

LAND RESTITUTION

1 Introduction

South Africa's land restitution programmes date back to the Restitution Act in 1994 and the opening of the land claims process in 1995. The aim was to return a significant proportion of land forcibly taken from individuals and communities after the passage of the 1913 Land Act, and the Commission of Restitution of Land Rights was established to undertake this process. Eligible claimants were given three years from 1 May 1995 to lodge claims, which was later extended to 31 December 1998. By that point, around 60 000 claims had been lodged, some of which were for more than one property.

Land restitution is an inherently complex process, as it needs to resolve vexed historical injustices in a manner that entrenches property rights and the rule of law, while also respecting budgetary limits. By 2013, around 15% of claims had not been resolved, primarily the most intricate ones. The difficulty of addressing these outstanding claims and the fact that government had reopened the process of lodging land claims were the basis for commissioning a performance and expenditure review (PER) of the land restitution process. The PER aims to assist the process of resolving outstanding claims and costing new ones, and allow realistic policies and programmes to be designed, in part by producing a costing model to test a variety of policy choices.

The PER was conducted by Genesis Analytics between November 2013 and August 2014. Some of its key outputs, insights and recommendations are summarised here. The full report and the costing model are available at www.gtac.gov.za/programmes-and-services/public-expenditure-and-policy-analysis.

2 Institutional context

Since its establishment in the mid-1990s, the institutional architecture of the land restitution process has undergone a number of reforms in order to increase its efficiency and effectiveness. This reflected the inherent complexities of managing land restitution while maintaining the rule of law and protecting property rights. However, it created a complex process through which claims had to be navigated if they were to be legally sound, as shown in Figure 1 overleaf.

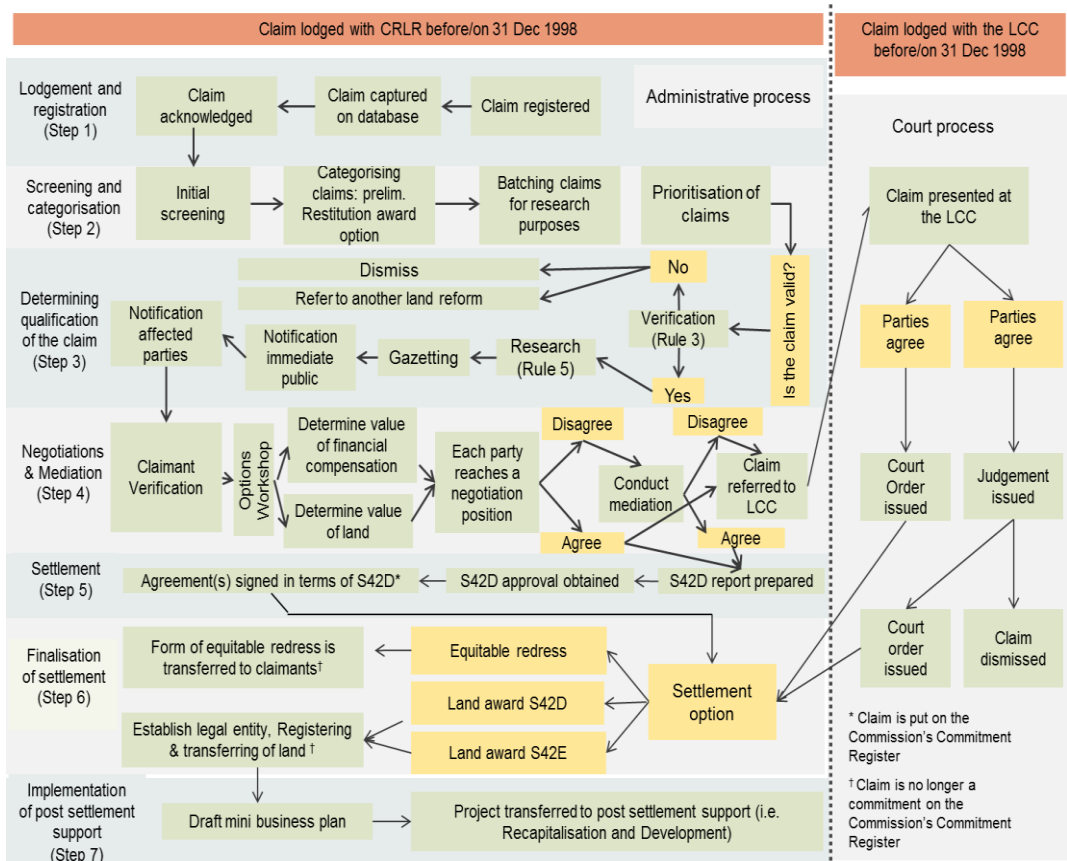
The Restitution of Land Rights Amendment Act (2014) extended the deadline for lodging claims to June 2019 to accommodate those who missed the 1998 deadline. Given the institutional, procedural and staffing weaknesses of the previous restitution experience, the reopening of the claims window creates organisational and budgetary challenges that the department and commission will be hard-pressed to address, such as:

- Different approaches to managing and settling claims may compromise the legal basis of some settlements.

- The commission has limited capacity, especially for conducting and managing the research aspects of the restitution process. This contributes to long lead times, poor decision-making, and disputes that end up in court.
- Without standardised record-keeping, progress cannot be measured adequately.
- The commission is no longer mandated to implement post-settlement support, but in practice continues to do so on behalf of the department.

Given these inefficiencies, the claim settlement process is lengthy, uncertain, repetitive and onerous for all parties. This has a significant impact on its cost-effectiveness.

Figure 1: Process flow for the restitution programme



3 Performance

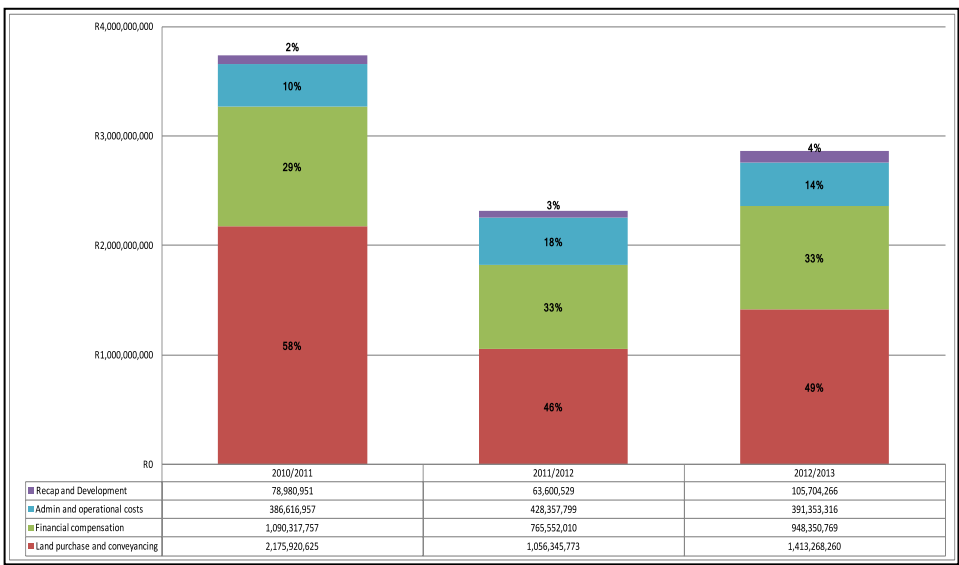
The assessment of progress in resolving land claims was hampered by the fact that changes in the way they were recorded necessitated a manual recount of settled claims. This recount showed that of the individual claim forms submitted (some of which were for multiple tracts of land), about 8 700 (15%) remained unresolved in March 2013. Importantly, by that point, 92% of settled claims had been settled through financial compensation rather than the physical return of land. While this option is much less expensive, it significantly reduces the impact of restitution on the transformation of land

ownership in South Africa. Given weaknesses in post-settlement support, however, there remains considerable doubt about the viability of farming on newly transferred land.

4 Expenditure

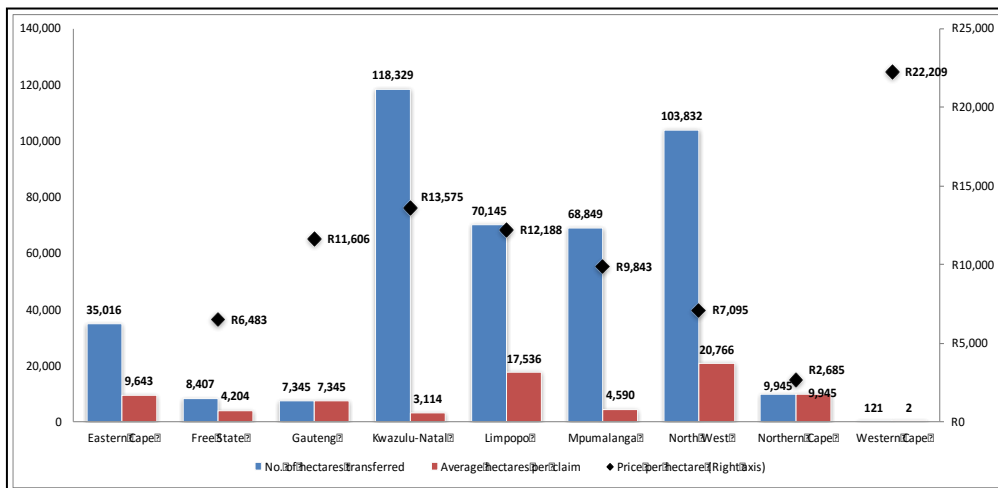
Between 2010/11 and 2012/13, the restitution programme spent R8.9 billion, of which 52% (R4.6 billion) was on purchasing and conveyancing land, and 31% (R2.8 billion) on financial compensation (see Figure 2). About 3% (R251 million) was spent on post-settlement support for farmers. The rest was mostly used for personnel and operational costs (e.g. research and legal fees).

Figure 2: Restitution programme spending, 2010/11 to 2012/13



Spending patterns vary considerably among the provinces (see Figure 3). Over the three years reviewed in the PER, KwaZulu-Natal transferred the most land (181 000 ha) to new owners, but the average size of settled claims was largest in the North West (21 000 ha), and the most expensive transferred land was in the Western Cape (R22 000 per ha).

Figure 3: Quantities and values of land transferred, 2010/11 to 2012/13



In general, claims are for larger parcels of land in more rural provinces; these claims are also more often settled through the transfer of land. Urban claims tend to be for smaller properties and are generally settled through financial compensation. Transferring land ownership is both operationally and legally more complex than paying financial compensation. It is also more expensive, as land is purchased at market rates while financial compensation is made at standardised rates.

By March 2013, over 8 700 claims still awaited settlement. In addition, a number of claims had been settled but had not been finalised: decisions had been made to award land or provide financial compensation, but had not yet been executed. The value of this liability in the Land Commission's commitment register was estimated at R1.4 billion. A further liability in the commitment register of R3.4 billion reflected promises to provide post-settlement support to resettled farmers. These commitments were made without obtaining clarity on the future availability of funds.

5 Costing model

Apart from the 8 700 claims outstanding in March 2013, a regulatory impact assessment of the Land Restitution Amendment Act (2014) commissioned by the department estimated that reopening the claims process might generate a further 397 000 claims. The PER developed a costing model to assess the budgetary impact of the outstanding claims as well as any new claims – however many might eventually be submitted.

The model estimates that about R22 billion would be required to settle the 8 700 outstanding claims from the first round over the next five years. This would necessitate an increase in the budget of around 50% above current baselines (about R3 billion per year). Should new claims lodged in the second round have similar profiles to those lodged in the first round, the number of new claims reach the 397 000 estimate, and they be settled in a similar manner over the next 20 years, a further R260 billion to

R300 billion would be required for the process. If, on the other hand, substantially more claims are settled through the transfer of land rather than through financial compensation, the costs could be as high as R500 billion.

6 Findings

The PER makes a number of findings on the land restitution process and its future:

- The projected cost of land restitution will place significant demands on the fiscus, even without any new claims.
- Priority should be given to completing the outstanding claims from the first round, in view of the long delays claimants have already endured and the costs associated with further delays.
- The commission's commitment register of R4,7bn is a major liability that needs to be addressed. It constrains the commission's ability to settle new claims and, as the responsibility for post-settlement functions has been transferred away from the commission, its scarce resources should not be used for this purpose.
- A clearly defined and standardised business process must be designed and implemented to optimise the commission's operations. Among other benefits, it would allow proper monitoring of the process of land restitution and its impact.

A key conclusion of the PER is that before proceeding with the processing and settlement of new claims, their financial implications should be assessed with a view to developing a practical, affordable and cost-effective approach to completing their settlement over a reasonable timeframe.

7 Postscript

In June 2016, the Constitutional Court ruled that all land restitution claims made after December 1998 had to be put on hold, after finding that Parliament did not properly consult the public before passing the Restitution of Land Rights Amendment Act in 2014. The Court found that given its importance, the 'truncated timeline' for consultation on the law was inadequate. The judgment invalidated the amendment and interdicted the Commission on Restitution of Land Rights from processing 'in any manner' any new claim made after the amendment came into force. Parliament has two years in which to rectify the deficiency.