

Dysfunctional Communal Property Associations in South Africa: The Elandskloof Case

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SUMMARY

Elandskloof was South Africa's first land restitution case to be resolved in the Land Claims Court and the first instance of a Communal Property Association being used as the legal entity under which land is held. Elandskloof was a Dutch Reformed Church Mission station in the Cederberg Mountains. The community were evicted from the land in 1961 when the church sold the farm, and group areas legislation was applied – the mission land was declared a white group area - in part to ensure that the community could not return.

The state purchased the farm and the land was returned to the community in an emotional ceremony in December 1996. At the time, politicians expected a thriving communal agricultural entity to emerge from this newly empowered community, and they made promises at the ceremony in support of this expectation. This in turn raised expectations amongst members of the community about what the state was going to provide for them.

Lack of communication at the outset between state departments resulted in the state being unable to deliver what many in the Elandskloof community expected to be given to them. Concurrently, fierce internal conflict within the community resulted in the community being unable to establish a final membership list, enforceable land tenure rules and an operational development strategy. In essence there was only enough land to accommodate a small group of those claiming membership of Elandskloof on the farm. Commercial agricultural operations ceased, harvestable resources and land itself was grabbed by community members, the management committees collapsed, and accounts were not paid. In 2006, Elandskloof was placed under the administration of the Director General of Land Affairs and Agriculture.

This paper briefly describes the Elandskloof case and a ten year follow up study during the administration period to establish some of the lessons from the case. The case is instructive in the context of post conflict land restitution after peaceful negotiation and transformation, communal property associations and land use planning during periods of uncertainty.

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1. INTRODUCTION

Elandskloof comprises two farms bordering the Middelburg Pass in a rural valley at the source of the Elandskloof River in the Cederberg Mountains wilderness area, approximately 200 km north west of Cape Town. Elandskloof was the first land restitution case in post-apartheid South Africa where the land was returned to the community; it was also the first case of a Communal Property Association (CPA) being used as a juridical person to hold land in South Africa. For many it was a symbol of hope for a post-apartheid society facing far reaching political, social and economic change. Unfortunately, the CPA became dysfunctional and more than ten years after the land was handed over, the community remains divided and the CPA has been placed under the administration of the Director General of Land Affairs. In terms of the Communal Property Associations Act 28/1996 (S13), in the event of maladministration or insolvency, a CPA may be placed under the administration of the Director General, or it may be liquidated.

Methodologically, the case has been examined from a critical systems theory perspective; the purpose is to seek ways to improve a situation as well as understand it, rather than focussing exclusively on the latter (Mingers 2006). The author has studied the case since 1997 when he was an advisor to the planning consortium. Since then, the case has been observed through participation in planning meetings, attendance at general community meetings and conflict resolution workshops, interviews and ongoing informal discussions with external agents and a number of Elandsklowers over the years, and scrutiny of documents over the years. The author spent two weeks on the farm surveying the boundaries of the Elandskloof farms in 1998 and 1999. Following this he provided advice to the Elandskloof committee chair and his attorney and state employees on trespassing charges filed against a number of Elandskloof residents. This study focuses on a recent follow up study in 2007 where the author interviewed 10 groups of Elandsklowers who lived on the farm and four other Elandsklowers who lived off the farm, two of whom had chaired the main management committee. A number of external agents were also interviewed at the time. The data collection processes and the analysis are biased firstly in that the author is a land surveyor, and secondly in that he was involved in activities which were designed to deliver functional outcomes at Elandskloof.

The article commences with a brief history of the region and the Elandskloof mission, the closure of the mission and the eviction of the people, up to the time where the land was returned to the community. A brief discussion on the problems associated with participatory planning and the difficulties associated with reconstructing a community which had been dispersed more than thirty years earlier follows. Finally the current situation where the CPA has been placed under administration is analysed in the context of how Elandsklowers themselves view the situation.

2. HISTORY

At the time the Dutch settled at the Cape in 1652, the indigenous Khoi pastoralists lived a semi-nomadic transhumant existence where they lived in kraals along the Oliphants River in the cold winter months and moved their stock over the Cederberg mountains into the Kouebokkeveld in search of better grazing in the summer. The transhumant lifestyle progressively came to an end as colonists appropriated the best land along river valleys. In addition, a series of laws by the Dutch and then the British colonial authorities in the 17th, 18th and 19th centuries subjugated the Khoi into indentured labour relationships with white farmers (Penn 1999, 2005).

One means for Khoi and ex-slaves in the region to avoid compulsory labour on farms, and the accompanying dependency relationship between farmer and labourer, was to squat on unregistered Crown land in the Cederberg (Anderson 1993). Officially the Cederberg mountain dwellers were squatters, but it is unlikely that they would have viewed themselves as such.

The Rhenish Mission Society set up mission stations in the Cederberg region, notably at Wupperthal in 1830. Wupperthal mission was later transferred to the Moravian Church. The Dutch Reformed Church (DRC) set up the Elandskloof mission in 1862, supposedly to counter the liberal ideas of foreign institutions such as the Rhenish and Moravian churches and the London Missionary Society (Anderson 1993).

In 1870 the Cederberg area was reserved for forestry purposes. Increasing pressure from this date onwards forced the Khoi “squatters” to move out of the Cederberg. The last piece of legislation which compelled people to move was promulgated in 1973 when the Cederberg were declared a wilderness area and in 2004 the mountains were declared a World Heritage Site (Voss 2004).

Thus from the late 19th century onwards, squatters were pressured into choosing one of three options; (1) they could move out of the mountains and subject themselves to a master-servant relationship by working on a white owned farm, (2) work for the forestry department, or (3) move onto a mission station. Apparently the latter was a popular choice as there were already 250 people living at Elandskloof in 1868, six year after it opened. By 1890 there were more than 900 people living there (Anderson 1993).

Elandsklowers lived multi-faceted livelihoods from the beginning as, economically, the land could not sustain a large number of people. Each family was allocated a piece of land on which to build a house. Families also had a small *kombuis* (kitchen - Afrikaans) plot for subsistence cultivation. The family head was supposed to pay an annual rent for their land and the right to graze stock. In addition, families supplemented this income by harvesting buchu (a medicinal indigenous shrub) and wild rooibos tea from the surrounding veld, and cutting wood from indigenous cedar trees – the latter practice was stopped for ecological reasons. Elandsklowers obtained cash from the sale of stock or by providing seasonal labour on white-owned farms in the vicinity. However, Abraham le Roux, who was the only long

servicing missionary - from 1863-1904 - observed that even the farmers tended to pay wages in grain rather than cash, as he struggled to collect rents from the Elandsklowers (Anderson 1993). The farmers themselves often operated in a barter system as they were some distance from the market system in Cape Town (Penn 1999).

A basis of the Elandsklowers restitution claim in the 1990's was the manner in which the mission grounds were extended to the ridges on the surrounding mountains in 1900 by an additional land grant farm No. 875 Clanwilliam, known as the outer farm (*buiteplaas* – Afrikaans) as it encloses the original farm no 876. The title deed for farm 875 included a condition that the land be used for mission purposes only. The Elandsklowers sold some of their produce to raise some of the money for acquiring this additional land, and this they claimed bestowed a *de facto* share in the ownership of the farm. However, the DRC's view of the inhabitants' contribution was arguably more in line of dues owed by tenants to a landlord. Throughout the history of the mission, it appears that only a small proportion of the community paid their annual rent to the DRC (Anderson 1993).

Elandskloof was a drain on Church resources and for more than 50 years prior to the land being sold in 1962, the DRC had considered closing the mission. There were proposals to sell Elandskloof in 1909 and in 1926. For internal church political reasons, and possibly economic reasons too (author), one of the alternatives proposed was to move the mission station to the town of Citrusdal where the white farming community had established a DRC congregation in 1916 (Anderson 1993).

The final demise of Elandskloof as a mission station should be seen within the context of the rise of Afrikaner nationalism and the accompanying philosophy of white supremacy. When the National Party came to power in 1948, it promulgated a number of new racially-based laws, such as the Group Areas Act of 1950.

The DRC supported the apartheid policies of the National Party government. In 1952, the DRC considered Elandskloof an outlying district of the Citrusdal congregation, not a mission station in itself. In an attempt to draw some revenue from the farm, the DRC appointed a farm manager. Occasionally serious conflicts occurred between the manager and the resident Elandskloof community, which prompted a group of Elandsklowers to protest to the Department of Coloured Affairs in 1958 (Anderson 1993, Smith and Anderson 1993).

In the same year, 1958, constituencies in the surrounding white-owned farming community and the DRC congregation in Citrusdal pressured the DRC to sell Elandskloof. In 1960, the DRC requested the Department of Coloured Affairs, under Minister P.W. Botha, to take over Elandskloof, presumably as a Coloured Reservation. Coloured Affairs turned down the offer, however, on the grounds that an Elandskloof Reserve was not economically feasible (Anderson 1993).

Following this, the DRC managed to get the restrictive clause reserving the land for mission purposes removed from the deed of the outer Farm 875. In September 1960, the DRC informed the community that they intended to sell the farm to a private owner. The DRC

offered compensation of 200 South African rand per family plus the building costs of their houses, less depreciation. The Elandsklowers resisted this by refusing to leave the land and set up a vigilance committee. As a consequence of ongoing resistance, eleven occupants were charged with illegal squatting in November 1960, but these charges were later withdrawn (Anderson 1993).

The Elandskloof farms were sold to neighbouring farmers in 1962, who set about evicting the Elandsklowers soon after transfer. The contract of sale stipulated that the Elandsklowers interests would be accommodated; the registered deed, however, did not include a restrictive clause to this effect. The Elandsklowers stories suggest a brutal element in the manner the Elandsklowers were evicted. Although they resisted, and some were arrested for doing so, eventually the community of 76 households was forced to leave Elandskloof on 12 September 1962 (Mayson *et al* 1998, Anderson 1993).

The community then spread out over the Western Cape, forming a diaspora of working and middle class Elandsklowers. Twenty six families remained on the neighbouring farm, Allendale, as farm labourers. The Allendale farmer empathised with the group apparently because his forefathers had attended the mission school at Elandskloof.

From the mid 1980's, the Allendale group led by John Januarie were at the forefront of initiatives to return to Elandskloof. Political changes in 1990 gave this group confidence to pursue this objective. Assisted by two NGO's, the Legal Resources Centre (LRC) and the Surplus People's Project (SPP), the group submitted a claim to the Land Claims Commission under the Restitution of Land Rights Act 22 of 1994. The group drafted a constitution under the Communal Property Associations Act 28 of 1996, while the legislation was itself being drafted, and they drew up a register of 308 members (Mayson *et al* 1998).

The efforts eventually bore fruit as Elandskloof was the first land restitution case where claimants were resettled on their land and the first Communal Property Association to be registered. For two years, the Land Claims Commissioner supervised negotiations between the community, the Department of Land Affairs and the land owners. Eventually a settlement was reached on 20 June 1996 and lawfully validated by a Land Claims Court order on 15 October 1996; the first such order issued by the Land Claims Court (LCC 20/96).

The state purchased the two farms numbers 875 and 876, less a small portion kept by the existing owners, for ZAR4,503,000. The Department of Land Affairs (DLA) registered the Elandskloof Communal Property Association (ECPA) in November 1996, and the land was transferred to the ECPA, with the list of 308 members on 13 December 1996. The land was handed over at an emotional ceremony on a national public holiday, the Day of Reconciliation, 16 December 1996 by the Regional Land Claims Commissioner, Wallace Mqoqi. The Minister of Land Affairs, Derek Hanekom, addressed a large crowd of Elandsklowers and invited guests. In his speech, Hanekom promised to return the following year with a tractor, providing the farm was thriving (Mayson *et al* 1998, Friedman 1996).

3. RESETTLING ELANDSKLOOF

Resettling Elandskloof would prove to be a major challenge. The hand over ceremony had created considerable expectations about what the state was going to provide among many of the Elandsklowers, while many of the operational aspects of settling the farm had not been addressed. In addition, the restitution process had established some of the structures which underlay later conflicts and ultimately a dysfunctional CPA at Elandskloof. Firstly, there was not enough land to sustain more than a handful of Elandsklowers on the farm. The historical narrative above indicates that the Elandskloof mission had always been a financial drain on the DRC. Secondly, the bridgeheaders in the struggle to reclaim Elandskloof had been based at Allandale, and most of them were farm workers. As the restitution process proceeded and complex issues and arguments had to be addressed, educated Elandsklowers had to become involved, and in the process they usurped much of the power and influence held by the bridgeheading group. Thirdly, rules for membership - the rights members could enjoy and their obligations to the CPA to retain membership - had not been established prior to the handover, neither had the rules for land allocation and land use. Lastly, it appears that neither the state nor the Elandskloof claimants had conducted an economic and environmental feasibility study, which included consultations with other state departments on what was legally permissible in developing Elandskloof.

There were numerous unexpected events which impacted on the orderly settlement of Elandskloof. For example, soon after the handover ceremony at the end of 1996, the Allandale farmer insisted that the Elandsklowers on his property return to Elandskloof, as they now had their own land. However, since the ECPA's rules for land allocation and land use had not been established, in many ways they were effectively squatting at Elandskloof. It also invested a significant amount of power in this group as they now occupied the land and they could not be evicted from land which was rightfully theirs. An early conflict arose when some of the Allandale group occupied existing farm workers cottages which the ECPA main committee had set aside for Elandsklowers who were involved in the commercial agricultural operations on the farm. This was one of the first incidents where the state intervened by providing mediation and dispute resolution services to address conflicts at Elandskloof.

Planning and Management of the Resettlement

Drawing on Mayson *et al* (1998), Cartwright (2007), Hofmeyr (1996), SPP (1994 – 1998) and Barry and Mayson (2000) and the author's interviews, major factors in reconstructing the community, and therefore the ECPA, with a workable land tenure system more than 30 years after the original eviction were:

- The establishment of a register of who qualified for land rights. E.g. who was a member of the ECPA? What was the status of different family members? How could rights be inherited? Given the carrying capacity of the land, who had priority to settle at Elandskloof and what were the rights of those who could not?
- The definition and formalisation of the land tenure system: i.e. the different rights that could be allocated, to whom they could be allocated, and the obligations accompanying

those rights. These included the right to occupy a house and for that right to be inherited, rights to a kitchen garden, rights to use agricultural land, visitation rights, grazing rights, rights of those who lived off site, obligations and contributions to the ECPA;

- The creation of a governance system. I.e. development of community-based institutions for the administration and enforcement of different rules and regulations for the management and administration of the settlement;
- The development of an effective conflict management system;
- Economic and environmental sustainability. There is insufficient arable land to support more than a few families; of the total area of 3100 hectares, less than 10% (± 300 ha) is suitable for agriculture– the rest of the farm is mountainous. Moreover, the arable land is more suited to collective or commercial farming as opposed to subsistence farming. At the time that the land was transferred in 1996, approximately 30ha were under citrus and deciduous fruit orchards. The remaining 270 ha are suitable for orchards, cash crops and *rooibos* (red bush - Afrikaans), a herbal tea that is endemic to the Cedarberg region. Furthermore the Cedarberg is an arid region and there is insufficient water to sustain a large agricultural operation.
- Development of infrastructure: water, sewerage, electricity, roads, telecommunications and refuse removal or processing facilities.

A main committee of nine people had been elected to direct and manage the ECPA. Once the land had been transferred, general meetings involving all potential Elandskloofers were held in the church building at Elandskloof at regular intervals.

The Department of Land Affairs appointed a planning consortium, comprising a firm of urban and regional planners, SetPlan, assisted by the NGO Surplus Peoples Project (SPP), at the end of 1996. They were mandated to assist in the planning and resettlement of the community. At the same time, the ECPA had appointed a farm manager for a period of two years to manage the farm on behalf of the ECPA. The farm had citrus and deciduous fruit orchards and grazing for stock. As part of his mandate the manager was to mentor and train a manager and a work team from the Elandskloof community, obtain implements, and market the produce e.g. citrus, pears and peaches.

The planning consortium was tasked with repositioning/reskilling the community to be able to run a farm, and associated planning. Specifically, their mandate included:

- Empowerment and capacity building to enable the community to take over the farm.
- Developing a resettlement plan along with land tenure arrangements.
- Preparing layout plans for resettlement.
- Preparing construction plans for infrastructure.
- Developing agricultural development plans.
- Developing economic development strategic plans, and
- Developing an overall land use plan.

To activate the process, the State set aside R4.9 m in settlement grants; R15,000 per household as a once-off grant and another R900 to assist the community with village planning and infrastructure (Cape Business News, January 1997).

Membership

Establishing the boundaries to membership became a major obstacle in the development of Elandskloof. Soon after South Africa's first fully democratic national elections in 1994, some DLA officials wanted to consider only the Allendale group as qualifying to return. After fourteen months of negotiations, during which time the Elandskloof committee and the NGO's were reputedly under immense pressure to finalise membership, the DLA finally agreed to a broader definition of who should be allowed to benefit from the scheme (Mayson and de Beer 1997).

The ECPA constitution, which was submitted at the court hearing in 1996, stipulates that membership is available to:

- a) those and their direct descendants who were part of the Elandskloof community who were deprived and disadvantaged and who suffered dispossession of rights in land and other assets;
- b) as well as such other persons (non-Elandsklowers) who suffered similar dispossession and that the Committee, in its own discretion, decided could be members of the Association;
- c) those who have a blood or marriage link to those in a) or b) above;
- d) any others that a general community meeting decides can be members as a result of their contribution to the affairs of the community.

Finalising the list of members and codifying their rights was critical for the committee and the planning consortium to be able to execute their mandates. Attempts were made to narrow down the criteria, but as late as 2007 the membership and the rights of each member had not been finalised. As one former main committee chair noted in 2007, the membership list of 308 was never properly validated, but it appears to remain the only legitimate list.

Schism and Solidarity

The Elandskloof community had acted in solidarity against the state in regaining their land. However, schisms surfaced once the land had been handed over and people competed for power and access to land and other resources. This is to be expected in terms of social change theory, but the conflicts had a major impact on Elandskloof becoming dysfunctional (Barry and Mayson 2000)

Soon after the handover in 1996, a small group, whom Mayson *et al* (1998) labelled "those who suffered most" or the "sufferers", contended that Elandskloof membership should be limited to those who were actually dispossessed in 1962. They maintained that the 1962 evictees suffered directly as a result of dispossession by the State. It was they who fought to

return to Elandskloof and there were many who were reaping the rewards of their labour (Mayson *et al* 1998). The author's interviews in 2007 suggest that many in this group had lived at Allendale and on other farms in the surrounding area.

A number of observers external to the community have identified the major causes of Elandskloof's dysfunctionality to be the divisions over conflicts about membership and whether people in leadership positions were truly Elandsklowers. Consequently committees could not function properly (Mayson and de Beer 1997, Pienaar 2006, Mayson *et al* 1998, Bosch and Hirschfeld 2004). Planning decisions, the promulgation of rules and procedures to allocate land rights, the obligations associated with these rights, and the use of communal resources were not effected.

The sufferer group asserted its position in a number of forums, such as committee meetings and general community meetings. To many outside this group, they undermined a number of the majority decisions taken by the broader community in general meetings as well as by the main committee. Some individuals within this group argued that majority decisions were invalid as, in their eyes, many people who supported these decisions were not true Elandsklowers. General community meetings were disrupted and decisions which had supposedly been ratified by a majority vote at one meeting were then challenged and effectively overturned at a subsequent meeting (Mayson *et al* 1998, Barry and Mayson 2000).

Further schism occurred over family affiliations. Firstly, many Elandsklowers are related to one another, and there are longstanding family feuds which surfaced in the committee meetings and general community meetings. Debate about eligibility for membership and other administrative matters was often determined by who was making a proposal rather than its functional merits. The sufferer group fervently opposed the first main committee chair, in part due to a longstanding family feud, which further impeded the development of Elandskloof (Mayson *et al* 1998). However, the three chairs who followed all had similar problems in getting the committee to function.

Interviews in 2007 also indicated that committee members often adopted a family position in cases of conflict of interests or inappropriate use of communal land and resources. One former committee member indicated that in issues relating to membership or disciplinary problems (e.g. land or resource grabbing), even in what to him were clear cut cases, committee members always sided with their extended family.

Allocation of land for housing, farming, communal use, grazing and a family kitchen garden proved to be a major difficulty. The planning consortium, based on a general community decision, designed and surveyed a residential area of 192 lots to accommodate the Elandsklowers. In meetings which the author attended in 1997, the thinking was that a proportion of the 308 people claiming to be Elandsklowers would actually return to the farm and that having legally surveyed plots would reduce the propensity for conflict. However, when Elandskloof was a mission, families had been spread out in a number of outposts under small copses of oak trees served by small springs and mountain streams.

A number of Elandsklowers strongly objected to the notion of a village and the surveyed layout. In the end, they were permitted to live at their former outposts on the understanding that they would provide and pay for the construction of their own services e.g. sewerage, electricity. From a planning perspective, providing services for these scattered outposts is very expensive, whereas servicing a cluster of houses in a village layout is substantially cheaper.

The absence of effective administration, lack of power to enforce rules, and the continual challenges to the legitimacy of many of the proposed land management rules resulted in competition for resources such as land for small scale agriculture, water, grazing and buchu for harvesting. Buchu is a herb that occurs naturally in the Cederberg which is used for medicinal purposes and in the cosmetic industry. There were frequent incidents where buchu was harvested by individuals for their own account, though it is a communal (ECPA) resource. A number of Elandsklowers were also arrested for trespassing and theft of buchu on neighbouring farms between 1997 and 2000.

Unfulfilled Expectations

A further major factor is that the state did not provide what many Elandsklowers perceived had been promised to them as part of the restitution package. This has been at the root of much of the Elandsklowers' expressions of anger since restitution. Administration in post-apartheid South Africa underwent radical changes, which meant that institutions and individuals responsible for administration, planning and service provision at Elandskloof changed a number of times.

The author's interviews indicate that many Elandsklowers expected the state to provide infrastructure such as waterborne sewerage, electricity, waste disposal and other services and utilities. The state had promised housing subsidies to the Elandsklowers in line with policies of land restitution and housing. A housing committee at Elandskloof was set up and strategies were developed as to how this should be done. However, the subsidies for housing were the mandate of the Department of Housing (DoH), rather than DLA, and Elandskloof did not fit within the rules for housing allocation specified by the DoH. One informant noted that an application for a housing subsidy would not be entertained unless the infrastructure was in place (i.e. engineering services). However there was no funding for these services.

The Department of Water Affairs (DWA) refused to allow pit latrines as there was a fear that these would contaminate the river. There were no funds to provide waterborne sewerage system in DLA's budget. However, although pit latrines were forbidden, initially no alternative was provided and then pit latrines were allowed as temporary measures. In 2007 a number of Elandsklowers said that they were resorting to going to the toilet in the bush.

An examination of correspondence files dating back to 1996 show numerous efforts to obtain funding for infrastructure. There were also studies which examined and challenged rulings relating to pit latrines as a sewerage system and such like. In the meantime, many Elandsklowers stated that they expected much of the infrastructure to be supplied to them as

part of the restitution package, especially after the speeches by politicians and senior officials at the handing over ceremony in 1996.

Director General's Administration

On 18 October 2005, a court order placed Elandskloof under the administration of the Director-General of Land Affairs in terms of section 13 of the CPA Act. More than 80 Elandsklowers signed a petition in support of this. The DLA appointed MTP consultants as their administrative agents in this regard.

A number of factors motivated the Court to grant the administration order. In essence, the ECPA had become dysfunctional. Management structures and functions were non-existent, and some residents appropriated community land, assets and resources for themselves. Community infrastructure had been vandalised by Elandsklowers themselves, including the administrative office and the accounting records, while boundary beacons demarcating residential plots in the village had allegedly been removed. The orchards, the machinery and the irrigation infrastructure of the community had not been maintained. There was little cohesion in the community and a former chair of the main committee had been taken to court by a group of Elandsklowers for alleged misappropriation of funds. Community meetings had ceased and there were severe conflicts between community members on the farm and also between those on the farm and those staying elsewhere in the Western Cape. A business plan which had been developed in the 1990's had never been approved by the DLA and much of it had not been implemented. There were also potential negative environmental impacts. Pit latrines which had been allowed as a temporary measure became dilapidated. Refuse was piling up as it was not collected and there was no refuse processing facility on the farm. Institutions and individuals ("friends of Elandskloof") who had been willing to assist the Elandsklowers distanced themselves from the project due to increasing levels of hostility (Pienaar 1996, MTP 1996).

4. LITERATURE ANALYSIS

There is a wealth of critique on CPA's, and Elandskloof has served as one of the oft-cited cases of what can go wrong. Everingham and Jannecke (2004), using Elandskloof as one of the bases of their enquiry, observe that the government under the African National Congress (ANC) has (in many rural cases - author) followed a rights-based approach to land restitution to restore land in communal form to bring justice to those who suffered past abuses. This is presumably as opposed to a developmental approach as they do not suggest alternatives. They argue that: "the rights enquiry paradigm romanticised a unified community derived from a false dichotomy between individual and communal property", which tends to ignore the competing interests of individuals and factions. Cartwright (2007) echoes this view. Communal property arrangements were drafted hastily, based on local conditions, in order to return the land quickly. Ultimately, communal property holding entities as the correct form of juridical person for land reform and restitution are questionable (Everingham and Jannecke 2004).

In contrast, Bosch and Hirschfeld (2004) argue in favour of a rights based approach, but that the local level rules should be established before the land is handed over. The specification of the rights to use, benefit and share resources at the outset in order to facilitate the beneficiaries investing capital and labour, is a trite solution to secure a functioning communal property institution. Perhaps strongly influenced by the work eventually written up by Pienaar (2006), and the Elandskloof case in particular, Bosch and Hirschfeld (2004) argue that prior to occupation, the land tenure system and the tenure rules must be clearly defined and agreed upon. The tenure rules governing who may hold a particular right and issues of transferability should be addressed up-front. Analysis of governance and accountability serves little purpose unless these are clear (and well known and accepted to all affected by them – author).

Barry and Mayson (2000), and Bosch and Hirschfeld (2004), note the dialectical nature of some communal systems in which a community has to be reconstructed and put back on the land. As a generalisation, such a community can be expected to act in solidarity with a unity of purpose. However, schism can be expected to occur once this is achieved as individuals and factions compete for power with the concomitant access to land and other resources. Bosch and Hirschfeld (2004:10), citing Pienaar (2000, 2002) note: “Prevarication by leadership exists as a general trend since making decisions appears to cause greater tensions than not making them. Other problems concern either no allocation, or inequitable allocation of assets based on self help; mismanagement; the squandering of opportunity; a disregard for internal rules; and infrastructure and land are left to deteriorate.”

Hall (2003) argues more strongly for a rights-based paradigm as opposed to the developmental paradigm. State subsidies and assistance are at present in South Africa tied to development plans. She argues that communities should not be bound by business plans, land use plans and development plans in order to conform to the wishes of the State. Restitution implies returning what was lost, and the State should have no greater rights in the land now than when it was lost. In essence, Hall’s argument is that restitution claimants should have the right to use their land as they see fit - within the bounds of the obligations accompanying those rights.

In synthesis, most commentators argue that communal property holding systems require clear sets of rules and management systems which are not dissimilar to the juridical persons to which CPA’s were mooted as an alternative i.e. Shareblocks and Sectional Titles. Everingham and Janecke (2004) challenge the rights-based approach and argue that CPAs were based on a romantic notion of a sense of community. They posit that perhaps communal models are inappropriate as a land tenure form and individualised tenure models should be the preferred alternative. This hypothesis ignores the range of ideas and opinions which existed when the ANC government assumed power in 1994. Certainly, in the author’s observation, the concept of schism and solidarity within communities and the difficulties of family title systems and CPA’s appeared to be well understood in workshops run by the Department of Land Affairs under Nelson Mandela’s presidency, soon after the 1994 elections (e.g. Barry 1998, Barry and Mayson 2000).

5. ELANDSKLOOF TODAY

Cartwright (2007) did an economic study of Elandskloof as part of an attempt by the DLA to get Elandskloof functioning. In essence his findings confirm what elements within the DRC had debated since 1909; Elandskloof cannot support a large community. There is not enough water and arable land for the 74 families currently living on site.

A number of Elandsklowers have appropriated land for farming on their own account. Cartwright (2007:10) observes that some of the private enterprises such as “buchu and *Eriocephalus*, private orchards, rooibos tea, wild harvesting of mountain buchu and flowers and animal husbandry” appear to be thriving. However, many of these are on communal land, using communal water, and it appears rent is not being paid to the ECPA.

Cartwright (2007) proposes a number of options. The one he favours involves the leasing out of assets to juristic persons, from within the community or outside, and that the ECPA committee functions are to administer these leases. That is, they should collect the rents and administer the conditions of the lease such as water usage and adherence to ECPA and statutory land use rules and regulations.

Social cohesion and management structures will have to be established first though. As mentioned earlier the DRC implemented a similar strategy in the 1950’s, and major conflict between the farm manager and Elandsklowers ensued. The ECPA main committee also attempted to keep a commercial farming operation going in 1997, but this failed.

The appointed administrators, MTP consultants, have been tasked with turning the Elandskloof situation around. In essence, they were asked to deal with the internal conflicts, re-establish the ECPA functions and implement a two year development plan.

Initially, wide-ranging consultations were held. Monthly ECPA meetings were reinstated as per the main committee’s function in the ECPA constitution. At a functional level, recovery programmes were initiated to produce achievable short term results. The irrigation system was repaired, the accounts were set in order and a short-term plan was put in place to rescue the orchards, secure income from harvesting them, generally get the farming operations underway, and manage the harvesting of communally owned natural resources such as buchu in an orderly fashion. A door-to-door census was conducted which also incorporated the development of an inventory of communal land and water used by individuals, moveable communal assets held by individuals, and stock on site held both by Elandskloof residents and non-residents. Intangible ideals such as community cohesion were being addressed using a number of methods such as encouraging community involvement in the agricultural operations and attempting to inculcate a sense of pride in the historical buildings at Elandskloof.

MTP (2006) echoed Pienaar (2006) that for further conflict to be avoided membership should be finalised and the land tenure rules with respect to use of communal land and administration should also be finalised. The fact that these rules were not finalised at the

outset is linked to the many internal conflicts as well as the competition for water, land and access to power. In spite of the membership rules not being established, they also argued for a cut-off date for people to return to Elandskloof or otherwise lose their rights.

This section has highlighted the multifaceted and complex problems of rescuing Elandskloof as a CPA structure and viable community. The following section focuses on the subjective experience of Elandsklowers throughout this process of resettlement and redefinition as a community. It provides a level of local reflection which is essential in the interpretation and analysis of the particular functioning of Elandskloof as an example of communal land provision.

6. PERCEPTIONS OF ELANDSKLOWERS

Today, most people at Elandskloof lead multifaceted livelihoods. They are involved in farming, small business, small-scale stock keeping, and provide seasonal labour to surrounding farmers. In many ways this is similar to life as it was on the mission.

In 2007, ten individuals and household groups of Elandsklowers who were living on the farm were interviewed during three visits to Elandskloof. Four of those interviewed had been involved in the main committee. The sample is biased by the fact that those interviewed were not working on the communally owned farming operations at the time. There may have been different opinions expressed by people who were working on the farm. Outside of Elandskloof, two former main committee chairs who lived in Citrusdal, were interviewed and a person living in Cape Town who was involved in an initiative to revive the project, was interviewed.

These interviews were augmented by interviews with officials, planning consortium professionals, the people who had been / were administrators on site and a number of researchers. This aspect of the study provided context to the current situation at Elandskloof and to the responses provided by Elandsklowers.

Elandsklowers were asked to relate their life histories, particularly their experiences of the eviction and restitution at Elandskloof if they were part of those events. They were then asked what had been positive about their return to Elandskloof, what problems had been encountered, and what problems remain. They were also asked to envision Elandskloof in ten or twenty year's time, and what would happen if the State offered no further assistance at all.

In response to what had been positive about their return to Elandskloof, the immediate response of most of the participants was that nothing positive had happened. However, upon reflection, they noted that they had acquired their land. The strongest negative reactions came from people who had been involved in the committees and from the children of committee members. Others who had not been involved with the planning and management of Elandskloof were more positive about their experiences and current life on the farm. Upon further reflection, those who reacted angrily initially were in accord with the rest of the group on the farm in noting that they were independent, and they were small-scale farmers in their

own right. There was a small-scale farmers cooperative which had developed for which they grew buchu and rooibos tea. It was peaceful and cheap to live at Elandskloof.

When probed about the problems encountered and those that remain, the argument emerged again and again that the state had lied to them and not delivered on what they perceived to be promises of resources and assistance. Some people were extremely angry, and bitterly disappointed that the promises of housing and infrastructure had never been fulfilled. To these people it was the government's responsibility to supply services and housing, and to maintain the access road running on ECPA land, not theirs: "Restitution means getting back what you lost, not just the land." They mentioned the promises made at the handover ceremony in 1996 and other promises which were not fulfilled. There were promises of practical and physical help to farm, and promises of financial advice too. A significant group of the Elandsklowers who were interviewed contended that none of these had happened.

One cluster of Elandsklowers felt that the State's failure to deliver on their expectations was the primary factor underlying their problems. However, they did acknowledge that internal strife among the Elandsklowers, particularly on the farm itself, contributed to the dysfunctional situation. Conflicts arose around resources which had been promised, such as houses, and who would be the recipient. Some resented that people who they believed did not really need a subsidised house were going to get one, and others who did not qualify for State housing, needed assistance with housing. The other issue was the grabbing of land for personal use and harvesting of buchu for personal gain when this was a communal resource.

One small group felt that the internal strife was not that strong any longer. One elderly woman noted that a lot of the Elandsklowers who had been there at the actual eviction were dying off and the strife between their descendents is not as strong nowadays. However, others argued that there had been intense nepotism and favouritism in land and resource allocation and the factional divisions remained strong.

A focal point of anger for the sample of Elandsklowers interviewed was sanitation. Elandsklowers did not have waterborne sewerage which many in the sample interviewed in 2007 asserted they were promised at the outset. However, they claimed that they were barred from using pit latrines, and so some of them resorted to using the bush instead. Two people in different groups conjectured that a white person would not go to the toilet in the bush. One told how his late wife had had to use a bucket in the lounge in winter in the morning and then dispose of material in the bush later in the day. In his observation, farm workers on surrounding farms have a water closet with a septic tank: "Why were Elandsklowers not allowed these?"

There was a lack of consensus over Elandskloof being put under administration, albeit that some 80 Elandsklowers' had supposedly signed a petition to motivate the administration order. A small group were very unhappy about the administration. They felt it was unnecessary and they distrusted the administrators. In contrast, others were very happy with the administrators and felt they were doing a good job. However, one person pointed out that there was a lack of continuity with the administrators - three groups of people had worked as

administrators over two years – and he was concerned about what would happen when the administrators left.

The lack of economic opportunity was seen as a problem; and it is an issue which has been raised by Elandsklowers in various forums for a number of years. Two people noted that it had been a major mistake to neglect the existing commercial farming. There has been no progress and no development and the commercial farming was crucial to the sustainability of Elandskloof. Their livelihoods are multifaceted by necessity, as the sources of income from Elandskloof are not sufficient on their own.

A younger respondent bemoaned that the lack of facilities for the youth, such as schools and sporting facilities. She did not see herself remaining at Elandskloof when her children reached school-going age. Older respondents noted that substance abuse, especially marijuana and alcohol are a problem, especially amongst the younger Elandsklowers. One woman noted that people were very religious when Elandskloof was a mission and there was no drunkenness. They used to make their own honey beer, but it was not strong. Today, wine is a curse as there is drunkenness and fighting.

Tensions with people living off the farm (the “outsiders”) also emerged in the interviews. A number of participants argued that outsiders had a great deal of (voting) control over the farm, yet they (outsiders) did not understand how things worked on the farm. The diaspora had been away from Elandskloof for many years, and were perceived as obstructing the locals on the farm and stopping important decisions from being made and executed.

Interviewees expressed concern over the carrying capacity of the land. At the outset sustainable development considerations should have had preference over legal restitution rights. Echoing the representations made to DLA before the land was handed back, a few argued that only the original 72 families who were evicted, not their descendents, should have been allowed to return. Allocating the available land to 308 people was impractical. Only direct descendents and the children who actually stay in the house should have been allowed back. Two groups still strongly resisted the concept of a village.

Some community members’ expressed anger at the administration was exacerbated by a sense of being dictated to. A former committee chair, who now lived in Citrusdal, complained that senior DLA officials tended to come to meetings and dictate to the Elandsklowers. They did not undertake planning and development in a participatory manner, as the planning consortium had done. A physical manifestation of this perception occurred when the Elandskloof community forced a Cederberg Municipality councillor to leave the site in 2007 when he visited Elandskloof and “dictated” to the community that they would have to use composting toilets instead of water borne sewerage. An outside agent who witnessed the event remarked that people might have assaulted the councillor had he not left.

When asked how they would turn the situation around and what they envisioned for Elandkloof in ten or twenty year’s time the first reaction did not address the question. The majority of respondents on the farm, with the exception of one retired couple, asserted that

the state had to stop lying to them. Furthermore, the state had to fulfil its promises. When pressed on the actual question above, the general response was that Elandskloof would evolve slowly from the current situation. Some residents are managing to farm on a small scale, while engaging in other economic activity at the same time, and they would continue to do.

A former main committee and building committee member agreed with the above vision, but he emphasised that there were some critical issues which needed to be addressed first. He noted that the main committee had to enjoy respect and power as a legitimate institution. People have to adhere to the rules and directives. In his opinion, one reason that the main committee stopped functioning was that committee chairs had taken on the role of a chief executive, rather than that of a leader and facilitator of democratic processes. Some chairs had ignored generally agreed committee decisions and implemented their own agendas. The conflict has to stop, however, and it remains very difficult to police and enforce the rules. In the past, if there were transgressions they came before the main committee. However, the supposed transgressor's family members on the committee would support them and a consequence of the disharmony result was that the cases were not resolved.

However, most of the respondents viewed it as the state's role to get Elandskloof fully functioning. The administrator should facilitate the development of sanitation, power and housing and then the main committee will have to be reinstated with new people in place. Two people argued that they needed to get a proper farm manager and the farm should be able to support him/her and pay his/her salary. The previous manager had not been well-supported.

In response to the question of what would become of Elandskloof if there was no further state assistance, the general response was that the Elandsklowers would have to help themselves and develop Elandskloof slowly and incrementally. "If you don't work then you don't eat" is how one woman, who had been vociferous in the sufferer group, put it. They would have to overcome the problem of committee divisiveness themselves.

There is a small group of Elandsklowers based in Cape Town who are also working to get the project back on track. Echoing the views of a DLA official interviewed in 2002, one person in this group argued that a CPA was not the right juristic person for Elandskloof. In her opinion, a trust could be used to develop a business plan, run a commercial farm and control the communal land. Beneficiation of buchu could be undertaken on site and proper training should be part of this plan. However, she noted that resource grabbing (e.g. buchu) and land grabbing were still a problem. Why a juridical person such as a trust should deliver better results than a CPA, particularly social cohesion, conflict management and the formulation and enforcement of rules, was not clear.

7. ANALYSIS AND CONCLUSIONS

Elandskloof is symptomatic of many of the dilemmas faced by South Africa's new government in the aftermath of apartheid. A major task was to address past injustices by delivering land speedily to those who lost it and thus ensure social and political stability. In a

stable socio-political situation, a project such as Elandskloof would probably have taken a number of years to plan and implement. Feasibility studies, the rules concerning who would benefit, how they would benefit (e.g. monetary compensation or a right to reside on the farm), and the rights and obligations of the beneficiaries would have been established and ratified long before the land was occupied.

New governments in rapidly changing post-conflict situations are seldom afforded such an indulgence. Furthermore, the peaceful, negotiated transfer of power in the South African case meant that government had to adopt a far more consultative and participatory approach than if there had been a clear winner in the conflict.

Much of the criticism of the rights-based approach to land restitution is misplaced, as post-apartheid political forces compelled this approach. The government had come to power on the basis of a human rights paradigm. It could not then ignore broader ethical expectations that it had to fulfil. Moreover, the restitution legislation stipulates that all potential interest holders be afforded the opportunity to claim a right to membership. However, one failure of the Elandskloof project is that it should also have been made clear at the outset that only a few members could expect to make a living at Elandskloof.

After the first fully democratic elections in 1994, in my observation the newly elected ANC government's higher level motives underlying cases such as Elandskloof were both emancipatory and empowering. They were emancipatory in freeing a group of people and their offspring from the oppressive structural and procedural imbalances which the apartheid system had created, and under which many Elandsklowers had suffered. The project was also supposed to empower a group of people to manage their own land and own agricultural operations individually and in common; a power the Elandsklowers did not have when it was a DRC mission.

In a stable situation, the medium term the risks of a project such as Elandskloof succeeding in attaining these higher level emancipatory and empowerment objectives, and the functional objectives of a socially coherent community and economically independent agricultural entity are immense, let alone in a rapidly changing post-conflict society. Land restitution cases such as Elandskloof are extremely complex. It would be an exceptional leader who enjoys legitimate power, and is possessed with the tenacity and passion to drive the development process in a participatory manner. It is unrealistic to expect a community which is in the process of being reconstructed, and in which membership and access to power is strongly contested, to share a common purpose and support the leadership and themselves have similar levels of tenacity and passion to those required of an effective leader to make the process succeed.

Moreover, management of Elandskloof was done by committee. Unless there is general consensus on the committee, or factions in the committee are organised in the same fashion as political parties, then the committee is unlikely to be able to address the complex challenges faced at Elandskloof.

In Elandskloof, the structural issues which underlie much of the internal conflict arguably rendered it impossible for community leaders to drive a coordinated development plan or for external agents to assist them effectively. There is only enough land and agricultural potential to support a small number of people, and thus coalition formation and competition for access to land and resources should be expected. Added to this are the difficulties of reconstructing a community which had been dispersed in a brutal manner thirty five years before, and where longstanding family disputes which date back to the time when Elandskloof was a mission re-emerged. Whether the state could avoid affording all potential interest holders the opportunity to lay claim to a right as an Elandsklower is debatable. There is an argument that those who were actually dispossessed in 1962 should have had the first choice to return and live off the farming operations. Others could perhaps have had an initial right, such as the right to reside on the farm, which could be converted after a period of residence.

In Elandskloof what exacerbated a the resettlement challenge was that the small group who had originally lead and driven the restitution process, and had had to portray themselves as victims of an injustice to effect the restitution, perceived themselves as being marginalised by better educated people once the hope of restitution became a realisable reality. Thus, instead of community cohesion in seizing an opportunity for empowerment, this group continued to cast themselves as victims as the source of their power in driving their agenda and the consequent schism effectively immobilised development such that the ECPA management structures were dysfunctional from the outset. The fact that the state has not delivered on what some Elandsklowers have asserted were promised to them such as sewerage and electricity (and a tractor that was promised at the handover) also fuelled the victim consciousness, which remains part of the dynamic. The interviews in 2007 indicate that there is still a significant cluster of Elandsklowers who believe it is the state's responsibility to develop Elandskloof as a functional entity. They are aware of what is required if the state offers no further assistance, but they have yet to assume a collective responsibility themselves.

As one external agent pointed out, a lesson from Elandskloof is that implementation strategy should address more than the functional issues of getting the farm up and running. The psychological leap from being traumatised by an injustice to a driver of a functioning agricultural project is immense.

Where the rights based approach can be criticised, is that the community themselves were supposed to formalise the obligations of communal property institution rights holders. Communal land holding systems, be they formal legal entities such as sectional title systems or customary systems, carry an obligation to the day to day functioning of the communal entity. In middle class condominium systems, these tend to be in the form of regular financial contributions. In the case of Elandskloof, there is an argument that membership and the tenure rules should have been established before the land was occupied. In an ideal case this applies, but it was not practical in the Elandskloof case as the land was occupied by the Allandale group and there was not enough land to hold all claimants. However, I argue that the obligations to sustain a claim to membership, and to sustain membership itself, should be more strongly formalised in the CPA Act itself or in similar legislation. Membership

obligations to the Elandskloof CPA could have been formalised in the form of contributions in the form of time and labour, or regular monetary contributions. Failure to contribute should result in loss of membership. However, the proposal that people either return to Elandskloof or lose their rights is impractical; there has never been enough land to accommodate everyone and membership has to include people who live off the farm perhaps with a view to retiring there.

However, enforcement of the rules – including those relating to membership contributions - is a major problem in a restitution case where the land is held communally. Documenting rules and obligations is the first step in the process. It is trite that there is an obligation to obey democratically established rules; but this has been a major problem at Elandskloof. Aligned to this is the inability to enforce the rules, especially when rules are broken by people living on the land itself. Two enforcement options are issuing financial penalties, temporary loss of membership or permanent eviction. Enforcement at Elandskloof has been near impossible without acceptance of the institutions which are mandated to make and enforce the rules and the family ties between “offenders” and those who judge them. Given the level of tension within the Elandskloof community, this may take a long time, perhaps a generation. Moreover, the political implications of a state or other external agency evicting a person from land to which the offender has acquired rights through restitution would be difficult in the early years of a project such as Elandskloof.

At the functional level, the government’s expectations were unrealistic if not naïve. Part of the problem was that the land was occupied by the Allandale group before proper planning and strategy formulation could be completed. However, a lack of proper consultation between the different government departments which had an interest in the farm, the failure to form a steering committee representing these departments and other interested parties, and a feasibility analysis setting out how many people could make a living from the farm and how other Elandskloof residents were expected to make a living, are glaring omissions. The failure to consult properly meant that Elandskloowers reasonably expected the state to subsidise infrastructure and housing. However, supply of many of these was constrained by existing law, policy and institutional matters relating to funding. The planning consortium was left to deal with issues that should have been identified before they commenced their work.

Perhaps a lesson for post conflict situations is the functionalist metrics used to evaluate land reform projects such as Elandskloof. In South Africa, government itself, opposition parties, and the news media, tend to set targets and appraise performance in land reform delivery based on quantitative measures. These measures may relate to the number of houses built to house the poor or the proportion of particular segments of society who own agricultural land. The quality of the outcomes, such as feasibility and long term sustainability measured in terms of the original purposes of these projects (e.g. pro poor housing supplied to people who continue to live in them, a black middle class agricultural sector) feature far less prominently in public debate.

What of the future in Elandskloof? Cartwright (2007) sets out an economic feasibility plan for Elandskloof and the functions that are required to implement this. At the outset, the planning consortium and the Elandskloof leadership did attempt to develop plans and strategies through participatory processes which were very similar to what he suggests. However, the failure of these can be attributed primarily to internal conflicts.

The risks of Elandskloof becoming dysfunctional were very high at the outset, and given the pressures on government to deliver quantifiable land reform and restitution outputs at the time, some of the land reform and restitution projects can be expected to fail. In the long term the ECPA will either resolve its internal problems and develop into a functional system or become insolvent. The state cannot afford to sponsor administration indefinitely, as Elandskloof has become a very expensive project, especially if officials' and NGO workers time is included in the total costs. What is needed is a means to commit ECPA members to fulfil their obligations, especially to adhere to rules and agreements and make regular contributions to the management and administration of the ECPA as an entity. Otherwise, the ECPA may become insolvent and the normal legal processes will ensue and a second wave of evictions will follow.

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