**SOUTH AFRICAN ACTUARIAL JOURNAL**
SAAJ **22** (2022) 29–49
https://dx.doi.org/10.4314/saaj.v22i1.2

# 'Where angels fear to tread'—Reflections on the role of an actuary as expert witness in the Land Claims Court

By MW Lowther

*Submission date 25 April 2022*
*Acceptance date 15 August 2002*

ABSTRACT
In this paper, the author reflects on his experiences of giving expert actuarial witness in the Land Claims Court regarding the calculation of financial compensation as an alternative to the restoration of dispossessed land. As no specific formula for compensation has been legislated in South Africa's land reform programme, relevant case histories are examined in which the common law has been developed. The technical, ethical and professional inputs which an actuary can provide are reviewed. The author concludes that actuaries are well suited to assist the Land Claims Court to resolve the potentially large number of claims, and that this will be in the public interest.

KEYWORDS
Land reform, land restitution, compensation, professionalism

CONTACT DETAILS
Mickey Lowther, University of Cape Town; Email: actuary@mweb.co.za

## 1. INTRODUCTION

1.1 In the early years of this century, I was approached to give input into a novel matter for actuaries—the calculation of compensation as equitable redress for land dispossessed in the 1900s as a result of unfair racial practices. So little precedent existed that the claimants engaged three actuaries to give their opinions on methodology!

1.2 Since then, I have given expert testimony in a number of claims for compensation in terms of the Restitution of Land Rights Act. This paper has emerged from my reflections on these experiences, and could inform an actuary asked to give evidence.

1.3 I consider that actuaries are ideally placed to serve the public interest in these matters, not just for the calculations (which are mainly straightforward) but also because our services are delivered in terms of our 'professional promise' to be technically correct and up-to-date, ethical, and subject to professional oversight. The presentation of this work at the Convention of the Actuarial Society of South Africa in October 2021, and its subsequent publication, contributes to the third strand of the professional promise—members of the profession gathered to examine these and other potential approaches to compensation.

1.4 The paper may also be of interest to the lawyers and property valuers involved in compensation matters, as little research seems to have been published on the specific subject of compensation calculations.

1.5 Section 2 positions land restitution as one of the three elements of South Africa's land reform policy. Section 3 sets out the relevant legislation, including the option for dispossessed persons to claim financial compensation instead of restoration of their land. This legislation does not lay down detailed rules for the calculation of compensation, so Section 4 reviews court cases which have created common law.

1.6 Section 5 looks at the data and calculations that may be needed by an actuary or other expert asked to assist the Court in these matters. Section 6 considers the broader requirements of the expert, and why actuaries can serve the public interest by delivering this service according to their 'professional promise'. This section concludes where 'angels fear to tread'—the tricky area of how far the actuary, as an expert witness serving the Court, can go in recommending and justifying methodology.

## 2. THE LAND REFORM PROGRAMME

2.1 'Post-colonial societies must grapple with redress. A usual feature of colonial conquest is the dislocation of conquered people from their land.' (Ngcukaitobi, 2021: xi) In its 'Ready to Govern' policy document, the African National Congress set out the three elements of its land redress policy—land restitution, land redistribution and land tenure reform. 'A new system of just and secure property rights must be created, one which is regarded as legitimate by the whole population' (ANC, 1993).

2.2 With respect to *land restitution*, a Commission for the Restitution of Land Rights would be established to restore land to South Africans dispossessed by discriminatory legislation since 1913. The adjudication of these claims was expected to be finished by 1999. Provision was made for 'equitable redress' as an alternative to land restoration. This could take the form of financial compensation, and issues and methodologies around the calculation of such compensation are the subject of this paper. However, it is useful to outline briefly the other two elements of the land reform policy, to place such calculations in perspective.

2.3 The *land redistribution* initiative aimed to provide residential and productive land to those who needed it but could not afford it. The goal was to redistribute 30% of agricultural land by 1999 (based on an estimate of 6% of land being sold per annum in recent years). Both market and non-market mechanisms were to be used to acquire and distribute property such as vacant government land, land already on sale, under-utilised land and, in certain cases, expropriated land.

2.4 The third and perhaps most challenging tier was *land tenure*. The land rights of millions of South Africans who hold their land in customary tenure in the former homelands, in informal settlements and on transferred land are uncertain (Beinart et al., 2017). These authors identified many different types of off-register tenure needing to be reformed, each with a different legal status (ibid: 25).

2.5 In 1996, the final Constitution was adopted by Parliament (Act 108 of 1996).[1] The three tiers of land reform were facilitated, particularly by Section 25. Property was defined to include land and the State was mandated to take measures to achieve equitable access to land. Section 25 reads as follows:

> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application—
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
>
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
>
> (a) the current use of the property;
>
> (b) the history of the acquisition and use of the property;
>
> (c) the market value of the property;
>
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

1 Constitution of the Republic of South Africa Act [No. 108 of 1996]

 

(e) the purpose of the expropriation.

(4) For the purposes of this section—

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

2.6 Now, 25 years later, much has happened in the land reform programme, which is far from complete. The successes and difficulties in land redistribution and tenure reform lie outside the scope of this paper, so the next section provides more exposition on the land restitution process, prior to the sections which concentrate on the calculation of compensation.

## 3. LAND RESTITUTION

3.1 As mandated by the 1996 Constitution, the Restitution of Land Rights Act (LRA)[2] was duly enacted, and amended from time to time thereafter. (The 2014 amendments were subsequently invalidated by the Constitutional Court, as discussed below.) The LRA provided for the restitution of rights in land to persons or communities dispossessed of such rights after 1913 as a result of past racially discriminatory laws or practices.

3.2 In terms of the LRA, the Commission for the Restitution of Land Rights (CRLR) was created, along with the Land Claims Court (LCC). The CRLR would receive and process claims. Where the CRLR could not resolve a claim, it would be referred to the LCC, which had the power to determine all matters, including the award of equitable redress, such as the payment of compensation, instead of restoration. The LCC has a broader, more inquisitorial mandate than the High Court—for example, hearsay evidence may be accepted, and the Court

2 Restitution of Land Rights Act [No. 22 of 1994]

 

may take its own initiative to gather evidence and fashion new remedies. As the Court stated in *Phillips*:[3]

> The LCC has a strict and true discretion and enjoys wide adjudicative remedial powers conferred under Section 33 [of the LRA]

3.3 In the LRA, 'restitution of a right in land' is defined as the restoration of a right in land, or equitable redress; and 'equitable redress' is defined as the payment of compensation, or the grant of alternative land, when restoration of land is not feasible.

3.4 Section 2(2) provides that restitution is not available if just and equitable compensation, as contemplated in S25 of the Constitution, and calculated at the time of dispossession, had been received.

3.5 Section 33 of the LRA directs the LCC to have regard to the following factors in coming to its determinations:

(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
(b) The desirability of remedying past violations of human rights;
(c) The requirements of equity and justice;
(cA) If restoration of a right in land is claimed, the feasibility of such restoration;
(d) The desirability of avoiding major social disruption;
(e) Any affirmative provisions which already exist in respect of the land;
(eA) The amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
(eB) The history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
(eC) In the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
(f) Any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution, in particular section 9 [*which deals with equality*].

3.6 Of the approximately 80 000 restitution claims submitted by the 1998 deadline, about 75 000 had been settled by 2007 (CRLR, 2007: 3). These statistics are somewhat misleading because urban claims are predominantly small claims by families and tenants, whereas rural claims may be for vast tracts of land by communities of hundreds of people. Most of the unresolved claims were complex rural claims 'involving disputes among claimants, disputes over the jurisdiction of traditional authorities, disputes on the part of landowners, or untraceable claimants' (Xingwana, 2007).

3 *Minister of Rural Development and Land Reform and another* v *Phillips* [2017] ZASCA 1; [2017] 2 All SA 33 (SCA)

3.7 The vast majority of finalised restitutions were (a) for urban land, and (b) by way of financial compensation and not land restoration. The CRLR was empowered to make Standard Settlement Offers of about R40 000 to dispossessed property owners, and about R17 500 to dispossessed former tenants. Although these amounts often bore little relationship to the lost right, claimants generally accepted them, inter alia because of bureaucratic delays in land restoration, the difficulty of restoration where the land use and settlement patterns had changed substantially, and a preference for the utility of cash.

3.8 Bohlin (2004) interviewed two communities which had accepted a financial settlement. Reasons given for taking cash included:

— A cash payment was perceived as a faster and more certain process.
— Restoration would be to the community, with attendant management and resource issues and difficulties.
— The elderly did not want to move again.
— The community's current way of life should be protected.
— They would not be welcome in the restored area.

3.9 Land expert Professor Ben Cousins (2016) goes further and recommends that the restitution process be closed, and most outstanding claims settled by compensation—excluding the relatively few claimants who desire to be genuine producers on land. This would allow the Department of Land Affairs to focus primarily on the larger projects of land redistribution and tenure reform. The restitution process was not designed to develop agricultural production.

3.10 Ngcukaitobi (2021) on the other hand reminds us that restitution is about more than the benefits of using land:

> It is about memory, the public affirmation that black people's pain matters, and the restoration of lost identities. This is why land restoration shall remain the most contentious and the most important of the land reform programmes. (ibid: 116)

3.11 Walker et al. (2010) also see land restitution as bigger and longer than a once-off restoration of a particular piece of land:

> It is increasingly clear that Restitution is best understood as a process, not a one-time event. The restoration of land as the formal settlement of a claim marks not the end of the restitution road, but an early stage in an ongoing and often extremely complex process of community reconstruction. (ibid: 1)

3.12 Land restitution was initially seen as a relatively short-term project, with the bulk of the cases expected to come from post-1948 Group Areas Act[4] dispossessions. The CRLR was provided with only a few staff, who apparently struggle to deal with complex,

4 Group Areas Act [No. 41 of 1950]

 

often overlapping, rural claims mainly from the early decades of the twentieth century. Throughout the 2000s, government set deadlines for when the process should be finished. In 2014 however, the Land Restitution Amendment Act[5] was enacted, reopening the window for the lodgement of claims. Approximately 160 000 new claims had been made by 2016, when the Constitutional Court declared the Amendment Act invalid, due to lack of proper consultation.[6] The CRLR was interdicted from processing these claims until Parliament followed due process—and although new legislation has not yet been approved, this vast number of claims may sooner or later reach the LCC and need to be decided.

## 4. FINANCIAL COMPENSATION—CASE HISTORIES

Although there are references to changes in the value of money, and to market value, there is no specific formula in the Constitution or the Land Restitution Act for the calculation of financial compensation as equitable redress. Nor, as far as this researcher is aware, has there been much academic research on how such compensation should be calculated. (Publications on compensation have mainly been with respect to compensation to current landowners in respect of land expropriated for the purposes of restoration.) In practice, the LCC has had to use its discretion to fashion appropriate remedies, guided by the principles set out in Section 25 of the Constitution and Section 33 of the Land Restitution Act. These remedies have on occasion been reviewed and refined on appeal to the Supreme Court and Constitutional Court. This section reviews some relevant cases.

### 4.1 *Farjas*[7]

4.1.1 The *Farjas* matter was an early claim, at a time when little common law had been developed by the LCC on financial compensation. (In earlier cases, such as the *Highlands Residents* case,[8] the parties had agreed without argument that such compensation would be achieved by adjusting the historic value of the property by changes in the Consumer Price Index.) In *Farjas*, the claimant went to the extent of appointing three expert actuarial witnesses to give their views—based on general principles—on how an agreed historical loss should be revalued to the present. Methods such as rolling up with bond interest rates or market returns on property or equity were suggested, but the LCC ruled that compensation would be calculated as the historical loss, revalued by the Consumer Price Index. This amount was substantially lower than the three actuaries' results.

4.1.2 On appeal to the Supreme Court of Appeal (SCA), that Court quoted Harms ADP in another LCC matter, *Mphela*[9] as follows:

5 Restitution of Land Rights Amendment Act [No. 15 of 2014]

6 *Land Access Movement of South Africa and others* v *Chairperson, National Council of Provinces and others* 2016 (5) SA 635 (CC) (2016(10) BCLR 1277; [2016] ZACC 22)

7 *Farjas (Pty) Ltd* v *Minister of Agriculture and Land Affairs for the Republic of South Africa* [2013] 1 All SA 381 (SCA)

8 Ex parte Former Highlands Residents: In Re: *Ash et al* v *Dept Land Affairs* [2000] 2 All SA (LCC) 26

9 *Haakdoornbult Boerdery CC and others* v *Mphela and others* (553/05) [2007] ZASCA 69; 2008 (7) BCLR 704 (SCA)

 

> Compensation, to be fair … must recompense. The purpose of giving fair compensation is to put the dispossessed, insofar as money can do it, in the same position as if the land had not been taken. Fair compensation is not always the same as the market value of the property taken; it is but one of the items which must be taken into account when determining what would be fair compensation.

4.1.3 The Court further quoted Moseneke DCJ in *Goedgelegen*[10] as follows:

> Neither liability nor culpability in the conventional sense is a feature of the restoration scheme envisaged by s25(7) of the Constitution and the Restitution Act … The claim … has a reparative and restitutionary character. It is … not compensatory in the civil law sense. Rather, it advances a major public purpose and uses public resources in a manifestly equitable way to deal with egregious and identifiable forms of historic hurt.

4.1.4 Regarding the issue raised on appeal, the Court held that the appellants had not demonstrated that the application of the consumer price index was inappropriate to revalue the undercompensation or, perhaps more accurately, would on the facts of the case lead to an unjust or inequitable result. In its view, an application of compound interest would defeat the purpose of the LRA. It would result in over-compensation. The method is not contemplated in the provisions of the LRA. The compensation awarded must be just and equitable not only to the appellants but also to the members of society who have an interest in the way public resources are utilised.

### 4.2 *Florence*[11]

4.2.1 The SCA held that the facts in this case were materially indistinguishable from the *Farjas* case. The Court was therefore bound by that decision, i.e. that the LCC is entitled to rely upon the CPI to determine changes in the value of money.

4.2.2 The Court *a quo*[12] noted that:

> One of the paramount criticisms levelled against the use of the CPI in converting the 1970 loss into current day value is that the Florence family will not be able to buy an equivalent house and therefore the use of the CPI will give rise to a discrepancy between the value of financial compensation and restoration. There is no evidence on whether or not the use of the CPI will not be sufficient to buy the Florence family a new house.

4.2.3 The Court *a quo* also distinguished the facts of the case from those of 'the leading international case of *Factory at Chorzow*[13] which deals with the principles applicable to the payment of compensation for the purposes of restitution.' That Court had held that

10 *Department of Land Affairs and other*s v *Goedgelegen Tropical Fruits (Pty) Ltd*. (CCT 69/06) [2007] ZASCA 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC)
11 *Florence* v *The Government of the RSA* (550/12) [2013] ZASCA 104
12 *Florence* v *Broadcount Investments (Pty) Ltd and others.* LCC 148/08
13 *Factory at Chorzow* (Germ. V Pol.), 1928 P.C.I.J. (ser.A) No.17 (Sept.13)

 

> … reparation for an illegal act must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed … the obligation to restore the undertaking, and if this is not possible, to pay its value at the time of the indemnification … to this must be added that of compensating loss sustained as the result of the seizure.

4.2.4 The Court *a quo* held that a fundamental distinction between the two cases was that the Florence family was dispossessed in terms of a legal act (the Group Areas Act), whereas the dispossession of the *Factory at Chorzow* was an illegal act.

### 4.3 *Florence* at the Constitutional Court

4.3.1 The *Florence*[14] matter was appealed in the Constitutional Court. The majority held that the primary compensation for dispossession should be the historic value of the land, adjusted by CPI to the present. This was seen to recompense for the dispossession *at the time of the dispossession*, consistent with no compensation being due if adequate compensation had been received at that time. The Court explained its reasoning as follows:

> [131] In my view, the Land Claims Court was correct in calculating the financial loss at the time of the dispossession and for the purpose of placing the Florence family in the same position they would have been in immediately after the dispossession. The starting point and main plank of the Restitution Act is an acknowledgement of widespread dispossession that occurred since 19 June 1913 and the need for equitable redress in the form of restoration of land or financial compensation. The legislation does not warrant an approach that fixes the compensation as if the loss never occurred. Nor does it warrant a full replacement value of the taken subject property.
>
> [132] Section 2(2) of the Land Restitution Act expressly prohibits relief to any person who received just and equitable compensation at the time of the dispossession. This means that the scheme of the Restitution Act makes the time of the dispossession the critical starting point of an assessment of financial compensation. The Government is right in that the purpose of financial compensation is to provide relief to claimants in order to restore them to a position as if they had been adequately compensated immediately after the dispossession. It must be correct that just and equitable financial compensation does not aim to restore claimants in current monetary terms to the position they would have been in had they not been dispossessed, but rather the financial loss they incurred at the time of the dispossession. The Land Claims Court was correct to set the loss at the time of the dispossession as the [then current] market value of the property less the amount of compensation the applicants had received at the time of dispossession …

4.3.2 However, it was also held that a history of hardship caused by the dispossession may entitle a claimant to a higher compensation award in order to assuage past disrespect and indignity:

14 *Florence* v *Government of the Republic of South Africa* [2014] Vol6 SA 456 (CC) [@ 124]

> [124] Equitable redress must be sufficient to make up for what was taken away at the time of dispossession. The amount of compensation has to be just and equitable reflecting a fair balance between public interest and the interest of those affected after considering relevant circumstances listed in section 33 of the Restitution Act. For instance, a history of hardship caused by the dispossession may entitle a claimant to a higher compensation award in order to assuage past disrespect and indignity.

### 4.4 *Jacobs (UAP)*

4.4.1 In *Jacobs (UAP)*,[15] the facts were quite different to *Florence*. The property in *Florence* was an urban erf, dispossessed under the Group Areas Act in the 1960s. In Jacobs, the property was a large rural tract of land, allegedly illegally dispossessed in the 1920s in aggravating circumstances.

4.4.2 The claimant motivated two adjustments to the 'historic market value plus CPI' basis of compensation. Firstly, it was calculated that historic market value adjusted by CPI amounted to only 5% of the current market value of the property. This was said to be inequitable, substantially less than the full current market value which would have in effect been received, had the property been restored. Secondly, claimant adduced evidence of the hardships caused at the time of the dispossession, and in the years thereafter. A methodology for assisting the Court to place a value on these hardships was fashioned, based on the rent that the family would have had to pay to replace their occupation of the dispossessed property. (This methodology is discussed further in Section 5 below.)

4.4.3 In its determination, the Court first followed the *Florence* methodology of determining the historic market value, and then adjusting this by CPI to the present. The Court then adjusted this result upwards:

> [117] …There are two reasons why we do so. The first is the nature of the hardship suffered by [the claimants] …The second is the grossly inequitable outcome of applying the actual financial value of at the time of dispossession [compared to] today's market value in the land.
>
> [119] There is a further claim … payment for the lost [past] use of the land …We do not believe it would be appropriate to consider this claim separately from our assessment of what is just and equitable … For the avoidance of doubt, our decision on the just and equitable compensation for the land equally applies to the loss of the use of the land. The amount we have determined as being just and equitable applies to the value of the land and its use.

### 4.5 *Jacobs (Erf 38)*

4.5.1 These themes were subsequently traversed by the Court in *Jacobs (Erf 38 Upington)*.[16] The claimants were the same as the *Jacobs (UAP)* matter, and made a similar case. Referring to *Florence*, the Court opined that:

> [14] … where the evidence shows that a conversion of the past loss based on the CPI will result in compensation which is not just and equitable, it will be permissible for the Court, having

15 *Jacobs and Others* v *Department of Land Affairs and Others* (LCC3/98) [2016] ZALCC 14
16 *Jacobs NO* v *Department of Land Affairs*, dated 06/01/2017, per Murphy J (LCC120/99)

 

> regard to the other factors listed in Section 33 of the Act, to make an adjustment in the quantum of compensation in order to eliminate the prejudice …

4.5.2 Further, that even though the *Chorzow*[17] principles of compensation on a delictual basis did not apply, they:

> [20] … usefully depict and set the parameters of what restitution in kind would amount to in financial compensation. It thus benchmarks the outer limits of compensation which will assist in determining an adjustment in the quantum of the compensation should it be found that conversion of past financial loss based on the CPI will result in compensation that is not just and equitable.

### 4.6 The *Jacobs* matters at the SCA

Both *Jacobs* matters were appealed to the SCA, which not only upheld the decisions of the Courts *a quo*, but also commented that it would have struck down the judgments of the Court *a quo* had they based the compensation on the current market value of the properties.

## 5. DATA AND CALCULATIONS

This section traverses the various data and calculations that might be needed in a matter where compensation instead of restitution is requested. These data and calculations are relatively straightforward. But they will be a significant input to the Court's crystallisation of a claim into money, and therefore must be appropriate and correct. Actuaries are ideally suited to serve the public interest by providing this service. Section 6 will look at the ethical and professional issues of an actuary's involvement.

### 5.1 Historic value

5.1.1 As emphasised in *Florence,* the value of the property at the time of dispossession is a vital element in the compensation calculation. Records of historic market values are usually available in respect of dispossessions under the Group Areas Act. Establishing historic values for older claims often presents a greater challenge.

5.1.2 Establishing a value (or range of values) for land is the job of a qualified property valuer.

5.1.3 Sub-section (3c) of Section 25 of the Constitution refers to market value as one of the relevant circumstances to be considered. There are other valuation methodologies for land, as discussed further in section 5.4 below.

### 5.2 Compensation received by the claimant at the time of dispossession.

5.2.1 This is a factual item to be supplied by the claimants, and to be deducted from the historic value of the property. In Group Areas dispossessions from the 1960s, there often was such compensation, whereas in many of the earlier dispossessions as a result of unfair racial practices, there may have been no such compensation.

17 *Factory at Chorzow* (Germ. V Poland), 1928. P.C.I.J (Ser.A) No 17 (Sep.13)

 

5.2.2 The South African Rand was introduced on 14 February 1961. The old South African pounds are converted to Rands at the rate of £1 to R2.

### 5.3 Changes over time in the value of money

5.3.1 Sub-section (eC) of Section 33 of the LRA is one of the factors for the Court to take into account, and reads as follows:

> In the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money.

5.3.2 The Consumer Price Index has been used by the LCC to measure changes over time in the value of money. This is consistent with other areas of the law, such as the Divorce Act,[18] where changes in the value of money are also calculated with reference to the CPI. Furthermore, awards for general damages are commonly adjusted with the CPI.

5.3.3 Stats SA monthly Publication P0141 is the official CPI data for South Africa. There are 'headline' year-on-year inflation rates covering all categories and areas, as well as breakdowns per product category and province. The monthly rates have been used by Stats SA to create an index going back to 1980. This can be easily be extended backwards.

5.3.4 Recently, the year-on-year rates for each month have been backdated to 1922. The annual average rates go back even further, to 1911. Apparently, these older rates are based on index of retail prices published in 1960 by the Union Government.

5.3.5 It can be debated whether point-to-point index values (eg March 1925 to March 2020) or annual average index values (eg average of all months in 1925 to average of all months in 2020) should be used. Koch (2018) motivates for the use of the latter in loss of income matters on the grounds that they represent the average value for the index over the year and are not skewed by a particular month. However, particularly over the long periods usually involved, and the other uncertainties over data, either method should be acceptable.

5.3.6 As discussed further in section 5.4 below, the current market value of the property may have grown much more than the change in CPI. It is sometimes asked whether a provincial CPI rate, or one related to property rentals only, would be more appropriate. I do not think so, as this part of the calculation is specifically looking at the change in the value of (South African) money. It could be debated whether the change in prices is the best available method for measuring changes in the value of money. Firstly, the constituent elements of the official CPI are changed from time to time. Secondly, economists track changes in a country's Gross Domestic Product per capita as an indication of changes in the standard of living.

### 5.4 Current value v historic value

5.4.1 The current value of the property does not form part of the 'historic value plus CPI' calculation endorsed in *Florence.* Yet the current value is usually an important factor in the deliberations, and in the minds of the dispossessed claimants. If these claimants had had their land restored to them, they would effectively be receiving the current value

18 Divorce Act [No. 70 of 1979]

 

thereof. But the Constitutional Court has held that this does not mean that compensation should equal current value.[19]

5.4.2 A simple comparison can be made of the average annual rate of increase in the CPI versus the average annual rate of increase of the property value. Especially in dispossessions from the 1920s, current property values may be far in excess of historic values plus CPI (although they could be less, for a variety of reasons). The Constitution requires compensation to be just and equitable—so the Court has discretion to take this potential inequity into account. In the *Jacobs (UAP)* matter, the Court increased the 'historic value plus CPI' calculation to narrow this gap, saying:

> [117] Compensation should be just and equitable. Market value is a factor. It is not a goal in itself. We intend adjusting the value upwards. There are two reasons why we do so. The first is the nature of the hardship suffered by [the claimants]. The second is the grossly inequitable outcome of applying the actual financial value calculated at the time of dispossession versus today's market valuation in the land.

## 5.5 Current valuation methods

5.5.1 The profession of property valuers is best suited to provide evidence on the current value of land. The valuation of agricultural land in particular is no easy matter, as evidenced by this quotation from one of the doyens of the profession, Pine Pienaar (2013:50):

> There is a saying among valuers that when you enter the valuer profession, you start off by valuing houses, then advance to commercial property and, with much experience behind you and a well-filled logbook, you qualify to become a candidate valuer in the agricultural sector. This saying is not unfounded and is supported by the diverse nature and complexity of the agricultural sector.
>
> Both macro- and micro-factors play a role in complicating a farm's value, some of which are controllable, but most are not. Farm values are further influenced by aspects such as natural resources and perceptions. All these factors can roughly be categorized into factors that influence the value of agricultural land in general, factors that influence the value of farms in a particular area, and factors that influence the value of a specific farm.
>
> To fully understand the interactions and forward and backward linkages, the ideal valuer should be an agronomist, an economist, a horticulturalist, a soil scientist, an animal husbandry expert and a stock farmer, a hydrologist, a weather man, a construction engineer and a building contractor, to mention only a few fields in which he should be an expert. As if this is not confusing enough, farm valuations can have elements of residential, commercial and industrial valuations woven together and are influenced by whether the natural resources (land and water) have been developed, maintained, exploited and/or utilized in a sustainable manner.
>
> All of this makes farm valuations complex but, although he cannot be all of these things, the well-informed valuer with experience in the agricultural industry who spends a lot of time on research can come up with a professional valuation. A proper understanding of the agricultural industry is, however, not negotiable but a prerequisite.

19 See the extracts from *Florence* at section 4.2 above

5.5.2 Actuaries advising insurers and pension funds will be familiar with the concept of different valuation methods for different purposes. Similarly, in property, there are various methods, as set out for example in Pienaar (2013) and Du Plessis (2015).

5.5.3 The *market value*, or comparable sales, method is easily understood and—at least in urban areas—relatively easy to establish. The *economic value*, or discounted cash flow, method will resonate with actuaries because of our training in valuing future cash flows and contingencies.

5.5.4 When faced with a current *market value* significantly higher than historic value plus CPI, courts may wish to be informed of the *economic value* as a more realistic appraisal of the value of the property. The *economic value* method capitalises future income and is thereby closer to the long-term value of the property to its owner. Of course, this economic value may be higher or lower than market value—for example, Pienaar (2013; 85)

> Normally there is a substantial difference between the market value and productive or economic value of farms. Experience has shown that the productive value of the more extensive types of farming such as cattle, sheep and game tend to be below market value. The productive value of the more intensive types of farming, such as fruit and sugar cane, tend to be above the market value. These differences have much to do with economic viability, farm size and opportunity cost.
>
> This economic value could be the relatively simple present value of future rental income, or a full-blown discounted cash flow analysis of future business plans. This method is obviously complex and needs detailed expert input on future income and expenses, including provisions for recovering capital, refurbishment and rates of discount which take added risk into account.

5.5.5 In the land claim of the Moloto Community,[20] the LCC noted that there could be circumstances in which an economic valuation would be appropriate. However, each case would need to be decided on its own facts, and a standard formula could not be applied. Such calculation will be complex, and the onus of proof lies with the party arguing for its use.

5.5.6 A variation of this method is to apply a *price/earnings ratio* to the current profits of the property. This may be suitable in simple cases, such as rental income, but probably not for a farm with a complex current and future financial structure. In any event, a PE ratio is merely an infinite annuity (1/i), and so still requires the selection of an appropriate risk discount rate. Edwards (2017) reports that the starting point for selecting a discount rate for agricultural properties in the USA is the applicable mortgage rate.

5.5.7 Du Plessis (2015) considers the various methods of valuation in the constitutional era, in order to assist the courts. Although the simplest method,

> the willing buyer willing seller method of determining *market value* has been described as illusory, since the bargaining process is constrained by a compulsory sale, and the seller is more often than not unwilling to sell. As King J stated in *Southern Transvaal Buildings* '… the law enjoins me to transport myself into a world of fiction and to don the mantle of a super

20 *Moloto Community* v *the Minister of Agriculture, Land Reform and Rural Development and others* LCC 204/2010

 

> valuator, overriding, if necessary, the views expressed by men experienced in the valuation of property and whose views are relied upon almost daily by willing purchasers and sellers. I must at one and the same time be the willing seller and the willing buyer, both well-informed, and I must arrive at a price in a market that did not exist at the time of expropriation. This is so because I must ignore any enhancement or diminution in value flowing from the expropriation or the scheme causing the expropriation. It is an Alice in Wonderland world in which the consideration of principles of valuation and the opinions expressed by experienced property valuators make the task of the super valuator seemingly "curiouser and curiouser".'

5.5.8 Yet market value is usually easily quantifiable, based on comparative sales, and for that reason formed the basis of the [Judge] Gildenhuys Approach arising from the Ex parte Former Highlands Residents matter.[21] This approach is to start with market value, and then adjust up or down for Section 25 factors.

5.5.9 Prof du Plessis concludes that the use of rigid and precise tools is not feasible, and each case must be looked at individually:

> The tool we have is the Constitution, which tells us where to go [just and equitable]. It is up to valuers to get us there!

### 5.6 Hardship

5.6.1 Sub-section (eB) of Section 33 of the LRA includes the hardship suffered as one of the factors that a court could take into account. However, Mabasa (2022) bemoans the lack of methodology for placing a value on such hardship. "In the majority of cases where claimants opted for financial compensation, the policies that governed the amount of compensation only took into account market compensation and were devoid of losses that were intangible but equally significant, such as the sense of place, livestock, spiritual and cultural heritage, and a general destruction of family units and family life."

5.6.2 Claimants might motivate that compensation for such hardship is a type of 'constitutional damages'. Du Plessis (2015) notes that one method for calculating compensation for expropriation by the State is the benefit the State will gain (as opposed to the loss to the expropriatee).

5.6.3 A somewhat similar 'transferance' methodology was used in the *Life Esidimeni* arbitration.[22] In a paper on the matter, presented to the Actuarial Society, Whittaker (2018) noted the Constitutional Court matter of *Fose*[23] wherein courts were obliged to forge new tools for effective remedies for the breach of constitutional rights, if the common law was inadequate. He also noted the SCA matter of *Kate*[24] where no direct financial loss could be calculated. That Court stated that 'to be held in poverty is a cursed condition', held that to be the true loss, and quantified the loss by 'borrowing' an interest-based approach. The

21 See footnote 8 above

22 Final ruling in the Arbitration between: Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and the National Minister of Health and others. Unreported.

23 *Fose* v *Minister of Safety and Security* 1997 (3) SA 786 (CC)

24 *Member of the Executive Council: Welfare* v *Kate* [2006] SCA (46) RSA

 

claimants in the *Life Esidimeni* matter had not suffered patrimonial loss, since their deceased relatives were all unemployed, and in care, and had not provided any financial support to the claimants. Nevertheless, the plaintiffs argued that the quantification of their constitutional damages could start from a new angle—i.e. the costs saved by the state now that the patients were prematurely deceased.

5.6.4 In a land restitution claim, one hardship usually suffered is the loss of the use and enjoyment of the property, between date of dispossession and date of restoration (or compensation). The courts have repeatedly said that compensation is not a patrimonial loss. Thus, a claim for the lost income from the property is unlikely to find favour. However, using a transference methodology, it may be an acceptable remedy for constitutional damages, to value the hardship caused as the rental income that the dispossessed would have had to expend to secure themselves occupation of a similar property. This argument was made in the *Jacobs (UAP)* and *Jacobs (Erf 38)* matters, and although the Court did not adjust the compensation fully for the amount claimed under this head, both courts stated that their final adjusted award also took into account the value of this lost past use of the land.

> [23] Mr Lowther in his testimony placed two possible values on the loss arising as a result of the affected members of the September family not being able to use the property between 1925 and 2016. In the final analysis, the plaintiff acknowledged, in light of the approach in *Florence*, that there is no entitlement to receive such an amount as compensation. The evidence, however, was intended to assist the court when considering the various factors listed in section 33 of the Act, other than the changes over time in the value of money; including: the desirability of remedying past violations of human rights; the requirements of equity and justice; the amount of compensation or any other consideration received in respect of the dispossession; the history of the dispossession caused, the current use of the land and the history of the acquisition and use of the land.[25]

5.6.5 A calculation of such lost past use could be made by interpolating geometrically between the historic and current land values, and then applying a reasonable rate of rental to produce a lost use value in each past year. Each loss could be adjusted by the CPI to the present to allow for changes in the value of money—but not rolled up with interest.

5.6.6 This approach requires the data item of 'reasonable rental'. In some cases, an actual historical or current rental amount may be available. Otherwise, an estimate could be made, with input from the property valuer. One potential data source for urban properties is to use the reasonable rentals which appear in the old rent control legislation.

5.6.7 In *Jacobs (Erf 38)*, the Court also noted (see 4.5 above) that it was useful to know the full patrimonial loss, as an upper bound for any adjustment. This value could be established by rolling up the result in ¶5.6.4 above with an appropriate rate of interest. In the *Jacobs* matters, this calculation was requested by the claimants, who suggested interpreting the result (using transference) as their 'lost life chances'. The compounding effect of interest was seen as similar to the compounding effect of each generation building their

25 See footnote 16 above

 

lives, education, employment and standard of living on the previous one—and this chain of development had been broken by the dispossession.

5.6.8 It would be important for the actuary to point out that the results in ¶5.6.6 are a transference calculation, and not a conventional loss of income report as provided in road accident and medical negligence matters. There may be a few cases where an exact loss of income report could be provided, but gathering the data of several generations of descendants of the original disposed family, and crystal-ball gazing as to what might have happened but for the dispossession, will usually be too speculative.

5.6.9 The *Jacobs* awards may be found in the respective judgments, as follows:

| ZAR | Historic value plus CPI | Current market value | Value of lost past use | Award |
|---|---|---|---|---|
| UAP | 2 420 000 | 36 450 000 | 22 800 000 | 10 000 000 |
| Erf 38 | 50 000 | 2 450 000 | 910 000 | 780 000 |

5.6.10 As an aside, it should be noted that the hardship of lost past use applies equally to claimants whose property is restored to them. However, the legislative framework doesn't allow them financial compensation as well as land restoration.

5.6.11 As a further aside, it should also be noted that in most cases the LCC does not concern itself with the use of the compensation award by the claimants, nor the distribution of the award between the qualifying claimants. In older claims there may be numerous descendants of the original dispossessed family, and in rural claims there may be an entire community. Where land is restored to a community, the CRLR encourages the formation of a Community Property Association to manage the land and ownership issues. Mabasa (2022) regrets that there is no obligation on the CRLR for adequate, meaningful post-settlement support. She quotes an anonymous senior member of the CRLR as follows: "Our role is to return the land to the people. We have now done that. We have no business assisting the community with any post-settlement support, be it business plans or whatever. Our job is done."

## 6. WHERE ANGELS FEAR TO TREAD—THE ROLE OF THE ACTUARY

### 6.1 Our Professional Promise

6.1.1 Members of the Actuarial Society of South Africa are required to abide by a Code of Conduct in the form of our Professional Promise. Accordingly, we endeavour to maintain the capability to deliver a quality service that is competent and up-to-date, ethical and subject to professional oversight (ASSA, 2015)

6.1.2 Included in our 'competence' requirement is only to provide services in an area in which we are competent. In more developed fields, such as valuations of life insurance companies, one can work under mentorship until ready to fly solo. In newer and wider fields, such as compensation for land claims, the actuary must be careful to understand the nature of the work—and its effect on the parties and the public.

6.1.3 Where there are no specific professional guidance notes, a general practice standard applies (ASSA, 2019) covering the prudent way in which the actuary should go about their work.

6.1.4 Hopefully, this article and the discussion thereof will be a starting point for an actuary asked to assist in a land compensation matter. It highlights the broad purpose of the land reform process, the balance between public and private interests, and differences from the 'patrimonial loss' concept more familiar to actuaries (as in loss-of-income claims).

### 6.2 Modelling

6.2.1 A specific competence of the actuary is modelling, and there is a specific part of our education syllabus to develop these skills. In land claims, there may not be many new or complex models to develop—yet even the arithmetic described in Section 5 above is a model—and actuaries are skilled in ensuring that models are appropriate, reliable and transparently documented. It is as vital for the court to understand the meaning of the numbers supplied, as for it to rely on their correctness.

6.2.2 The Actuarial Society (2017) has a relevant guidance note on the management of models. Of particular relevance here is the recommended use of alternative scenarios rather than a single set of assumptions.

6.2.3 In my experience, property valuers appreciate the actuary checking the logic and accuracy of their discounted cash flow spreadsheets and CPI adjustments, given our familiarity with such processes. But the actuary must resist trying to be an expert property valuer, as this is not in our expertise.

### 6.3 Reporting

6.3.1 A specific part of modelling is documenting and communicating the work. Lowther and Mort (2016) highlights how a poorly thought through report in a claim for maintenance against a deceased estate can lead to the report being incorrectly used—i.e. giving the impression of the actuary 'certifying' the widow's needs, when the report has merely quantified the information supplied.

6.3.2 Thus the actuary will be expected to think carefully about how to position their report, and how to be as transparent as possible. Actuaries have also practised professional communication in their training, but even after years of practice it takes skill, time and a desire to get-it-right to communicate financial matters effectively.

### 6.4 Public v private interest

6.4.1 The actuary should be aware of Section 25(3) of the Constitution which requires that compensation reflect an equitable balance between the public interest and the interests of those affected. As in other actuarial work, the actuary could highlight whether assumptions are conservative or best estimate, and maybe even do scenarios on different bases.

6.4.2 It is of course the court which has to decide the balance between public and private interest. A somewhat similar situation occurs in medical negligence claims, as expressed by Prof van Boom of Leiden University in the foreword to Whittaker (2021):

> … the quest for alternative compensation systems in the area of medical malpractice birth injuries also raises the key question of whether we want to redistribute the proceeds of the current system over other—and presumably more—beneficiaries. Choosing a system that

 

compensates all children with birth defects (and their families), irrespective of whether caused by nature or by man, may sound appealing if we have notions like distributive justice, social solidarity and equal opportunities in mind. Such a broad scheme would go a long way in alleviating the burden of the stricken families and providing coverage for an adversity they could not insure against before the event.

This allocation of resources debate resonates with the discussion in Section 3 above as to whether the Restitution strand of the land reform programme should be terminated in favour of Tenure Reform and Redistribution.

### 6.5 Expert witness or advocate?

6.5.1 The tricky path that angels might fear to tread, alluded to in the title of this paper, arises because this is a new field in which other professions also play—including lawyers and judges and property valuers. Should actuaries 'stick to their knitting' (as a leading lawyer suggested while trying to work through the complexities of the 2001 Pension Funds Amendment Act for which he felt actuaries were responsible)? In other words, just be a super-calculator and produce answers to sums as requested. Or should they use their broader ability to make financial sense of the world in the public interest, especially since the land reform programme is clearly in the public interest?

6.5.2 Perhaps unfortunately in this respect, land compensation has been channelled through a Court system, which can be acrimonious as well as bound by precedent and process. The actuary will be engaged by one of the parties, and there may not be an opportunity for all concerned to sit down and throw possible solutions around. On the other hand, there is some common purpose amongst the parties in that the legislation is intended to bring about restitution, and once a claim is registered, the CRLR pays the claimants approved expenses.

6.5.3 In the area of adjustments to compensation for S33(eB) hardship, the actuary might be able to suggest, or lead a discussion on, possible new methods that could be fashioned. But it is not clear if the actuary would be overstepping the mark as expert witness to the Court and becoming an advocate for the claimant instead.

6.5.4 An assumption may need to reflect a balance between public and private interest—for instance an estimate of rental income as hardship. Presenting alternative scenarios and/or adjustments for contingencies will allow the Court—as opposed to the actuary—to decide where this balance should be.

## 7. CONCLUSION

If and when the 2012 amendment to the LRA is adequately repaired by Parliament, another 160 000 land claims may fall to be decided. Drawing on the common law that has been developed in the absence of a specific legislated formula, the author has highlighted data and methods that could help fashion the compensation for dispossessed land. It is concluded that actuaries' technical, ethical and professional inputs makes them well suited to assist the Land Claims Court to resolve the potentially large number of claims, and that this will be in the public interest.

 

ACKNOWLEDGEMENTS

I would like to thank all those colleagues, especially Adv Joel Krige, who have assisted me with fruitful discussions and useful suggestions. My particular appreciation goes to Greg Whittaker for his detailed review as well as his ongoing commitment to encouraging quality actuarial services in the compensation field.

ABBREVIATIONS

| | |
|---|---|
| ANC | African National Congress |
| ASSA | Actuarial Society of South Africa |
| CPI | Consumer Price Index |
| CRLR | Commission for the Restitution of Land Rights |
| LCC | Land Claims Court |
| LRA | Restitution of Land Rights Act , No 22 of 1994 |
| SCA | Supreme Court of Appeal |

REFERENCES

ANC (1993). Ready to Govern: ANC Policy Guidelines for a Democratic South Africa. Policy Unit of the ANC. Johannesburg

ASSA (2015). Code of Professional Conduct. Available at https://www.actuarialsociety.org.za/download/professional-conduct. Accessed 22.08.2021

ASSA (2017). Actuarial Practice Note 902. Available at https://www.actuarialsociety.org.za/download/apn-902-june-2017. Accessed 22.08.2021

ASSA (2019). Standard of Actuarial Practice 901. Available at https://www.actuarialsociety.org.za/download/sap901general actuarial practice2. Accessed 22.08.2021

Beinart, W, Delius, PNSM & Hay, M (2017). *Rights to Land – A Guide to Tenure Upgrading and Restitution in South Africa*. Fanele

Bohlin, A (2004). A price on the past: Cash as compensation in South African land restitution. *Canadian Journal of African Studies* **38**(3), 672–87. DOI: 10.1080/00083968.2004.10751303

CRLR (2007). Annual Report 2006/7. CRLR. Pretoria

Cousins, B (2016). Land reform in South Africa is in trouble. Can it be saved? Nelson Mandela Foundation. Available at https://www.nelsonmandela.org/uploads/files. Accessed 22.08.2021

Du Plessis, WJ (2015). Valuation in the Constitutional era. *Potchefstroomse Elektroniese Regsblad* **18**(5), 1725–59

Edwards, WM (2017). How much is that farm really worth? – A comparison of three land purchase decision tools. *Journal of Applied Farm Economics* **1**(1), 18–29

Koch, R (2018). *The Quantum Yearbook*. Van Zyl Rudd

Lowther, MW & Mort, JWT (2016). Towards best practice in the actuarial assessment of maintenance claims against deceased estates. *South African Actuarial Journal* **16**(1), 127–41

 

Mabasa, B (2022). *My Land Obsession - A Memoir*. Picador Africa. Johannesburg

Ngcukaitobi, T (2021). *Land Matters – South Africa's Failed Land Reforms and the Road Ahead*. Penguin Random House South Africa

Pienaar, P (2013). Farm valuations in practice. Agri Land Price Index (Pty) Ltd

Walker, C, Bohlin, A, Hall, R & Kepe,T (eds). (2010). *Land, Memory, Reconstruction and Justice – Perspectives on Land Claims in South Africa*. Ohio University Press

Whittaker, GA (2018). The Life Esidimeni arbitration and the actuarial quantification of constitutional damages. *SA Actuarial Journal* **18**(1), 71–97

Whittaker, GA (2021). Medical malpractice in the South African public sector. ASSA

Xingwana, L (2007). Speech for the land handover celebration for the Hlabisa-Mpukunyoni community claim Hluhluwe: Kwazulu-Natal. Delivered by the Minister of Agriculture and Land Affairs, Department of Land Affairs

 