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## The Reconstruction of Communal Property: Membership and Rights in Limpopo's Restitution Process

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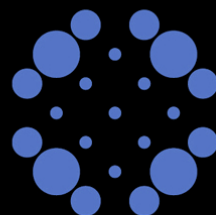
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# The Reconstruction of Communal Property

Membership and Rights in Limpopo's Restitution Process

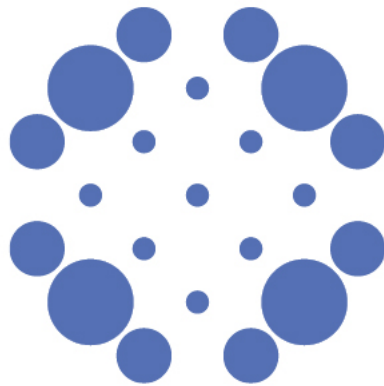
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# CLTSUMB

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## 1. Introduction

In one of the more remarkable features of post-apartheid South Africa, the government adopted a far reaching land restitution policy first through national law, and then in the constitution. Underlying these new laws is the view that the distribution of material resources in South African society was unjust. The new government was committed to undoing the historical injustices that led to a land distribution of 87% of total land area in white hands and the rest in black ones. Legally, the restitution program attempted to rid post-apartheid society of what Theunis Roux (2009) has called “unjust holdings;” those that were due to past racial discriminatory laws. Land restitution was designed to permit historical redress for those who lost land or homes after 1913, the date of the Native Land Act which formally divided South Africa’s lands. The redress could come in the form of the land that was lost, land of comparable value to that which was lost, or monetary compensation.

Land restitution, like other features of the new South Africa, sought to protect property rights. The constitution makes clear that even when it is demonstrated that the land had been taken for racial reasons after 1913, the current owner had to be paid a fair price, which has been interpreted as market price, for the land. Extensive use of expropriation was ruled out both because of legal issues<sup>1</sup> and because of limited state capacity, so the preferred mode of transfer was through negotiations between “willing sellers” and “willing buyers.” Land owners who did not receive the price offer they sought could refuse to sell.

Just as importantly, through August 2009, the Department of Land Affairs was purchasing only land, not functioning businesses. The aim of the Restitution Act was to restore land; past and future uses were moot. Thus, payments were for the land and immovable property, not for the functioning farm including all its equipment (trees but not nuts, irrigation pumps but not pipes). It is the state, not those who lost land, who negotiates with the land owner and then pays for the land. An important distinction in the restitution process has been rural land versus urban land and homes. The urban claims have gone relatively quickly if not smoothly (Walker 2007, Beyers 2010). Rural claims, however, are very different. They involve large areas and they have involved relatively intensive farming with sophisticated irrigation systems, export crops, storage facilities and critical economic upstream and downstream connections.

All of this is relatively well-known. There is a growing set of publications on the processes of land restitution, the degree of success or failure, and the formation of joint venture companies to manage the farms formerly owned by white South Africans or the government (e.g. James, 2007; Fay and James, 2008; Alden and Anseeuw, 2009; Walker, Bohlin, Hall and Kepe, 2010). In this article we want to point in a different direction. Given that the rural restitution claims were generally lodged as group claims, how was membership in these groups determined? What were the implications for group organisation and individual rights? What were the implications in terms of matching rights lost in the past with rights returned in the present?

Those claiming land, more often than not, were living in what had been the former homelands or Bantustans. They held land in “customary” fashion with what Cousins (2008) terms nested systems and flexible boundaries which were often shadows of earlier systems. Before turning to our main subject it is important to recall what the land tenure arrangements were as claimant communities attempted to regain land through the Restitution Act. During the apartheid years, the apartheid government forced three to four million people out of urban and rural areas and assigned them to “homelands” (James 1983, Platzky and Walker 1985). Many communities became aware of the Restitution Act and the possibility of regaining lost land. Those attempting to regain their land formed land committees, or claimant committees, sometimes with the assistance of nongovernmental organizations like Nkuzi Development Association (Nkuzi) in Limpopo Province or the Association for Rural Advancement (AFRA) in KwaZulu Natal. Upon filling out claims forms, members of these

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<sup>1</sup> Transfers from one private entity to another were not seen as compatible with the insistence on expropriation only for public purposes.

committees had to decide whether to file individual or group claims. And if they filed a group claim, they had to decide on the nature of that group. In Limpopo, almost all filed group claims under the chief's name. Chiefs are official government appointees under the Bantu Authorities Act of 1951. During Apartheid, chiefs and headmen, under authority from the national and provincial governments, granted Permission to Occupy (PTO) registration for those living and farming in their jurisdiction. These rights of occupation have been problematic since 1996. They are not, as we shall see, resolved through land restitution. The forms of land tenure directly stemming from apartheid were to be replaced by the Communal Land Rights Act (CLRA) but that act, after many years of debate and controversy, has been declared unconstitutional so there is no law in place. While Communal Property Associations (CPAs) were formed primarily to receive and manage restituted land and property, the land tenure situation in the former homelands remained unresolved. Indeed, it was unclear if the CPAs were to be under traditional authorities or not, which then became another battleground (Claasens and Cousins 2008).

This paper focuses on the significance of membership in the Communal Property Associations that most often are the beneficiaries in the restitution of farmland. At one level, the paper aims to point up the options and challenges involved in the formal creation, or recreation, of a recipient community. In their links to a complex history of rights and social relations, and in their implications for future membership and distribution of benefits, these projects raise important issues about the meaning of rights, the meaning of community, and who gets to decide about these meanings. At another level, the paper tells the story of how material considerations have influenced the choices of the actors involved, from prospective members to central government, in a cluster of rural restitution cases. In part, the primacy of material considerations reflects the success of the government in deflecting the focus of the land reform process away from justice and towards economic realities (Derman and Hellum 2009). This deflection must, however, also be considered within the context of a government that, with limited resources, is trying to meet the challenge of a constitutionally mandated land restitution whose extent was hardly anticipated when the South African land reform was articulated and where those directing land reform have had to shift policy directions in response to national changes.

The Communal Property Association Act, which was intended to be far-reaching, democratic and non-discriminatory, is very different in organization and practice from the intentions of the lawyers who wrote the act. Such understandings are fundamental to place in context the official claims made on the success of the land restitution process. If one were to take official numbers at face value, South Africa's restitution process would seem to be all but complete. Former Chief Land Claims Commissioner Tozi Gwanya stated already in 2004 that "by world standards, South Africa has been on the fast track in implementing restitution..." (Clapman, 2004), and by March, 2008, 94 percent of all restitution claims had been settled. Beneath the glossy surface, however, most of the rural land claims – around 4300 – were still outstanding as of September 2009, with each claims process costing government in the region of 11 million Rand (Umhlaba Wethu, 2008; 2009). Moreover, the communal beneficiaries on those claims that so far have been settled face serious challenges with respect to the relationship with private business partners, the organisation of agricultural production and marketing, and the distribution of the benefits thereof (Hall, 2010; Walker et al., 2010). It is safe to say that most of the challenges related to restitution of farmland in South Africa begin with, rather than end with, the transfer of land.

Our experience with the challenges that CPAs face with respect to membership, exclusion, and recovery of rights stems from the Limpopo Province and specifically from six community claims in the Levubu catchment area east of the town of Makhado. A relatively high rainfall area, Levubu is a series of irrigated high value farms whose current status reflects the construction of a dam (Albasini) and associated irrigation works. It is surrounded by former homelands on all sides. Our methodology is qualitative. It has included extensive talks and interviews with community leaders, committee members, community members, officials of the Regional Land Claims Commission (RLCC) in Polokwane, local politicians and bureaucrats, farm valuers, lawyers involved in restitution, Land Claims Court judges, and Department of Land Affairs (DLA) officials in Tshwane. Field research has been carried out since 2005. In addition to these interviews, we have collected and studied an array of

documents relevant to the process, including laws, CPA constitutions, partnership agreements, policy statements, transfer agreements, articles in the popular press, and scholarly articles.

In Section 2, we give a brief historical background to the Levubu claim in northern Limpopo Province, the most rural of South Africa's provinces. Section 3 provides an overview of the conceptual challenges and theoretical options faced by a community that is in the process of reconstruction for the purpose of recovering land rights lost during apartheid. Against this background, Section 4 provides a review of the actual experience to date in Levubu, focusing on explanations for the choices made and implications for the future. Section 5 concludes.

## **2. Land Restitution in the Levubu area, Limpopo Province**

Land restitution is one of the three arms of the South African land reform that commenced soon after the end of apartheid in 1994. The other two arms are land redistribution, whereby grants are awarded for the specific purpose of buying commercial farmland, and tenure reform, which seeks to establish and secure the rights of people living in the former homelands.

The goal of restitution, as spelled out in the Restitution of Land Rights Act 22 of 1994, is "To provide for restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 (The Native Land Act) as a result of past racially discriminatory laws or practices..." The pragmatically motivated cut-off date stems from the 1913 Native Land Act time, which enhanced the documentation attached to dispossession, making determination of such dispossessions easier today. Claims had to be lodged prior to December 31, 1998, a controversial decision since many potential claimants were never made aware of the possibility of lodging claims.

Limpopo Province and KwaZulu-Natal differ from most other South African provinces in that substantial portions of farmland were seized after 1913. In Limpopo, dispossession occurred mostly in the 1920s and 1930s but took place as late as the 1970s. Approximately 70 percent of the farmland in the province became subject to claims lodged before the end of 1998 (excluding claims by CPAs or tribal authorities against each other). Some of this farmland, including the land under claim in Levubu, is highly productive and under intense cultivation. Commercial farms in Levubu produce an array of high-value crops, including macadamia nuts, fruits, and vegetables. A well-developed processing industry, in which commercial farmers have traditionally held a stake, prepares the raw materials for a mainly export market.

The Levubu claims cover 350 commercial farms, totalling around 10,000 hectares of irrigated agricultural land. Claims to agricultural land are divided among seven claimant communities – Tshakhuma, Ravele, Ratombo, Shigalo, Masakona, Tshitwani, and Tshivhazwaulu – while four other claimant communities possess claims to forest land.<sup>2</sup> One of the seven communities, Tshakhuma, decided to form a trust; the other six opted for communal property associations (CPAs). Communities found themselves having to become new institutions in accordance with the Communal Property Association Act of 1996 to enable them to form juristic persons in order to acquire, hold and manage property on the basis agreed by community members.<sup>3</sup> According to the act, such institutions are to be non-discriminatory, equitable, democratic and accountable to all its members. Supervision was to be carried out by the then Department of Land Affairs.

Reflecting a rising government concern with the economic consequences of its land reform programmes, a model of restitution was selected for these high-potential areas that involve the

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<sup>2</sup> These communities were grouped together as Cluster 1. There are several other groupings that have made claims against all of the farms along the Luvuvhu River, and those north and south of the river as well.

<sup>3</sup> In contrast to a CPA, a trust is a legal relationship, resulting from a contractual arrangement, whereby the trustee holds or administers property for the benefit of a beneficiary or for the furtherance of a specified purpose.



communities and a “strategic partner” in a joint enterprise on the transferred properties.<sup>4</sup> According to this model, the strategic partner – a private company possessing expertise in farm management and operation – will oversee the running of the farm for a period of at least 10 years after its transfer to the community. Although the model raises as many questions as it answers (Derman, Lahiff and Sjaastad 2010), its foundation is that the community will provide land while the strategic partner will provide expertise and cover running costs.<sup>5</sup> Profits are shared evenly, although a land and housing rent is also paid by the joint enterprise to the CPA. In our discussions with the NGO assisting communities and with the CPAs the idea of strategic partnerships was imposed. Communities were told simply they would not receive their land back without these arrangements even though it is not part of the Restitution Act or the CPA Act.

The idea is also that farm workers increasingly will be recruited from the communities. They and other community members are to be trained in terms of farm management during the initial 10-20 year period, gradually paving the way for communal assumption of all responsibilities and culminating in the dissolution of the strategic partnership and the complete handover to the CPA (or a new entity). During these years, the community members are not allowed to relocate, settle or farm on an individual or family basis on the transferred farmland although this may be renegotiated over time

The immediate benefits expected to accrue to the communities is therefore an annual rent paid by the joint venture for the use of the land and buildings, and a share in the profits realised by the partnership over the contract period. Communities are generally committed to the deployment of such funds in public investments although this is easier if the community is not too dispersed. In addition, it is expected that community members will replace the existing work force on the farms. In the longer term, communities are expected to benefit through an established capacity to run their own farms and, not least, to be able to settle on the recovered lands.

The realisation of these benefits depends in part on the terms and conditions resulting from three legal processes, which are conceptually distinct but in practice linked together: the establishment of a communal legal entity (either a CPA or a Community Trust); a business agreement between the community and a strategic partner to form a joint enterprise for management of the farms;<sup>6</sup> and, finally, the transfer of the property rights to the land.

The transfer of property is the culmination of a complicated process. In brief, the government negotiates a price with existing farmers, supplies the funds once an agreement is reached, and then transfers rights directly from farmer to community. In the case of Levubu, the government would not transfer the titles to the communities unless and until strategic partner agreements were in place. More generally, the process involves the valuation of commercial farms, offers of purchasing prices that may be accepted or rejected by existing farm owners, and sometimes protracted legal processes involving challenges to the legitimacy of claims. Expropriation procedures have been initiated by government elsewhere but not yet in Levubu.

In the following, we will focus mainly on the challenges faced by the communities in the establishment of a communal legal entity – mainly CPAs – and the implications of these challenges for how the process of land restitution has unfolded.

### **3. Communal Property and Membership: Choices and Challenges**

When articulating a land restitution process in the context of post-apartheid South Africa, it would appear that the government was privileged with an uncommon degree of freedom of choice. Old

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<sup>4</sup> It was originally intended that farm workers, through newly established organisations, would hold a small ownership interest in the joint ventures, but this idea gradually faded from view and has yet to be implemented.

<sup>5</sup> There is an ongoing disagreement around who provides the capital since the land cannot be mortgaged and the strategic partners claim that they don't have sufficient guarantees on return of capital to invest.

<sup>6</sup> The strategic partnerships have been analysed elsewhere (Derman, Lahiff and Sjaastad, 2010).

owners and users were on their way out and new ones were being ushered in; new owners and users who often carried little baggage in the form of strong, existing organisations, traditional authorities notwithstanding. As far as communal property was concerned, it was also in a situation where it could draw on lessons from a wide body of theoretical and empirical research.

There was little choice, however, in the matter of whether or not to opt for community claims in the restitution process in Levubu: the sheer scale of the reform rendered a process of individual claims infeasible for the government bureaucracy and judiciary; and both the nature of land tenure at the time of dispossession and the manner of dispossession itself would generally have made establishment of individual property boundaries impossible.

By effectively limiting the options to CPAs or trusts, as governed by South African law, did the government go too far in dictating how communal property would be formed and structured? One of the lessons from the collective action literature (see e.g. Ostrom 2000) is that groups who are able to create and enforce their own rules perform better than groups who must accept externally enforced rules. The government, however, clearly felt that aspects related to both scale and time, and also to the disarray in which many communities found themselves after apartheid, necessitated a high degree of guidance and formality. In fact, without the aid of NGOs, many communities would not have lodged claims at all.

On the issue of membership, Ostrom (2000) had this to say:

“If a group of users can determine its own membership – including those who agree to use the resource according to their agreed-upon rules and excluding those who do not agree to these rule – the group has made an important first step toward the development of greater trust and reciprocity. Group boundaries are frequently marked by well-understood criteria, like everyone who lives in a particular community or has joined a specific local cooperative. Membership may also be marked by symbolic boundaries and involve complex rituals and beliefs that help solidify individual beliefs about the trustworthiness of others.” (p. 149)

The Communal Property Association Act (GoSA, 1996) specifies that an application for registration of a CPA must include “a list of names and, where readily available, identity numbers of the intended members of the provisional association: Provided that where it is not reasonably possible to provide the names of all the intended members concerned, the application shall contain (i) principles for the identification of other persons entitled to be members of the provisional association; and (ii) a procedure for resolving disputes regarding the right of other persons to be members of the provisional association...” The act also permits registration of different classes of members, provided the rights of the different membership classes are clearly spelled out and do not violate more general principles of equality. In practice, as far as membership in CPAs formed for the purpose of restitution was concerned, all parties appear to have assumed that the Restitution Act was restrictive and clear enough on this point.

The Restitution Act specifies (GoSA, 1994) that “A person shall be entitled to restitution of a right in land if (a) he or she is a person or a community dispossessed of a right after 19 June 1913 as a result of a past racially discriminatory law or practices or (b) a direct descendant of such a person.” The law separates between claims made by individuals and claims made by communities. A community, as defined by the act, is “any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group.” For a community to make a successful claim, in addition to proving dispossession of rights after 19 June 1913 due to racially discriminatory laws or practices (for which just and equitable compensation was not received), the community should presumably also prove that it is indeed a community according



to the definition of the act and that it, as such, should be seen as the rightful heir to the community that was once dispossessed.

Judgments by the Land Claims Court in the Kranspoort case (LCC26/98) and by the Constitutional Court in the Richtersveld case (CCT19/03) establish that a list of community members is not required for a claim to be registered and valid. A community is a dynamic and ever-changing entity, and while some members will leave, others will join. Moreover, this process of renewal is not dictated by lineage alone but also by other forms of association related to culture, location, and livelihoods. For this reason, in the case of community claims, determination of lineage between claimants and those originally dispossessed is futile. What is necessary is to establish a sufficient measure of commonality and cohesion within the claimant community and to establish inter-temporal continuity between claimants and the community that was dispossessed. The lack of a requirement of membership lists, for the purpose of lodging a restitution claim, seems well-reasoned. It serves to underline the fact that the claimant – the successor to the dispossessed rights – is the community, not its individuals, and that mapping of lineages is immaterial. And for a claim to be accepted, a community requires a constitution that should include criteria for membership.

Since lists of members are not required prior to lodging a claim, one might consider the possibility of defining a community without any reference to membership at all. In this model, a community is a legal entity defined along the lines of a business firm or a foundation; in a sense, it lives its own life, independent of the individuals who at any given time populate it. A CPA will, however, differ in many important ways from such entities, whose individuals associate with it through partnership agreements, share holdings, specific labour contracts, and the set of laws that protect and dictate such relations. Firms and foundations are set up by real people with real interests, but are often instrumental in nature, with contracts constitutive of the resulting entity. This is not the case with respect to community claims and restitution; here, the objective must be to give appropriate legal description to a pre-existing entity whose population possesses pre-existing and legitimate claims. Otherwise, the process itself would become a mockery of its original purpose.<sup>7</sup>

Consider, instead, the following four stylised models:

Model 1. If the claimant community is defined in terms of the present-day jurisdiction of traditional leaders, then every adult currently residing within that jurisdiction would be a member. The territorial boundaries of these jurisdictions are generally well-defined and can usually be traced back to the apartheid years and the wish to clarify for government who had responsibilities over whom. This process of mapping and boundary making, along with enumeration of all chiefs, was implemented in the designation “unitary” ethnic homelands. More problematic is the possession by some individuals or households of two or more dwellings within different jurisdictions, producing individuals with multiple memberships. Such a model might also encourage opportunistic behaviour, e.g. through migration from non-claimant communities to claimant communities. The biggest problem, however, is that such a model would violate the intent of the restitution programme by including numerous individuals and households with no legitimate claims in terms of past removals. Since dispossession took place, communities have been moved, split, and merged, and have received settlers with no historical link to the dispossessed land.

Model 2. A more discriminating model would include, as separate members, every adult who was evicted or who is a direct descendant of someone who was evicted from a given community’s claim in the past. Conceptually, bearing the intent of the Restitution Act in mind, this may be something of an “ideal” model. In practice, it would involve considerable challenges. First, tracing all descendants,

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<sup>7</sup> Furthermore, an entity of this nature is not allowed under the Communal Property Association Act of 1996, which requires both “information demonstrating that the community is a community.” It is naturally also the case that even within a community, the exercise of rights, privileges, and duties must at some point filter down to the individual level, and this cannot be done without first determining who individual members are.

some of whom will be living in far-away places, may prove impossible. This problem could, however, simply be ignored; trace those who are traceable and forget about the others. A greater problem lies in the establishment of “community” as the entity dispossessed in the past and its relation to present claimants. Dispossession was often arbitrary in terms of traditional cultural and political boundaries: they did not necessarily involve the collective removal of a discrete, well-defined community. Sometimes half a community was removed, while the other half were left alone or removed at a later date and relocated to an entirely different place. Moreover, at the time of removals, a given household may have lost its dwelling but retained its cropland. Basing membership claims on some notion of “community in the past” rather than “community in the present” might therefore simply transmogrify or amplify the associated problems of claims identification and membership.

Model 3. Rather than focusing on individual adults and their claims, membership in claimant communities could focus on present-day households. Thus, every household that contains at least one member who is a descendant of someone dispossessed in the past would constitute a membership. This would have some practical advantages in terms of facilitating identification of claimants, limiting the number of members, and organising the community. This would put a household with, say, five descendants on the same standing as a household with just one, but this would primarily be a problem for those benefits that are distributed on a member-by-member basis rather than as community investments. Perhaps more serious would be the dynamic aspects of such a model: how is a household defined, and what happens when sons and daughters strike out on their own, perhaps establishing households outside the present-day community? And how to account for the fragility of the marriage relationship itself, and AIDS and high mortality in the townships and mines?

Model 4. While all the above models would necessarily involve a fluctuating membership, with subtractions as people die (or, in model 1, move away) and additions as others are born, become adults, set up new households, or move in, it is also possible to define a fixed membership. Such a model would take as its starting point those individuals or households that were dispossessed in the past. For example, each household dispossessed in the past gives rise to a single, indivisible membership. This membership is then held collectively by present-day descendants. A membership may vanish if the lineage is broken, but no new memberships are added. Since this model produces collective rather than individual present-day memberships, it leaves open the question of the precise group of individuals who today can be considered members; this, presumably, would be at the discretion of the descendants. A household model could, for familiar reasons, also entail serious gender problems.

The main characteristics of the different models can be summarised in Table 1 below:

*Table 1: Characteristics of membership models*

Model	Membership criterion	Membership unit	Number of members	Size of membership
1	Jurisdiction	Individual	Floating	Large
2	Lineage	Individual	Floating	Large
3	Lineage	Household	Floating	Intermediate
4	Lineage	Family	Fixed	Small

The above models do not exhaust all the possibilities. They do, however, go some way towards illustrating the challenges faced by communities in defining themselves and their membership. The challenge, for example, of women’s membership rights in a traditionally patrimonial culture with patrilocal residence; the impossibility of establishing exactly what rights were lost by different lineages; the challenge of reconciling lost rights with post-apartheid rights as governed by modern laws and regulations; the amorphous, liquid nature of community and the tension between claims

rooted in traditional jurisdiction and those rooted in location of dwellings or farmland; the arbitrary nature of dispossession and its disregard for community in any form whatsoever; the problem, in short, of finding a reasonable model that provides some measure of justice for the families of the dispossessed while avoiding the chaos that might ensue from overly bureaucratic and intractable procedures.

In the following section, we will describe the process of establishing legal communal entities as it unfolded in Levubu, while considering the motivations and implications of the choices made.

#### 4. Claims and Communities in Levubu

In the wake of the new constitution and the land reform policies that followed South African democratisation in 1994, the Levubu communities gradually became aware of the opportunities presented by restitution claims. This process was facilitated, and in some cases initiated, by independent lawyers working in Limpopo and by a Polokwane-based NGO called the Nkuzi Development Association (hereafter Nkuzi). In 1997, Nkuzi set up an office in Elim, an old mission station located just outside a communal area some 30 kilometres east of Makhado, for several purposes, including assisting in the claims process. This initially involved awareness-building among community leaders and forming or supporting local land claims committees to oversee the process. After the submission of the land claims themselves to the Land Claims Commissioner, Nkuzi provided assistance, sometimes with the financial support of government, in setting up the CPAs, including the drafting of constitutions and membership lists for the proposed community organisations. In aid of the latter, Nkuzi provided forms for community leaders to distribute where the names and contact details of individual claimants were recorded.

In the course of this early process, prior to the lodging of claims, it appears that local leaders believed that the strength of the claim in part depended on the number of claimants. The forms from Nkuzi were distributed widely and, with little regard for tracing of actual lineage to those dispossessed, people were actively encouraged to register. Membership lists became correspondingly large. Thus, a motivation for the first membership lists produced was a desire to make them as inclusive as possible. These initial lists were generally based on individuals rather than households, so that a husband and wife could register separately. Where Nkuzi was involved, this practice was fully adopted. Household are the traditional land-holding units, and subsequent revisions of the lists by the communities themselves did in some cases merge separate members from the same household into a single membership. For better or worse, these original lists are the ones currently attached to the CPA constitutions located in the CPA registry in Tshwane (see Table 2, “original lists”).

*Table 2. Number of claimants according to verification processes by RLCC*

Community	No of claimants according to original lists 1998	No of claimants according to grants approval 2005
Ravele	824	324
Masakona	740	148
Tshakhuma	720	144
Ratombo	260	104
Shigalo	837	120
Tshitwani	190	126
Tshivhazwaulu	300	155

Sometime after the claims were lodged, in 2000 and 2001, staff employed by the Regional Land Claims Commission (RLCC) in the provincial capital of Polokwane, with the aid of Nkuzi, undertook investigations to verify the claims. This was a very challenging and time-consuming task, involving

extensive examination of field evidence such as burial and ceremonial sites and historical documents. The claims verification process focused on the claims themselves – that is, whether the areas under claim contained evidence of prior settlement by the claimant communities and their antecedents – rather than on specific lineage ties between dispossessed and claimant communities. The RLCC accepted, however, that all individuals above the age of 18 who were direct descendants of the dispossessed were eligible as members of claimant communities. Accordingly, the original membership lists produced by the communities were generally accepted at face value and incorporated in the RLCC files when the acceptance reports for the Levubu claims were completed.

After the claims were formally gazetted, extended processes of land transfer and partnership negotiation commenced. The RLCC approached the commercial farm owners with a view to buying them out, undertaking valuations on those farms whose owners were agreeable. This process was delayed by occasional disaffection with the initial valuation, an associated breakdown in price negotiations, and the need for additional valuations. Because the process frequently took up to two years or more, inflation became an additional issue. Some farmers also challenged the validity of the claims, bolstered by an early decision by the Land Claims Court which established that only the court could issue final judgment in these matters (see case number LCC43/02). Even when the RLCC receives a favourable decision in the courts regarding validity of claims, it would need to instigate expropriation proceedings against “unwilling sellers” among the commercial farming community. Government has, however, been reluctant to use this instrument, in part because of a previous inconsistency between the Restitution Act and the South African Constitution, which specified that expropriated land must be used for a public purpose, but also in all probability because it wants to avoid protracted legal proceedings. The RLCC was also, by its own admission, struggling with a problem of insufficient staff and resources to mainstream the process of farm transfers. As a consequence, most of farms for which an agreed price had been reached were left in the care of the outgoing owners for several years. And although transfer agreements specified a minimum of required capital maintenance on the part of these owners, and despite the RLCC subsequently withholding 25 percent of the purchase price (in 2009) in lieu of an inspection prior to actual transfer, it is impossible to contract against critical forms of neglect of high-potential farmland.

In a parallel process, communities and strategic partners became engaged in protracted negotiations over the specifics of the strategic partnership agreements. Although it initially appeared that the communities would be steamrolled into signing agreements largely drawn up by government in consultation with the strategic partners, the interventions of Nkuzi and a law firm in Johannesburg (working pro bono) ensured that community interests were protected to some degree, although this also added to delays in the process. The first farms were purchased in 2005 and were operated according to a caretaker arrangement between government and strategic partners until the signing in December 2007 of the final partnership agreements. One strategic partner, Mavu Management Services, withdrew amid claims that the government owed it 12 million rand. It was replaced by Umlimi. Umlimi succeeded in having the contracts rewritten for a 15-20 year time frame, which would permit them to provide adequate returns on their investment. In late 2008, however, the largest strategic partner in Levubu, South African Farm Management, went bankrupt, rendering the future of the joint ventures and claimant communities highly uncertain. This was followed by the bankruptcy of Umlimi which has put in jeopardy all strategic partnerships as the generic model. For the time being, the affected claimant communities are hiring their own farm managers.

In the meantime, the communities had been busy revising the membership lists. In e.g. the case of the Tshitwani community, this was plainly a result of belated concern among some of the community leaders that individuals unworthy of membership would benefit from the land transfer and partnership. An initial list had contained 250 members, but this was reduced to 190 before the constitution and its attendant list was lodged with the CPA Registry in Tshwane. Successive purges by the community leaders had, by late 2007, brought the number down to 108 members. Other communities, such as Tshivhazwaulu and Shigalo, operate with more than one list. Among the Tshivhazwaulu, for example, the privilege to settle on the land once the strategic partnership has dissolved is reserved for a smaller group of members, who must be heads-of-household who are

direct, patrilineal descendants of the dispossessed and must reside in the community. Other benefits, such as they are, may potentially accrue also to members who do not fulfil these criteria. This would seem to reflect a desire for different classes of membership, although this was not indicated in the community's constitution. When we met with the Shigalo community leaders, it was indicated that a male member's rights are passed on to his wife and children while a female membership dissolves upon her death; unless, that is, her children have no contact with their father and use their mother's name. The Shigalo situation is further complicated by the presence of two distinct groups within the community, with respect to restitution: the Shigalo people who were dispossessed of land in Levubu were merged with a group already settled in the present communal area. The recognized chief is Khomanyani who did not lodge any land claim and who contests the growing power of the Shigalo who seek their own chief as well as offices. While the Shigalo "chief" is recognized only as a headman of Khomanyani, the Shigalo have constructed their own CPA offices with monies from the rent. In terms of jobs, priority is given only to Shigalo members.

The extent and duration of changes to membership lists are unclear; in some communities, it may still be going on. Clearly, precise criteria have yet to be established in some of the communities; there is confusion between households and individuals, between male and female rights (especially succession to these), over the necessity or otherwise of residing within the present-day community, and over the necessity of possessing a South African identification number. As one community leader said, "exact numbers are difficult." The ramifications of this confusion are also unclear; while the original lists still reside in the CPA Registry in Tshwane (Pretoria), their significance may be marginal insofar as decisions about benefits such as jobs and training are taken by a small group of leaders at the heart of the community.

The rising concern within some communities with the number of members was shared by the RLCC, but for a somewhat different reason. Government had already committed itself with respect to a sequence of grants that would attend the transfer of land to communities, and these grants had been made dependent on the number of members in the community. Bloated membership lists thus constituted a problem for a sector of government that was already struggling with rising wage bills and moneys for farm transfers. A subsequent policy statement from the Chief Land Claims Commissioner dictated that the RLCC return to the communities in order to establish family trees sprouting from those originally dispossessed. In the calculation of grants, each household (rather than individual) that was originally dispossessed would constitute one membership, regardless of the number of descendants currently alive. This follows the logic of model 4 above. The new membership lists are given in Table 2 (in the "grants approval" column); using the new grant-motivated method, membership lists were reduced to an average of 29 percent of the original lists. These lists apply to government benefits but not to actual membership in the CPA and the rights and responsibilities therein.

The "new" membership lists produced by the RLCC also violate principles laid down in the Restitution Act, as interpreted by the South African courts. As noted by Pienaar (2009), in recognition of the changing nature of communities, mapping of individual lineages between claimants and dispossessed is indicated only for claims by individuals, not for community claims:

"This improper application has also caused uncertainty about the identity of community membership on two grounds. Communities are faced with having to include people as 'members' who had not associated themselves with the community and who were not accepted as members – purely because of descent (which may span up to six generations); and exclude people who, while not related by blood or marriage, had become accepted as part of the community subsequent to the removal." (Pienaar 2009).

In every other respect, the Levubu claims have been treated by both the RLCC and the communities themselves as community claims. The decision by the Land Claims Commissioner to instigate such lineage mapping procedures also for community claims appears to be not only a clear misapplication

of procedure but also a project that, while reducing direct government costs, expended significant time and resources within an already stretched bureaucracy.

The current situation with regard to membership in the new CPAs in Levubu is confusing. Several different lists are circulating, depending on who is using the list and for what purpose. In the following final section, we discuss implications with regard to ongoing and future restitution.

## **5. Discussion**

There is much that remains unclear about the future of the communities, their collaboration with strategic partners, and the distribution of benefits from restitution. The collapse of South African Farm Management and Umlimi was a serious blow to the scenario envisaged by the government, in which communities after 10 years, now possessing well-trained managers within their ranks, would emerge as sole operators of vibrant commercial farms with profits being reinvested in community health, education, and infrastructure.

There is also widespread agreement that the CPA model has failed to live up to expectations. Two studies of South African CPIs (communal property institutions, which comprise both CPAs and trusts) from 2002 and 2005 arrived at mostly discouraging conclusions. The earlier study states that "...there is concern that multiple allocatory and adjudicatory procedures will create overlapping de facto rights that elude both official and legal resolution, creating fundamental insecurity of tenure." (Cousins and Hornby 2002: 17). The more recent study states that "The majority of CPIs are partly functional from an institutional perspective but largely or totally dysfunctional in terms of allocation of individual resources and the defining of clear usage rights, responsibilities, powers and procedures for members and the decision making body." (CSIR 2005: Executive Summary). Summarising the problems associated with CPAs, Lahiff (2009: 99) notes that "Recurring problems include a failure to define clear criteria for membership of the CPA or the rights and responsibilities of members, a lack of capacity for dealing with business and administrative issues, and a lack of democracy both in procedural matters and in terms of access to benefits."

One major arena of difficulty has been the requirement that CPAs have a constitution which sets out how the CPA is to function, how elections are to take place, the responsibilities and benefits of membership, how to include new members and how in general, the CPA should function democratically. However, rather than have the process of constitution writing be a learning and organic process, boiler plate constitutions were given to the leadership who then adopted it at an annual general meeting usually with no discussion. While the constitutions make provision for women to hold leadership positions in practice this has not been respected. Among the core principles to be accommodated in the CPA constitution, in accordance with the CPA Act is fair and inclusive decision-making processes and equality of membership. Through equal membership rights women also attained equal ownership rights which, if practice, would have meant substantial change. However, government has lacked either the capacity or the interest to assure women's interests and participation. Most members do not know what is in their constitutions nor have either the intent or the spirit behind them been of interest to the RLCC or the DLA.

In this light, the uncertainties surrounding membership and members' rights in the Levubu CPAs seem part of a more general pattern. The problems can, according to Lahiff (2009: 101), be traced to the fact that "...the ideology of 'willing buyer, willing seller' and 'demand-led' reform based on the market not only absolves the state of responsibility for the outcomes of the land reform programmes, but also effectively pre-empts key questions about the design of resettlement schemes that ought to have been answered at the outset..." In the case of restitution, government views about membership appear to have been dictated by the logistics of individual versus group claims and by prior decisions about the nature and size of grants. The lacklustre performance of CPAs clearly did cause the government to give some thought to alternative models of organisation in the case of high-potential farming areas; tellingly, however, the answer it came up with was more private-sector help (in the



form of strategic partners), rather than a careful examination of rights and duties within the CPAs themselves.

In Levubu, a critical issue with regard to membership concerns the right to settle on the reclaimed land after 10 or more years of strategic partnership. This is certainly an important right, as it speaks directly to the original intentions of restitution and the expectations of claimants at its outset. The extent to which membership lists will determine the speed and manner in which claimants are relocated is still uncertain, however, and will depend much on the internal politics and power structures of the communities when relocation commences. It is not clear that this will happen in all cases. Masakona who are fortunate in that most CPA members reside in one place are improving their current location rather than seeking to move. Moving will be expensive and there will be a lot to be lost if they do so.

Membership may also prove crucial in determining the distribution of job opportunities on the farms and in the selection of candidates for managerial training, although these may have little long-term impacts if the strategic partnerships turn out to be failures. Strategic partnerships and future community control of commercial farms may also generate substantial business opportunities in terms of sub-contracting and marketing, also perhaps linked to the local processing industry, where community membership may be required for participation. Finally, membership in the communities is in the end a determinant of how these issues will be solved; in the final analysis, it is the members of the community who must vote on the key issues of benefit distribution and elect the officers who oversee the organisation of community interests and farm operations. However, how democratic these processes will be is highly problematic given what we have observed of their current functioning.

The distribution of financial benefits to individual members may seem unlikely at the outset. However, if a small group of individuals are able to exclude dissenting voices and large segments of the community grass-roots from formal membership, the CPA or trust may effectively become a restricted club whose main goal is to further the interests of a local elite. From meetings with community leaders, it is already clear that at least two of the communities plan to reserve some of the financial benefits for paying tribute to the chief. In some of the communities, it is also clear that the restitution process is seen as a means of reasserting traditional authority: upon eviction, some traditional leaders became subordinate to leaders already established in the areas to which evictees were relocated; others were lackeys of the apartheid regime and their authority has suffered since independence in 1994. Only among the Masakona has there recently been meaningful dialogue among a wider membership, largely due to a good working relationship between the CPA and the traditional authorities. In addition, large numbers of Masakona members work on the farms and the new incomes have brought visible improvements to the community.

From a legal perspective, the relevant membership list is that which is attached to the CPA constitution in the CPA Registry in the Department of Land Affairs (DLA) in Tshwane. This list is, however, subject to revision by the community itself, provided it follows proper procedure and submits revised lists to the DLA. It is also unlikely that excluded individuals will possess the resources required to regain membership through the courts. The relevant arenas for de facto determination of membership and exclusion are therefore likely to be executive branches of government, particularly the RLCC, and the communities themselves.

The failure to establish criteria for community membership and enumeration from the very outset of proceedings has opened the door for local manipulation, tampering, opportunism, and high-jacking of community interests. This was further promoted by the subsequent, very restrictive interpretation of membership that the RLCC adopted as means of limiting grant transfers to the communities. The capacity of the RLCC to redefine the concept of membership to suit its own ends was a misapplication of procedure and can, given the wording of the Restitution Act, be questioned on a legal basis. The dubious legal foundation is, however, unlikely to have any practical implications, particularly since the RLCC possesses other means of limiting grant transfers, e.g. by simply designating applications for development grants as frivolous or infeasible. The main problem, then, springs from a lack of a

proper examination of the letter and intent of the Restitution Act, an associated lack of proper ground work, and a culture of altering the rules as the process unfolds, a strategy adopted by both government and some of the communities.

Beyond individual membership in the separate communities, the restitution process as it has unfolded in Limpopo raises additional questions. First, in the chosen model of restitution in Levubu, it becomes necessary to try to match communities dispossessed in the past with communities in the present. This is no simple task. As noted, past communities may have dissolved, split up, and regrouped; dispossession may have affected a fraction, but not all, of the population of a past community; past boundaries and affiliations are obscure; and current communities are often amalgamations of splinter groups from different past communities. In the effort to trace a line from past to present, conflicts have emerged. In the case of a claim to a farm close to but outside the Levubu cluster (Welgevonden 36LT), a focus on current jurisdiction led to intractable problems of affiliation that could only be solved by merging the different groups of claimants, which included disparate ethnic groups. The merged group was, however, not viable, and has since split up again. The conflict remains unresolved. In Levubu, two of the communities are laying claim to the same farm. Both were at some time evicted from the land; while the Ravele were the first to be evicted, the Tshakhuma later established a community there as farm workers on a banana plantation. These problems can, largely, be traced to the perceived economies of scale in restitution: a few large claims are easier to process than many small claims – or so it appeared to government initially.

Second, a community may find that part of the land it is claiming is currently occupied by another group of black and previously dispossessed people. In Levubu, this is the case for the Tshitwani, whose claim is partly occupied by a group from the Tshakhuma community. The government line here is that land reform should not punish those who have already suffered, so evictions in these cases are unlikely. Monetary compensation, sponsored by government, is more probable. The presence of the Tshakhuma on Tshitwani land, next door to the commercial farms transferred to the Tshitwani, has, however, already led to accusations of theft and destruction. In the meantime, according to the strategic partnership agreements, the Tshitwani are not themselves allowed to settle on their land.<sup>8</sup>

Third, a person (or his or her descendants) may have been dispossessed twice or several times during the apartheid era. According to the present model, the descendant of such a person possesses a right of restitution for each dispossession. Technically, this seems dubious, since rights established through relocation, however inferior, may be construed as replacing those that were lost; if one is evicted, for example, from a one-hectare plot 10 times in a row, this does not mean that one possessed 10 hectares. In Levubu, however, individuals who are “lucky” enough to have had an ancestor who was chased from one location after another in the past will be a member of several claimant communities; and more often than not, this individual will be living side by side with an individual who is not a member of any claimant community at all. This may serve to remind us that as one group after another was dispossessed under apartheid, the pain was felt not only by those who were evicted but potentially also by those who were already living in those areas to which the evictees were relocated. Yet the latter possess little or no stake in the restitution process.

Both of these latter two issues speak, more generally, to a broader question of justice in the restitution process. The consequences of the tremendous suppression of the majority of South African citizens were almost universally suffered. In the light of this history, is it reasonable and just to transfer benefits of potentially substantial proportions to a limited group of present-day citizens whose ancestors just happened to be dispossessed from the right places at the right time? Rights to land are typically linked to a deep-rooted sense of identity and belonging, and their allocation is a notoriously sensitive issue. Yet the rights that were once lost will never re-emerge in their past form, and both communities, identities, and land will most often have undergone substantial changes since dispossession took place.

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<sup>8</sup> On the other hand the Tshitwani are profoundly divided internally. Efforts to have them work together have failed and so they have been left to founder.

Perhaps the pragmatic view of the previous Regional Land Claims Commissioner for Limpopo, Mr M. Mokono, sheds some light on these questions: restitution should not be considered in isolation but as one part of the larger purpose of land reform; one weapon, amongst a wider armoury, that may all go some way towards settling past injustices; and while one may discuss the fairness of specific manifestations of this general purpose, government must nevertheless do as much as it can in any way that it can. Yet this perspective cannot resolve the many problems that arise from competing community claims. Nor will an eagerness to get on with the job of restitution help to reduce the opportunities for traditional leaders to re-establish power and claim ownership of land at the expense of their subjects.

In Levubu, the problem is not so much in choosing to go ahead with community claims rather than individual claims – this choice was widely accepted and promoted by the range of stakeholders involved. Rather, the problems have emerged because of a failure properly to analyse and anticipate the issues that must arise in a process where the claimants are communities, including issues surrounding membership. The lack of clear guidelines and principles has plagued the process since its inception. By attempting to achieve a lot in a short time with limited resources, government may be paving the way for new and different kinds of injustice and inequality.

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