



FINANCIAL COMPENSATION POLICY

This policy is applicable to all claims in terms of the Restitution of Land Rights Act, 1994 (Act 22 of 1994) where a Claimant has opted for restitution in the form of financial compensation.

DOCUMENT CONTROL

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| Managed by: Regional Land Claims Commissioner | Responsible position: Chief Land Claims Commissioner |
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| Contact position: CLCC | Date approved: 02/04/2016 |
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|----------|---------|---|
| Approval | 2 | Valuations by Valuer General, Minimum compensation payable, and equitable compensation for unregistered rights in land. |

- The Financial Compensation Policy outlined below was reviewed and approved by the Minister.
- This Financial Compensation Policy comes into operation on date of signature, and replaces existing policies on financial compensation policies.

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Initials:

GEN

Minister
Nkwinti, GE (MP)

1. DEFINITIONS AND ACCRONYMS

1.1 Definitions

| Term | Meaning |
|-------------------|---|
| Alexkor | Means the judgment of the Constitutional Court, in the matter between Alexkor Ltd and Another v Richtersveld Community and Others (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003); |
| Claim | Means any claim for restitution of a right in land lodged with the Commission in terms of the Restitution Act, or an application lodged with the Registrar of the Court in terms of Chapter IIIA of the Restitution Act for the purpose of claiming restitution of a right in land; |
| Claimant | Means the any person who has lodged a claim within the timeframes prescribed in the Restitution Act, or for whom a claim was lodged including a person, a direct descendant of a person, an estate or a community; |
| Commission | Means the Commission on Restitution of Land Rights; |
| Constitution | Means the Constitution of the Republic of South Africa, 1996; |
| CPI factor | Means an amount determined by the division of the baseline average Consumer Price Index of the year in which the dispossession of rights in land occurred, divided by the baseline and average Consumer Price Index for the year preceding the year of the valuation report, both baseline averages having been determined by Statistics South Africa, and approved for use by the Commission by the Chief Land Claims Commissioner, and adjusted annually; |
| Court | Means the Land Claims Court, or any other competent appeals court; |
| Du Toit Judgment | Means the judgment of the Constitutional Court, in the matter between Du Toit v Minister of Transport (CCT22/04) [2005] ZACC 9; 2005 (11) BCLR 1053 (CC); 2006 (1) SA 297 (CC) (8 September 2005) |
| Equitable redress | Means any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land |

| Term | Meaning |
|---------------------------------|--|
| | after 19 June 1913 as a result of past racially discriminatory laws or practices, including- (a) the granting of an appropriate right in alternative state-owned land; (b) the payment of compensation; |
| Florence Judgment | Means the judgement of the Constitutional Court, in the matter between Florence v Government of the Republic of South Africa (CCT 127/13) [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) (26 August 2014) |
| Historical Valuation Method | Means a valuation conducted in the manner and for the purpose set out in paragraph 10 below; |
| Housing Subsidy | Means the Government Individual Housing Subsidy quantum approved by the Minister responsible for Human Settlements and approved for use by the Commission by the Chief Land Claims Commissioner, and adjusted annually; |
| Improvements | Means the buildings and other improvements that were permanently affixed to the land, to which the claim relates, at the time of dispossession and in respect of which there is evidence to prove their existence; |
| Just and equitable compensation | Means compensation determined in terms of section 25 (3) of the Constitution of the Republic of South Africa, 1996, calculated at the date of dispossession of the Claimant's rights in land, and includes any other consideration that is just and equitable; |
| Minister | Means Minister of Rural Development and Land Reform; |
| Mphela Judgment | Means the judgment of the Constitutional Court, in the matter between Mphela and Others v Haakdoornbult Boerdery CC and Others (CCT 42/07) [2008] ZACC 5; 2008 (4) SA 488 (CC); 2008 (4) BCLR 675 (CC) (8 May 2008); |
| Restitution | Means the restoration of a right in land; or equitable redress; |
| Restitution Act | Means the Restitution of Land Rights Act, 1994 (Act No 22 of 1994); |
| Restoration | Means the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices; |
| Registered right | Means registered title to the land, or any other right in land |

| Term | Meaning |
|---------------------|--|
| | that is recorded with a government office in which rights in respect of land or minerals are registered or recorded for public record in terms of any law; |
| Right in land | Means any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question; |
| Unregistered rights | Means a right to occupy or use the land recognised and protected by law, not registered nor required to be registered and includes the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question; |
| Valuer General | Means the Valuer General appointed in terms of the Property Valuation Act, 2014 (Act 17 of 2014) |

1.2 Acronyms

| Term | Meaning |
|-------------|---|
| CLCC | Chief Land Claims Commissioner; |
| CPI | Consumer Price Index. The CPI shall be used as the metric to calculate changes over time in the value of money as set out in the Florence Judgment. |
| RLCC | Regional Land Claims Commissioner; |
| PFMA | Public Finance Management act, 1999 (Act No 1 of 1999) |

2. TITLE

The Financial Compensation policy is a management tool used by the Commission to determine the amount of compensation payable to a Claimant who is entitled to restitution, and has confirmed in writing the option for restitution in the form of financial compensation.

3. POLICY STATEMENT

The amount of compensation to be paid to a Claimant (that has opted for restitution in the form of financial compensation) that is entitled to restitution shall be determined in accordance with this policy, read with the Restitution Act. This policy replaces prior policies on the determination of financial compensation.

4. PROBLEM STATEMENT

- 4.1 The Constitution of the Republic of South Africa Act, 1996 provides for a right to restitution or equitable redress to persons or communities dispossessed of property, after 19 June 1913, as a result of past racially discriminatory laws or practices, to an extent provided for in an Act of Parliament.
- 4.2 The Restitution Act gives effect to the right to restitution in the Constitution in respect of rights in land, and provides the framework through which that right is to be given effect. The Restitution Act defines a Right in Land, Equitable Redress, Restitution and Restoration. Those definitions have been included in paragraph 1.1 above.
- 4.3 Following various reviews of the manner in which financial compensation was determined, the Minister approved a financial compensation policy in July 2013. That policy sought to standardise the manner in which financial compensation is determined. Prior to that policy, there had been different methods of determining financial compensation payable to successful Claimants resulting in inequity.
- 4.4 The absence of a regulatory framework or case law giving guidance on how to determine just and equitable compensation in terms of the Constitution has made it difficult for the Commission to determine just and equitable compensation particularly to those dispossessed of rights in land in the form of Unregistered Rights.
- 4.5 The Valuer General is currently in the process of codification of section 25 (3) of the Constitution. This will go a long way in resolving the challenge referred to above. Once the necessary regulatory framework has been finalised, this policy will be reviewed and aligned to that framework.
- 4.6 This policy document therefore seeks to ensure consistency and standardization of the determination of just and equitable redress payable to a Claimant whose claim meets the requirements of restitution; and addresses shortcomings in relation to its application to land claims for financial compensation where the right in land claimed is an Unregistered Right.

5. PURPOSE

The purpose of this policy is to standardize the manner in which financial compensation to Claimants that are entitled to restitution, and have opted for financial compensation, in terms of the Restitution Act, is to be determined.

6. APPLICABLE LEGISLATIVE PROVISIONS

- 6.1 The Restitution Act provides for the settlement of land claims by the Minister in terms of section 42D of the Restitution Act if there is an agreement about how a claim must be settled and the Minister is satisfied that the claim meets the requirements for restitution; or by the Court in terms of section 35 of the Restitution Act.
- 6.2 The Restitution Act makes provisions for the restoration of a right in land or equitable redress to a person, direct descendant of a person, an estate, or a community dispossessed of a right in land, after 19 June 1913, as a result of past racially discriminatory laws or practices, and who has lodged a claim within the timeframe provided for in section 2 (1) (e) of the Restitution Act. No person is, however, entitled to restitution of a right in land where Just and Equitable compensation was received for the dispossession.
- 6.3 The determination of just and equitable compensation payable is informed by the application of the factors set out in section 25 (3) of the Constitution at the time of dispossession.
- 6.4 The Restitution Act, in section 33 read with section 42D (1A), requires the Minister and the Court to consider various factors before making any award, including the following:

- “(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”

7. SCOPE

- 7.1 This policy applies to all claims in terms of the Restitution Act where a Claimant that is entitled to restitution has selected redress in the form of financial compensation. This shall include Claimants who lost rights in land:
- 7.1.1 in the form of Registered rights in land;
- 7.1.2 in the form of Unregistered Rights in land;
- 7.1.3 in the form of Indigenous or customary law ownership rights, as was recognized in the Alexkor Judgment;
- 7.1.4 whether compensation was paid, e.g. expropriation or forced sale; or where compensation was not paid, at the time of dispossession; and

7.1.5 in the form of tenancy rights in claims on urban land; including back yard dwellers in the former black townships who were victims of racially discriminatory laws or practices.

7.2 This policy shall apply to claims on urban and rural land.

7.3 This policy shall apply to all Commission Officials involved in the negotiation of claims for financial compensation.

8. OBJECTIVES

8.1 The objectives of this policy are:

8.1.1 to ensure consistency in the determination just and equitable redress payable to a Claimant whose claim meets the requirements of restitution, and who has opted for restitution in the form of financial compensation;

8.1.2 to standardise, across restitution claims (where a Claimant has opted for restitution in the form of financial compensation), the manner in which the compensation referred to above is determined.

9. PURPOSE OF FINANCIAL COMPENSATION

9.1 The Constitutional Court in the Florence Judgment held that “the purpose of financial compensation is to compensate the Claimant in order to restore them to the position they would have been in immediately after the dispossession. Nothing in the scheme of the Restitution Act provides that financial compensation shall be an equivalent of restoration in kind. A Claimant is entitled only “to the extent provided by an Act of Parliament”. And the Restitution Act makes it clear that compensation may be granted in lieu of the land claimed or that it will be determined as an equivalent of the restoration of the subject land”.

9.2 Financial Compensation is therefore payable for a right in land as defined in the Restitution Act, and not for any other rights that the person may have had which are not rights in land as defined in the Restitution Act (e.g. business rights, etc).

10. HISTORICAL VALUATION

10.1 The Restitution Act requires that a determination be made on whether an amount, if any, or any other consideration received in respect of dispossession is just and equitable calculated in the manner determined in section 25 (3) of the Constitution. In order to do so, a valuation of the actual right in land that the Claimant was dispossessed of, calculated at the time of dispossession is to be conducted, i.e. a historical valuation.

- 10.2 The Valuer General, or any other registered valuer appointed by, or in consultation with, the Valuer General shall be required to determine the market value of the right in land that the Claimant was dispossessed of, as at the time of dispossession. Information regarding nature of the right in land that the Claimant was dispossessed of and the date of dispossession shall be provided to the Valuer General by the Commission.
- 10.3 Once the market value has been determined, the valuer and, or, any other appropriate professional shall apply the factors listed in s 25(3) of the Constitution, as may be applicable, as at the date of dispossession, which will lead to an upward or downward adjustment. The end result will be just and equitable compensation for the right in land, the Claimant was dispossessed of, that should have been paid at the time of dispossession.
- 10.4 If the just and equitable compensation so determined is higher than the amount paid at the time of dispossession the difference between what was paid shall be determined, and converted into present monetary value using the CPI factor.
- 10.5 Where no compensation or any other consideration was paid at the time of dispossession, the whole just and equitable compensation so determined shall be converted into present monetary value using the CPI factor.
- 10.6 Where there were Improvements belonging to the Claimant, at the time of dispossession, and the value of those improvements cannot be determined as part of determining market value, an amount equal to the Housing Subsidy shall be payable in addition to the amount determined in terms of paragraphs 10.4 or 10.5 above.
- 10.7 Further guidance on how to conduct a historical valuation, or to apply the factors referred to in section 25 (3) of the Constitution may be obtained in the Mphela, Du Toit and Florence Judgments.

11. POLICY PROVISIONS

11.1 In determining financial compensation payable to a successful Claimant, the Commission shall be guided by the nature (relativity) of rights in land of which the Claimant was dispossessed and the extent of land on which those rights were held. Compensation shall be determined as set out below.

11.2 Determination of financial compensation payable to a Claimant dispossessed of Registered Rights

11.2.1 This category relates to persons or communities that were dispossessed of:

- (i) registered title to the land, or
- (ii) any other right in land that is recorded with a government office in which the rights in land or minerals are registered or recorded for

public record in terms of any law. An example, without limiting the generality of the foregoing are leases registered against the title deed in terms of section 1 (2) of the Formalities in Respect of Leases of Land Act, 1969 or any other prior law; or registered Quitrent rights.

- 11.2.2 A copy of the instrument in which the right was recorded, or a certificate confirming the existence of that right in land issued by the person in charge of the government office in which the right in land was registered, verified to the satisfaction of the Regional Land Claims Commissioner, shall be required in order for the compensation to be determined in terms of this category.
- 11.2.3 In this category compensation shall be determined using the Historical Valuation Method.
- 11.2.4 The valuation shall be for the actual right in land the Claimant was dispossessed of, registered and confirmed in the manner set out above. It must be pointed out that not all registered rights are ownership or equate to ownership. This will be taken into account when valuing the registered right.

11.3 Determination of financial compensation payable to a Claimant dispossessed of Customary or Indigenous Law Ownership, or rights akin to ownership

- 11.3.1 In the Alexkor Judgment the Richtersveld community claimed that it was dispossessed of ownership under common law or indigenous law. They successfully argued that ownership under indigenous law amount to a customary law interest referred to in the definition of a right in land.
- 11.3.2 The court stated that indigenous law is a law that must not be seen through the common law lens, but that its validity must be determined by reference not to the common law but to the Constitution. The court warned that in applying indigenous law one must be considerate of the fact that is a system of law that is not written down but practiced and passed on from generation to generation. It has its own values and norms.
- 11.3.3 The court also stated that "indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it."
- 11.3.4 Finally, the court stated that "the determination of the real character of indigenous title to land therefore "involves the study of the history of a particular community and its usages." So does the determination of its content.

- 11.3.5 This category therefore relates to persons or communities that were dispossessed of a right in land in the form of ownership rights in terms of customary or indigenous law; or rights akin to ownership.
- 11.3.6 The rights akin to ownership include instances where the dispossessed person or community were entitled to ownership but for reasons beyond their control could not obtain ownership. An example is where there was an agreement for the purchase and sale of land and the dispossessed person or community had paid the purchase price but the land had not been transferred prior to the dispossession, as was the case in the Florence matter.
- 11.3.7 The dispossession of the right in land, or right in land akin to ownership, must have taken place.
- 11.3.8 The Claimant must provide information that will satisfy the Minister (of section 42D) or the Court (section 35) that they were dispossessed of a right in land in the form of indigenous law ownership or a right akin to ownership, in the manner set out above and detailed in the Richtersveld Judgment.
- 11.3.9 In this category compensation shall be determined using the Historical Valuation Method. The right in land to be valued will be an ownership right.
- 11.3.10 The valuation shall be for the actual right in land the Claimant was dispossessed of, and confirmed in the manner set out above.

11.4 Determination of financial compensation payable to a Claimant dispossessed of unregistered land rights

- 11.4.1 This category relates to persons or communities that were dispossessed of an Unregistered Right including a right to occupy or use the land recognised and protected by law, not registered nor required to be registered.
- 11.4.2 This category includes the interest of a labour tenant and sharecropper, a customary law interest less than ownership, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.
- 11.4.3 Reference to the recognition and protection by law of an Unregistered takes into account recognition that was subsequently given to rights recognised after the adoption of the Interim Constitution of the Republic of South Africa, 1993 and the (final) Constitution.
- 11.4.4 In this category compensation shall be determined using the Historical Valuation Method. The right in land to be valued will be the actual Unregistered Right the Claimant was disposed of.
- 11.4.5 ALTERNATIVELY to the Historical Valuation Method in determining compensation for this category of rights will be the payment of the Housing Subsidy for the right in land the Claimant was dispossessed of and a further

Housing Subsidy for the improvements belonging to the Claimant, at the point of dispossession. In other words, Housing Subsidy multiplied by two.

11.5 Determination of financial compensation payable to a Claimant dispossessed of tenancy rights in an urban areas

11.5.1 This category includes tenants in urban areas, including back yard dwellers who were dispossessed of their tenancy rights as a result of past discriminatory laws or practices.

11.5.2 The compensation payable in this category shall be an amount equal to the Housing Subsidy, payable to each verified household that was dispossessed in the manner set out in section 2 of the Restitution Act.

12 MINIMUM AMOUNT PAYABLE

12.1 The determination of what is just and equitable compensation is not a mathematical exercise, as was determined by the Constitutional Court in the matter of Mphela Judgment. In the absence of a regulatory framework or case law giving guidance on how to determine just and equitable compensation in terms of the Constitution steps must be taken to ensure equity.

12.2 In order to ensure redress that is just and equitable, and where the compensation amount payable for any right in land is less than the Housing Subsidy, the Housing Subsidy shall be payable to each qualifying household.

13 VALUER GENERAL

13.1 The Office of the Valuer General is autonomous institution. The Valuer General is impartial, must act without fear, favour or prejudice; but is accountable directly to the Minister.

13.2 As part of his or her functions, the Valuer General is required to conduct valuations of properties for land reform purposes, including Historical Valuations. He is also required to determine matters to be reflected in a valuation report; codify section 25 (3) of the Constitution; and make recommendation to the Minister regarding the criteria for valuing properties for land reform purposes, procedures and guidelines for the valuation of properties (excl. the method for valuations), system to monitor compliance with the criteria and procedures.

13.3 Approved documents referred to in paragraph 13.2 above shall be applicable in the determination of compensation set out in this policy. Where there is no alignment between this policy and those documents, this policy shall be reviewed accordingly.

14 MANNER OF PAYMENT

The Chief Land Claims Commissioner shall determine the method / manner of payment of financial compensation awarded in terms of section 35 or section 42D of the Restitution Act, ensuring that where an award is made to a community all the members of the dispossessed community shall have access to the compensation on a basis which is fair and non-discriminatory towards any person and which ensures the accountability of the person who holds the compensation on behalf of such community to the members of the community [section 42D(2) or 35 (3)]. Where compensation is to be paid to more than one direct descendant the compensation shall be divided not according to the number of individuals but by the lines of succession [section 2 (4)].

15 ROLES AND RESPONSIBILITIES

- 15.1 The Regional Land Claims Commissioner shall be responsible for the implementation of the financial compensation policy, as the official delegated the function of negotiating claims on behalf of the Minister.
- 15.2 The Director: Quality Assurance shall be responsible to monitor application and compliance with the financial compensation policy.

16 NON COMPLIANCE

Non-compliance to financial compensation policy and other applicable policies, standards and procedures will result in disciplinary action in accordance with the Code of Conduct applicable in the Public Service.

**SIGNED BY THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM, IN
PRETORIA, ON THE DATE MENTIONED BELOW.**



**NKWINTI, GE (MP)
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM**

DATE: 02/04/2016