister determines it to apply, will be unconstitutional. There are also opinions of to the other side.

#### **ANNEXURE D: “Communal Land” and “Communal Land Tenure”**

The term “Communal Land” is potentially confusing. Land owned by a CPA is not ‘communal’; or ‘communally owned’; or ‘group owned’-; or ‘community owned’ - land, it is privately owned land. On 13 December 1996 Elandskloof CPA became the (private) owner of the land.

Land that is (nominally) owned by the State in trust is usually referred to as “communal land”. Examples of such land are former SA Development and Trust Land, former Bantustan (TVBC) land and land held in terms of the ('Coloured') Rural Areas Act 9 of 1987. The law and statutes applicable to such land determines the extent to which the owner and the occupiers and users of such land may deal with the land.

Restitution land and Redistribution land may be classified in law as ‘communal land’ in terms of the Communal Land Rights Act 11 of 2004. The issue is discussed at **ANNEXURE C**.

A CPA owns the land in the same way as private common law (private) Trust, Company or other legal entity owns land. The trustees of a (private) trust owns its land in terms of the provisions of its Trust Deed, the Trust Property Control Act, other laws that may be specifically applicable and the law in general. A CPA owns its land in terms of the provisions of its constitution, the CPA Act, etc.

While section 8(2)(b) of the CPA Act provides that “the main object of a CPA must be to hold the land in common” – it does not mean that the land is “communal land”. Similarly, while section 9(1)(d)(iii) mentions that part of the CPA’s land may be set aside for “communal use”

(shared use – or used by more than one person), it does mean that the portion so set aside becomes “communal land”.

The fact that the CPA owns the land (as private owner) means that a municipality cannot and may not construct, install and maintain service infrastructure and reticulate and provide residential related services on land unless township establishment procedures have been followed.

Private ownership means the CPA may allocate and dispose of the land or register a mortgage bond against the property as security for the repayment of a loan without asking anybody else's permission.

Whether a **system of “communal land tenure”** will develop or re-develop within the Elandskloof community will depend on the extent to which rights definition, determination, allocation and ongoing administration takes route. An extract from the November 2001 paper by John Bruce is included:

**“The term “communal land tenure”** indicates the presence of a communal dimension in land management, but the nature of the “communal” dimension varies from one system to another. In some communal tenure systems it is little more than a residual myth of a common origin of land rights and a vague sense of responsibility to the community for responsible land use; in others it is a forceful reality that conditions land use on community consent.

It is best to think of a communal tenure system of a broad conceptual umbrella overarching a landscape which involves numerous land use niches, each with its own tenure rules. It is possible to refer to these as “tenure niches”, with each “niche” a discrete area of land within that landscape defined by application to it of a specialized set of tenure rules (Bruce, Fortmann and Nhira 1993).

Distinctive patterns of resource use in different areas, determined by physical features of the resource, economic factors and cultural factors, spatially define the many tenure niches. Under the “communal” system umbrella one finds individual, family and lineage tenures and common property (land whose use is shared by the community as a whole or by some subset of community members).

The balance between these land uses and the tenures that go with them will vary considerably depending on the nature of the land resource and livelihood.

Where pastoralism is the principal livelihood, common property in pastures may predominate. In agricultural systems, common property will be quite narrow and specific, such as the forest reserves described in Box 3. In agricultural systems, residential and farmland is usually held individually and acquired by inheritance.

The “community” as a whole, for example the village, will usually have little by way of rights to dispose of this land. But there is a narrower community, the lineage, whose living members may have claims on the individual landholder.”

#### **ANNEXURE E: Can you be a member without having your name on the list?**

The ambiguity of the CPA Constitution concerning criteria raises whether the only people who may assert membership are the persons whose names appear on the list?

The CPA Act defines **'members'** to mean “the members of an association or the members of a community, as the case may be, including members who comply with the provisions of

paragraph (i) of item 5 of the Schedule, and for the purposes of sections 12, 13 and 14,<sup>38</sup> shall mean those members whose names appear on a list contemplated in the said item 5”;

Item 5 of the Schedule to the Act notes that: Qualifications for membership of the association, including a list of the names and, where readily available, identity numbers of the intended members of the association:

Provided that where it is not reasonably possible to provide the names of all the intended members concerned, the constitution shall contain-

- (i) principles for the identification of other persons entitled to be members of the association; and
- (ii) a procedure for resolving disputes regarding the right of other persons to be members of the association.

In the case of Elandskloof it is clear that persons who comply with the criteria of the second part of clause of clause 6.1.1 are without their names being on the list, entitled as of right to membership. Clauses 6.1.2 and 6.1.3 make it clear that a person may only become members once the committee in the case of 6.1.2 and the General Meeting in the case of 6.1.3 approve of membership.

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<sup>38</sup> 12, 13 and 14 concern “Approval for certain transactions”; “Administration, liquidation and deregistration”; and 14 “offences”. We are clear why members are only the people whose names appear on the list for these sections. We may either not understand it, or it may be a mistake on behalf of the legislature. In many cases CPA have been established without any members.