

# RESEARCH Report 28

## Bakwena ba Mare a Phogole (Klipgat) Community Restitution Claim

*Susan Tilley and Ntombizabantu Nkazane*



Belgische Technische Coöperatie nv  
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COMMISSION  
ON RESTITUTION  
OF LAND RIGHTS

DEPARTMENT OF  
LAND AFFAIRS



**PLAAS**  
PROGRAMME FOR LAND AND AGRARIAN STUDIES  
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*This document forms part of a series of reports researched and written by the Sustainable Development Consortium, led by Phuhlisani Solutions, on behalf of the Commission on Restitution of Land Rights and Belgian Technical Cooperation.*

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# Acronyms

ABET	Adult Basic Education and Training
ARC	Agricultural Research Centre
ARDF	Agricultural Rural Development Finance
CASP	Comprehensive Agricultural Support Programme
CLCC	Chief Land Claims Commissioner
CPA	Communal Property Association
CRLR	Commission on the Restitution of Land Rights
DLA	Department of Land Affairs
DoH	Department of Housing
DME	Department of Minerals and Energy
DoA	Department of Agriculture
LRC	Legal Resources Centre
NGO	Non-governmental Organisation
RDG	Restitution Discretionary Grant
RLCC	Regional Land Claims Commission
Section 42D	Section 42D of the Restitution of Land Rights Act 22 of 1994, as amended
SDC	Sustainable Development Consortium
SP	Strategic Partner
SPG	Settlement Planning Grant

# Executive summary

This diagnostic study examines the case of the restoration of the remaining extent of the farm Klipgat 18 IQ, falling under the Ventersdorp Local Municipality in the North West province, to the Bakwena ba Mare Phogole community in July 2000. The restored land of the Klipgat farm is approximately 873 ha in extent.

This report outlines the community's attempts to develop and use the land that has been restored to it in terms of the Restitution of Land Rights Act 22 of 1994 ('Restitution Act'). It examines the nature and content of the post-settlement support received and draws lessons from the community's experience that might inform the development of a strategy for post-settlement support provision by land reform institutions and associated agencies.

At the outset, the report describes the location and physical features of the restored land, the history of ownership and dispossession, and the changes in land use that took place in the post-dispossession period. The process of the claim lodgement, verification, negotiations and settlement are then traced. The developments and support provided during the post-settlement phase are examined in some detail.

Current activities taking place on the land include:

- a lease agreement with a mining company, Etruscan, for the extraction of alluvial diamonds
- a piggery that supplies local markets with pork
- grazing of 20 cattle and 6 sheep owned by community members
- an arts and crafts project established by a group of five women who are making beaded necklaces and earrings

- a brick-making project that has supplied bricks to local housing projects and has the potential to make sufficient bricks for the proposed housing project on the farm.

The study concludes with an analysis of critical strategic issues, as follows:

- The definition of membership is unclear.
- Tensions within the communal property association (CPA) are threatening to undermine the progress made by the community.
- Protracted discussions and planning regarding development activities have taken place. However, these have not been followed through with direct action or implementation, partially as a result of the community becoming immobilised by ongoing internal tensions and a lack of resolution about the way forward, and partially due to a lack of support from the Regional Land Claims Commission (RLCC) in the form of grants as well as technical and organisational support.
- The community remains unclear about whether projects that are established on the farm are to be viewed as communal projects or as the property of individuals.
- Ownership rights and subsidies regarding housing settlement on communal land require further investigation.
- The relationship between the mining company, which has mineral rights on the community's land, and the CPA remains an unequal one. In addition, the terms and conditions of the agreement between the two parties are not well defined or understood by the community. The community is unable to quantify the potential benefits that might accrue from their valuable asset.

# Key features of the Klipgat restoration

<b>Province</b>	North West
<b>Date claim lodged</b>	9 July 1996
<b>Date settled (Section 42D)</b>	2 April 2001
<b>Total settlement amount</b>	R 1,820,000 (R1.8 million)
<b>Size of land awarded</b>	873 ha
<b>Type of legal entity</b>	Communal property association (CPA)
<b>Number of members</b>	Approximately 500
<b>Developmental activities</b>	<ul style="list-style-type: none"> <li>• A piggery has been developed and is operational.</li> <li>• The CPA receives R6,000 per month from a diamond mining company as rental and is supposed to receive interest on its equity share in the mining business.</li> <li>• A brick-making project has been started.</li> <li>• A group of women have established a bead-making project.</li> </ul>





# 1. Property description – location, physical features and basic services

The remaining extent of the farm Klipgat 18 IQ, in the North West province under the jurisdiction of the Ventersdorp Local Municipality, was restored to the Bakwena ba Mare Phogole community in July 2000.

## Location

The farm Klipgat 18 IQ is located north west of the town of Ventersdorp in the Rustenburg district of the North West province.

## Extent of land area

There is a discrepancy across various documents in the recording of the precise extent of the restored land. The valuation report (CA Young Valuations 1999) states that the land area is 872.9161 ha in extent. This is in agreement with the title deed. However, the extent of the land transferred to the CPA, as reflected in the Memorandum: Mandate to Negotiate (2000) and the Agreement of Sale (2001), is 872.8060 ha. The Department of Land Affairs (DLA) research report on Klipgat No. 18 IQ states that the land area is 872.8138 ha.

The community has indicated that a number of their ancestors' graves are located outside the periphery of the farm boundary and that they are not clear why the boundary of the restored land excludes these burial sites. The business plan indicates that the cemetery is located on Erf 85 (Business Plan 2004). The discrepancy in the land areas as reflected in different documents may account for the difference of approximately 1,000 m<sup>2</sup>, which area could represent the burial area that lies beyond the perimeter fence. The boundaries of the farm have either not been clearly demarcated or the entire extent of the claimed land has not been restored to the community, although the area in question is relatively small.

## Rainfall, climatic conditions and topography

The area has warm summers and cold winters with frost during the winter months. The summer rainfall is between 500 mm and 550 mm per year (CA Young Valuations 1999).

The farm has undulating grazing lands with soil consisting of sandy loam which is fairly stony. The farm consists of

120 ha of dry land; 98 ha of Smutsfinger and erigrostos pastures and 654 ha of stony sour grass grazing (CA Young Valuations 1999).

According to the business plan (2004), previous surveys indicated that the soil of the farm is of the Msinga soil series and varies from shallow or stony areas to medium textured and freely drained areas. The dominant soil types are Rensburg and Katspruit, which are not high potential agricultural soils but can be utilised for cropping if well managed.

The area is known for cattle farming as well as dryland cropping with the cultivation of grain, sorghum, maize and pastures being common. The carrying capacity of the land is estimated at 6 ha per large livestock unit.

There is a diamond digging on the property that covers approximately 100 ha, on the eastern boundary.

## Water supply

There are seven boreholes on the property but only three are functioning. One of the boreholes has the capacity to pump approximately 10,000 litres of water per hour (CA Young Valuations 1999).

The Mooi River runs through the property and the farm is part of the Groot Marico irrigation scheme.

The diamond diggings on the property draw a high volume of the farm's underground water.

## Environmental issues

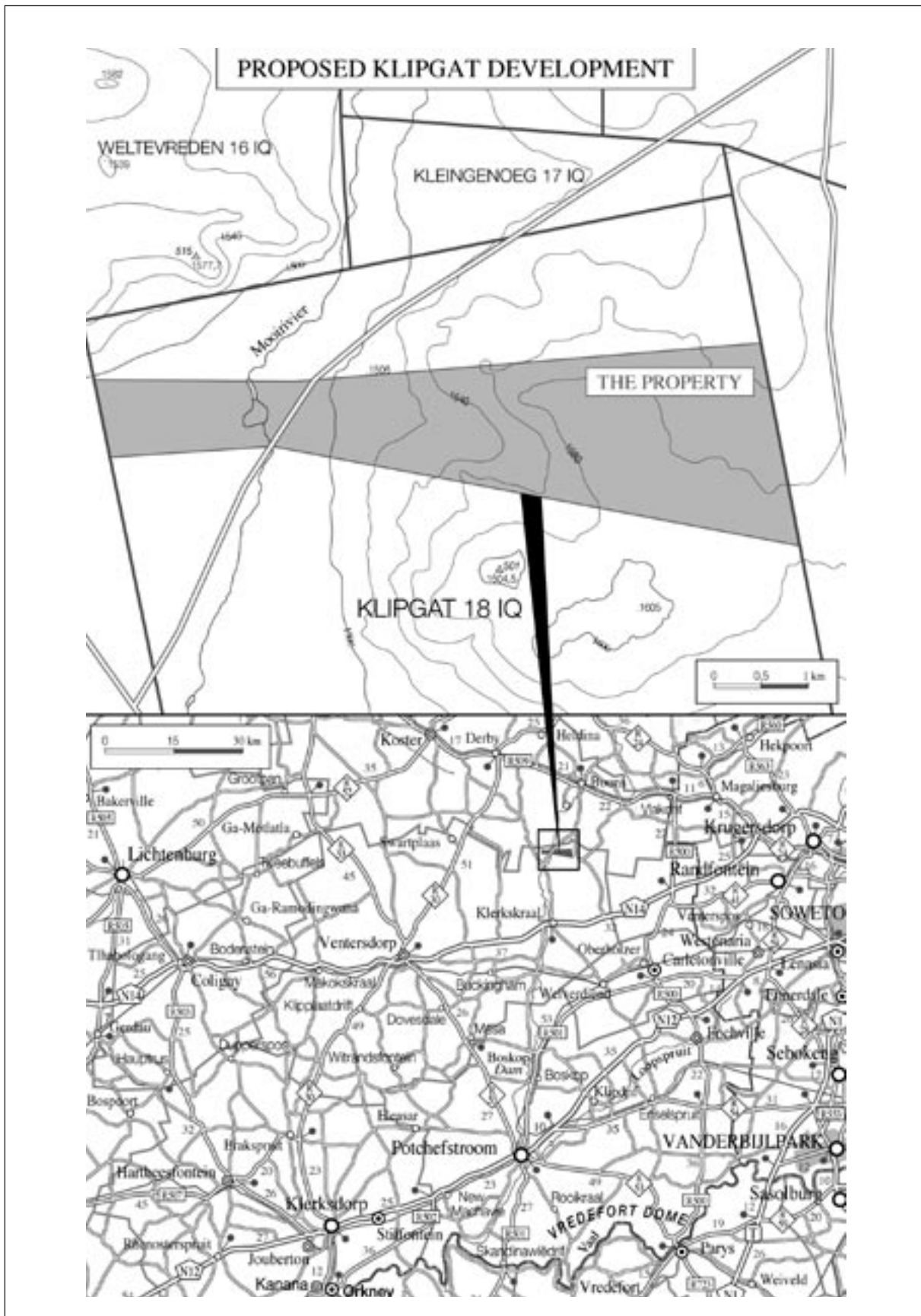
No environmental impact assessment was done prior to the settlement of the claim.

According to the business plan (2004), the following environmental issues need to be taken into consideration:

- The mining activities should be monitored and rehabilitation should be done during all stages of the mining.
- The *bloekom* (eucalyptus) trees are alien plants that consume large quantities of water. It is recommended that these trees should be removed.



**Map 1. The boundaries of Klipgat 18 IQ**



- It seems that there are no longer any endangered animal species on the farm.
- The cemetery on Erf 85 should be included in the layout plan.
- A new village should be planned according to appropriate standards. Special detail should be given to the following:
  - sewerage
  - water quality for consumption
  - waste disposal.

### **Basic services**

All major services are available in Ventersdorp, Rustenburg and Carletonville, each of which is approximately 45 km from the farm. The road to Boons runs through the property and serves as a transport link for community members.

## 2. History of ownership, dispossession and changes in land use

In 1913, 14 black families bought the farm Klipgat for £1,783. The community held the land in undivided shares under title deed 7241/1913. The 14 families were originally sharecroppers in the Vereeniging area and when they became aware of the looming promulgation of the Natives Land Act 27 of 1913 (which had the effect of rendering sharecropping unlawful and prohibiting further purchases of white-owned land by black people) they purchased and moved to the farm Klipgat, on the advice of their attorney Pixley ka Seme. According to the deed of transfer, the power of attorney authorising the transfer of Klipgat was signed on 6 May 1913, six weeks prior to the passing of the Natives Land Act on 20 June 1913.

The 14 owners and their families lived on and worked the land, cultivating dry land crops and grazing livestock.

Diamonds were later found on the farm and the community entered into a contract with a white miner and shared in the profits of the mining operation. According to a descendant of Nape, one of the original owners, 'Africans were not allowed to sell or own minerals and so they gave the surface and mineral rights concession to a white prospector and later sold their rights to him.'<sup>1</sup>

The income from agricultural production and the mining operations meant that most community members did not have to leave the farm in search of employment. At least half of the farm is arable and was highly fertile and productive prior to dispossession; the community was said to be self-sufficient in terms of maize and other food, and substantial surplus produce was sold on various markets. The farm had a school and all community children received a rudimentary education, while others went on to tertiary education and became professionals.

During the 1960s, the owners of Klipgat received a letter informing them that only white people were allowed to occupy land in the area. When the community was first threatened with removals, they formed an anti-removal

committee and obtained assistance from an attorney to act on their behalf.

The land was eventually expropriated by the apartheid government in terms of Section 13(2) of the Native Trust and Land Act, 18 of 1936. The forced removal of the residents took place over a fourteen-year period from 1961 to 1975.

The first group of people were forcibly moved to the farm Uitkyk in 1961 and were accommodated in military tents. Other members of the community were scattered and went to Ledig, Modikwe, Ramathlabana, Mathopestad, Johannesburg and other areas on the Reef. In some cases, members of the same family were separated and family life was disrupted. The community's traditional support structures were destroyed and many people were reduced to poverty.

The pressure on the remaining members of the community to move was intensified and some members agreed to move to the Groot Marico while others continued to resist. Various agents tried to divide the community and police raided the farm and arrested and detained members. One of the founder members, David Thekiso, was arrested and died in detention at the Bougroep prison in Potchefstroom. In 1975, Jacob and Elisa Thekiso and their families were the last members of the community to be forcibly removed. They were dumped in Brits and their livestock was left at Klipgat and not returned to them.

The state expropriated the farm in terms of the provisions of the Expropriation Act 63 of 1975. A Mr Momberg applied to purchase the farm and bought it on 30 June 1976 from the *Departement Landboukrediet en Grondbesit* [Department of Agricultural Credit and Land Ownership] for R52,500; A bond was registered against the property.

Mr Momberg used the land for grazing cattle, cultivating maize and other dryland crops and entered into a contract with a mining company to undertake diamond prospecting and mining in the eastern section of the farm.

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<sup>1</sup> Interview: J. Nape, June 2006.

## 3. Claim lodgement, verification of members, negotiations and settlement process

### Claim lodgement

The claimant of the farm Klipgat is the community made up of the descendants of the 14 original co-owners of the farm. This grouping of descendants regard themselves as the Bakwena ba Mare a Phogole community. Having heard that they could claim their land under the restitution programme, a group of community members contacted other members via word of mouth, radio and print media. A series of meetings was called to discuss the possibility of claiming the land. It took the group a number of years to trace all members of the community and to finalise the claim for lodgement, which was done with the assistance of the Legal Resources Centre (LRC). The claim was lodged on 9 July 1996 and was viewed by the Commission for the Restitution of Land Rights (CRLR) as complying with the provisions of Section 10(1) of the Restitution Act, as amended.

### Validation and the gazetting of the claim

The claim was gazetted in terms of notice 2727 of 1998 (*Government Gazette*, 13 November 1998).

### Verification of members

In 1998, the Regional Land Claims Commission (RLCC) Research Unit and members of the claimant committee held various meetings and embarked upon an exercise to clarify who they understood to be members of the claimant community. This was undertaken prior to the adoption of the CPA's constitution, which details eligibility for membership, and which was adopted in April 2001. However, in September 2002, the RLCC indicated that it was still going to appoint a service provider to conduct a further verification process.<sup>2</sup> According to community respondents, there are 500 members in the claimant group but there are still differences of opinion regarding how membership is defined and who exactly the members are.<sup>3</sup>

### Negotiations

On 2 April 2001, the Minister for Agriculture and Land Affairs approved the request for a mandate to negotiate the purchase of Klipgat farm for the Bakwena ba Mare a Phogole community in terms of the Restitution Act. The community was assisted by the LRC during the negotiations process. The Mandate to Negotiate outlines the status of the claimant community and indicates that the members are descendants of the 14 original owners. It specifies the particulars of the claim, describes the property, states the acceptability of the claim, outlines the history of acquisition and dispossession of the rights in land being claimed, specifies the financial implications, and makes recommendations for approval by the minister.

### Financial implications

During the negotiations, the then landowner, Mr Johannes Christoffel Momberg, requested that the valuation price of R855,000 be increased to R950,000 due to the potential of the mining operations on the property and loss of potential earnings.<sup>4</sup> The DLA and the RLCC agreed to pay this increased amount.

The DLA agreed to allocate R3,000 per household as Restitution Discretionary Grants (RDGs) and R1,440 per household as Settlement Planning Grants (SPGs). It was estimated then that the claimant community was made up of 200 households, thus bringing the total grant allocation to R870,000.<sup>5</sup>

In September 2002, the RLCC acknowledged that it had yet to appoint a service provider to conduct 'claimant verification' (that is, community membership), and that this was delaying the disbursement of grants to the community as determined by what is referred to as the Deed of Settlement of March 2002, otherwise known as the Settlement Agreement.<sup>6</sup>

<sup>2</sup> Correspondence: RLCC to LRC, 19 September 2002.

<sup>3</sup> Interview: CPA interim committee members and community residents on Klipgat farm, July 2006.

<sup>4</sup> Memorandum: Submission in terms of Section 42D, April 2001.

<sup>5</sup> Memorandum: Submission in terms of Section 42D, April 2001.

<sup>6</sup> Correspondence: RLCC to LRC, 19 September 2002.

## Purchase and transfer

The agreement of sale was signed between the chairperson of the CPA and the landowner on 18 July 2001, and a handover celebration was held on 25 July 2001. The purchase date is recorded on the title deed as being 24 August 2001.<sup>7</sup> The title was registered in the name of the CPA on 11 January 2002 (Title deed, T2983/2002).

## Community profile

No formal skills audit or formal profiling of the community has been undertaken to date. The capacity and qualifications of the community members of Klipgat are diverse, with some members being professionals such as doctors and lawyers while others are illiterate and work as manual labourers. The majority of the members are unemployed. A number of the members have farming skills as a result of having previously worked on farms – this was evident amongst workers in the piggery and those wishing to embark on the poultry project. Some of the CPA committee members are experienced in human resource and personnel management, while others have expertise in the construction industry and are playing a leading role in attempting to establish a housing project.

## Legal entity, ownership and membership

### Establishment of the legal entity

Several meetings were held between the claimant community and a representative from the DLA in order to decide upon an appropriate legal entity. According to the LRC attorney involved in assisting the community, establishing a legal entity was a long and difficult process as there was much disagreement within the community. This was compounded by resistance from some sections of the community to women being members.<sup>8</sup>

The community chose a CPA as their legal landholding entity. The signed constitution is not dated, and there is a difference of opinion regarding when the community adopted the constitution, with some saying this was done in late 2000, while others indicate April 2001. There are also allegations that different versions of the constitution were adopted and/or circulated to the community.<sup>9</sup> The CPA was registered as CPA/01/0329/A in April 2001 in terms of the Communal Property Associations Act 28 of 1996.

A community committee was established in 2000 with 14 elected members. Each member was supposed to be a direct descendant and representative of one of the 14 original owners. However, this initial committee was allegedly dominated by representatives from the Ngakane family, with all the positions in the executive held by Ngakanes. The term of this committee was to end in April 2004 and a new committee was to be elected, but for a range of reasons no elections were held. After a series of general meetings and pressure from the community, a general meeting held on 19 June 2005 determined 3 July 2005 as the date for the election of a new committee. The elections were duly held and a new committee was elected without any objections being noted. It was agreed that there would be a transition period to allow for a proper handover from the old to the new committee.

The old committee was to hand over by 16 July 2005 but on this date the members of the old committee indicated that they did not recognise the new committee. As a result, a crisis committee was formed and the old (that is, the original) committee was dissolved due to an alleged lack of accountability and financial mismanagement. This crisis committee (also referred to as the Concerned Group) was made up of appointed members. Elections for a permanent executive were due to take place on 6 November 2005. For a range of reasons, this election did not take place.

According to members of the crisis committee, meetings did not take place regularly, and there are tensions amongst committee members and between factions within the community. While a code of conduct was drafted in a bid to establish a mechanism to settle tensions and disputes, it does not appear to have led to an improvement in the situation. The current committee has attempted to take the CPA forward and holds report-back meetings for those who are able to attend, but it clearly does not enjoy the support of all community members.<sup>10</sup>

In a bid to resolve these and related issues, a meeting was held between the CPA, the interim management team, representatives from the Moalusi and Ngakane families and RLCC officials on 25 April 2006. During the course of this meeting, Mr Mothibe from the RLCC office acknowledged that a number of errors had occurred in the process of the land claim and that government officials were partially to blame for these problems. Examples of errors included:

<sup>7</sup> Correspondence: RLCC to Department of Minerals and Energy, 22 October 2001.

<sup>8</sup> LRC file notes and personal communication with Kobus Pienaar, 2006.

<sup>9</sup> Correspondence: Bakwena ba Mare a Phogole Crisis Committee/Concerned Group to Mr Lerato Molaudzi, undated.

<sup>10</sup> Interviews: Interim CPA committee members, June 2006; Correspondence from Bakwena ba Mare a Phogole Crisis Committee/Concerned Group to Ms Lerato Molaudzi, undated.



- failure to compile the claimant verification list before the land was handed over
- absence of plans pertaining to how the land would be used
- absence of research to find out the needs of the community, their preferred development options, and so forth
- failure to verify the list of 200 households submitted to the office of the RLCC
- failure to resolve the verification of the status of the Moalusi and Ngakane families.<sup>11</sup>

The latter issue, as discussed in the meeting of 25 April 2006, raises a number of important aspects about how membership is determined, besides the lack of a thorough assessment at the time of the claim being lodged. At issue is the transfer of land from one of the original families (Ngakane) to another family (Moalusi) prior to their dispossession.

According to the land transfer document of 28/29 August 1913, 14 members bought the farm, which was 1,019 morgen (873 ha) in extent. It then lists the members. As these members died, their portions were re-registered in the names of their children or spouses. When the CPA was established in 2001, membership was defined in terms of descent from these 14 original purchasers. It has since come to light, however, that the 1/14<sup>th</sup> share of one of the members, Mr William Ngakane, had been sold to Mr Lucas Moalusi in 1940. Lucas Moalusi passed away in 1945 and the title deed was transferred to Lucy Moalusi. The expropriation orders of 1966 thus reflect the name Moalusi and not Ngakane (as Ngakane had already sold out). This would seem to indicate that the Moalusi family is eligible for 1/14<sup>th</sup> share of Klipgat, and the Ngakane family is not (as they were not forcibly dispossessed), but this contradicts the CPA constitution which explicitly refers to the 14 original purchasers and makes no reference to subsequent owners.

The fact that this matter was not clarified at the outset is causing a great deal of tension within the community and has contributed to the CPA becoming dysfunctional.

### Membership

Clause 8.1 of the constitution indicates that members of the association are the families and direct descendants of those persons listed in a schedule as an annexure attached to the

constitution. Each person listed in the schedule represents one family and hence one member of the association.

Clause 8.3 further notes that applications for membership by families other than those listed in the schedule shall be made to the committee which shall submit such applications to a general meeting of the CPA which shall decide whether to accept or reject an applicant.

As indicated above, there is a great deal of uncertainty about who is a member and how membership is defined. The problem is compounded by the fact that the term 'member' is used interchangeably to denote the original 14 families and the members of the broader (contemporary) community.

### Rights and duties of members

The CPA gives members the right to utilise the land for farming. The members agreed to be guided by principles of fairness and equity in their allocation of grazing and cultivation rights. The wealthier members of the community were at first unhappy with this arrangement because they believed that the poorer members would hold back the development of the land. After much negotiation, the community set aside its differences to work together for the common good of the community.<sup>12</sup>

The following selections taken from the CPA constitution state the rights and duties of members:

- *Every member shall have the right to make improvements upon plots of land allocated to it; such right is subject to the obligation of that member, to maintain such improvements. (Clause 9.1)*
- *Every member shall have the right of access to the land and other communal facilities and amenities. Included in the aforementioned, is the right of access to the land for grazing and cultivation purposes, gathering of firewood or thatching grass, fetching of water and access to other assets, resources and projects of the Association. (Clause 9.2)*

The procedures for acquiring these rights are dealt with in Clause 20 of the constitution which outlines the registration and allotment of sites, stating that general meetings may allocate plots by a simple majority vote to members for their exclusive use. The committee may also make recommendations to the general meetings of the association on the allocation of plots to members. The

<sup>11</sup> Minutes of meeting dated 25 April 2006.

<sup>12</sup> LRC file notes and personal communication with Kobus Pienaar, 2006.

committee is required to maintain a register of every family which is a member of the association, as well as details of sites allocated to them. A member may be deleted from this register by the committee in the event of his or her death, on the request of a member or on expulsion from the CPA.

Section 20 of the constitution also provides details of entitlements. Clause 20.8 states that:

*Any member to whom a site has been allocated on the land and which has been duly recorded in the register shall be entitled to the undisturbed use and benefit of the site, subject to the terms and conditions of this Constitution.*

Clause 20.9 further states that:

*The remainder of the land not allocated in terms of this paragraph shall be utilised for the use and benefit of the members as a whole in accordance with the rules as determined by the Association in general meeting referred to in paragraph 9.2.*

While the right to use and access land is enshrined in the CPA constitution, the CPA has yet to develop a land-use plan or business plan that could be of practical use to the community. In the absence of such plans, the potential exists for land to be allocated in an ad hoc manner and not in accordance with the most appropriate use of the available land areas. To date, the CPA has identified an area of the farm where housing will be built but plots have not yet been demarcated or allocated to specific members.

Representation of community members in general meetings is set out in Section 9 of the CPA constitution. Clause 9.3 states that:

*All rights of the members shall be exercised subject to the rules as determined by the Association in general meeting from time to time. Any such rules may be amended or rescinded by the Association in general meeting.*

According to Clause 9.5:

*At general meetings each member<sup>13</sup> shall be represented by both a male and female person who is part of such member and not less than eighteen years of age elected by a majority of vote of such persons being part of the members who are not less than eighteen years of age. Provided that a member may be represented by a single male or female person only where such member does not have as a part of it a*

*person of the other sex of not less than eighteen years of age; provided further that if a member has a person as part of it recognised by law as its head such person (not being less than eighteen years of age) and his or her spouse (not being less than eighteen years of age) or senior spouse (not being less than eighteen years of age) in the case of a polygynous or polygamous union, shall represent such member; provided further that should such head and/or his or her spouse and/or his or her senior spouse (as the case may be) not exist, a person of the same gender as such non-existent spouse not less than the age of eighteen years being part of such member shall represent the member and if there is more than one person of such gender being part of a members the identity of such representative shall be decided by a majority vote of all such persons being part of the members who are not less than eighteen years of age; provided further that if a member can be represented by one person only such person shall have two votes. Representatives shall have the right to vote on any issue independently of each other. Every representative of a member shall have the right to vote at a general meeting of members in person or by proxy.*

Clause 9.5 is confusing on numerous levels, and it is not surprising that the community members who were interviewed were unclear as to its meaning and how membership was defined. Particularly confusing is the fact that the constitution uses the term 'member' to describe the descendants of the previous owners.

Clauses 9.6 to 9.8 make provision for the payment of monies to the CPA. Clause 9.6 states:

*Every member shall be obliged to pay its share of any financial commitments of the Association as determined by the Association in general meeting.*

Clause 9.7 states:

*Every member shall be obliged to pay any levy lawfully imposed on it by the Association in general meeting.*

This is further stated in Clause 9.8:

*Every member shall be obliged to make contributions towards the maintenance of the land for the common good.*

The above three clauses address the issue of payments being made by members to the CPA. The CPA has the

<sup>13</sup> For the word 'member', read 'families and direct descendants of those persons listed in a schedule as an annexure attached to the Constitution' as defined in Clause 8.1.



power to determine an annual membership fee in a general meeting. Each member has to pay this fee to the treasurer of the committee by the end of February each year.

Clause 9.10 deals with succession of members:

*Every member shall maintain its standing as a member in the event of the death of any such person who in part constitutes such member. Any future descendent or future spouse of a person who constitutes a member shall become and be regarded as such member for the purposes of this communal property association unless such person voluntarily relinquishes the benefits of such membership.*

Clause 9.11 states:

*A member wishing to relinquish the benefits and rights accruing to it by virtue of this constitution, or whose membership of the Association is terminated in accordance with this constitution, may dispose of its benefits and rights to a purchaser of its choice, provided that such purchase has been admitted or will be admitted as a members with the consent of the Association in general meeting, and provided that the terms of the sale are disclosed to the Association, and the Association in general meeting consent to such sale.*

Having spelt out the powers and the duties of members, the constitution also allows for a process by which matters can be raised and resolved within the sub-structures of the CPA. In the event that it is not able to resolve differences or disputes, the CPA can request the intervention of the Director-General of the DLA to assist in resolving disputes (Section 24 of the constitution).

### **Termination of membership**

Clause 10.1 states that:

*Membership of the Association may only be terminated on reasonable grounds by the Association in general meeting after the matter has been considered at a*

*fair hearing by a general meeting of the members of the Association at which the member was given an opportunity to present its case in accordance mutatis mutandis with paragraphs 17.2 and 17.3.*

These paragraphs outline the reasons and conditions for the office of committee members to be terminated and vacated and the procedure for the removal of a committee member.

## **The terms and implementation of the Settlement Agreement**

Correspondence between the LRC and the RLCC:North West dated 19 September 2002 indicates that what is referred to in various correspondence as the 'Deed of Settlement' was signed in March 2002. It would seem that this document constitutes the Settlement Agreement. However, a copy of this agreement could not be traced by the RLCC, the DLA, the CPA committee members or the LRC. The RLCC project officer indicated that the memorandum submission in terms of Section 42D is the document that is used in the absence of the Settlement Agreement.<sup>14</sup> The lack of a signed Settlement Agreement would seem to reflect a lack of adequate management of key documents by the RLCC and other parties. In the event of any disagreements or differences of opinion, neither the claimant nor the RLCC has a definitive reference point. In addition, there is no legally binding document that locks various role players into the settlement and development process or requires any party to provide settlement support.

The Section 42D memorandum, as signed by the minister on 2 April 2001, details the financial arrangements for the settlement. It outlines the purchase price and the Restitution Discretionary Grants and Settlement Planning Grants to be made available to the claimant. These grants as recorded in the memorandum have, however, been altered with handwritten figures added alongside the typed text at the time of the document being signed by the minister. To date, none of these grants have been paid out by the RLCC.

<sup>14</sup> Personal communication, Molaudzi, August, 2006.

## 4. Post-settlement developments and associated support provision

### Assets

According to the pre-land transfer certificate of valuation (CA Young Valuations 2001), the various assets of the farm were 'in a similar condition as on the date of valuation on 1 June 1999' and indicates that no assets had been stripped from the property.

The farm had been fenced and divided into ten large and seven smaller camps by the previous owner but many of the fences have since rusted away.

The farm has two original farmhouses. One is 282 m<sup>2</sup> in extent and the other is 101 m<sup>2</sup>. Five workers' houses consisting of a kitchen lounge, four bedrooms, a bathroom and an outside toilet are also on the property, as well as a workshop and carport.

At the time of transfer, there was one main farmhouse with smaller warehouses for the storage of farming equipment. The farm workers lived in thatched dwellings and an agreement was reached that allowed them to remain on the farm and required that they assist with the maintenance of the dwellings and help with the farming operations.

### Business plan and land-use plan

The Section 42D memorandum deals with the proposed land use in Clause 7, stating that the claimant community intends 'taking over the farm as an ongoing business as it is with the current landowner, that is farming. Since they have opted for resettlement, their plans will however be substantiated by recommendations of development and agricultural professionals.'

A business plan (also referred to as the 'development proposal') was prepared by the Welwyn-Mhiduve-Tlokwe Consortium, as appointed by the DLA. It was accepted and approved by the chairperson of the CPA and was forwarded to the RLCC on 3 May 2004.

The plan outlines the intended land uses as being a continuation of the current activities, namely, dryland cropping and cattle farming. The plan also proposes a number of new activities including the establishment of a

piggery, poultry farming, vegetables, a snake park and an urban housing settlement.

The plan indicates that the following activities took place during the facilitation process:

- meetings with stakeholders
- meetings with beneficiaries
- identification of issues by means of a detailed questionnaire
- discussion with the committee members of the CPA to determine the final priorities.

The plan specifies the following proposals for economic sustainability:

- Agricultural activities (extensive farming):
  - 120 ha of cultivated fields for growing maize and sunflowers – 4 job opportunities
  - 508 ha for cattle grazing – 2 job opportunities.

To date, the activities listed above have not yet been established, with the exception of some members bringing 20 head of cattle and six goats of their own to graze on the property.

- Agricultural activities (intensive farming):
  - 5 ha for vegetables – 20 job opportunities
  - 5 ha for broiler units – 8 job opportunities
  - 2 ha for pig farming – 2 job opportunities
  - 2 ha for paprika farming – 34 job opportunities
  - 5 ha for hydroponic tunnels (vegetables and cut flowers) – 20 job opportunities.

Of the above planned activities, only the piggery has been established to date.

- Semi-agricultural activities:
  - 13 ha reptile park (including 'milking' of snakes for venom) and a guesthouse – 8 job opportunities.

Community respondents indicated that they were afraid of snakes and that they did not know where the idea for a snake park came from. They also felt that there would not be enough tourists to come to the park or a guesthouse, in the event that one was established.<sup>15</sup>

<sup>15</sup> Interviews: Claimant community members resident on the farm, June 2006.

- Non-agricultural activities (business):
  - general dealer – 3 job opportunities
  - tuck shop and restaurant/tavern – 2 job opportunities
  - tourist shop at the snake park – 2 job opportunities
  - butchery – 3 job opportunities.

Community members indicated that there may be potential to establish a butchery for fresh meat but that in the absence of a freezer or a cooling room, this activity could not expand or be lucrative. Some community members commented that they would not like to have a tavern on the premises as alcoholism would become a problem. Others commented that the only people who would buy from a general dealership would be themselves and that it would probably be cheaper to buy from shops in the nearby town.<sup>16</sup>

- Non-agricultural activities (light industrial):
  - sewing
  - welding
  - toilet paper factory
  - candymaking factory
  - gingerbeer brewery
  - arts and crafts.

It was envisaged that a light industrial centre be constructed to accommodate various activities. These activities would create 21 job opportunities. Thus far, the arts and crafts project has been initiated. A group of five women are involved and are generating a limited income.

In addition, the business plan outlines the housing and village layout needs. Seventy erven are planned for the first phase and provision is made for another 114 erven in the second phase. The plan states that an application for rural housing subsidies will be presented to the provincial government (North West Housing Board). According to community members, this application has yet to be made,

and the Department of Housing (DoH) (Mafikeng office) was unaware of any such application having been made.

## Mining operations

An alluvial diamond gravel run exists in the eastern area of the Klipgat farm.<sup>17</sup> While mining operations were established on the land prior to restoration, according to the certificate of valuation (CA Young Valuations 2001), no mining activities took place on the land as from the date of the initial valuation in 1999. A Heads of Agreement was then negotiated and signed on 1 March 2005 between Etruscan Diamonds (Pty) Ltd,<sup>18</sup> Basson Delwery CC (now called Gothoma Diggings CC) and the Bakwena ba Mare a Phogole CPA once the settlement of the claim had been concluded.

The CPA are the surface owners of the land on which the diamond diggings are located and Etruscan is the owner of the mineral rights. Etruscan appointed Basson Delwery cc (Gothoma Diggings cc) as the sole contractor to explore and mine for alluvial diamonds and to process the diamondiferous gravel on the property. Operations at the Klipgat Diamond Mine recommenced in June 2005 upon Etruscan Diamonds receiving a mining permit under the new mining legislation.<sup>19</sup>

Article 2 of the Heads of Agreement states the following:

*Etruscan will grant the MaPhogole Community a 26% interest<sup>20</sup> in the mineral rights related to the property. The MaPhogole Community will not be required to make any contribution to costs associated with the Klipgat project and, subject to Article 3, the MaPhogole Community will be entitled to receive 26% of the profits from the Klipgat project after payment of all expenses related to the project including operational costs.*

The operational costs include royalty payments to the existing royalty beneficiaries under a separate agreement

<sup>16</sup> Interviews: Claimant community members resident on the farm, June 2006.

<sup>17</sup> Alluvial diamonds in the Ventersdorp district are found in gravel runs related to palaeo-drainage systems which drained generally from north to south. Mining is by open pit using conventional loading and hauling equipment. The gravel is unconsolidated, thereby allowing for free digging without any blasting being necessary. The gravel is treated in a conventional pan plant where the material is screened, concentrated (by pans) and then X-ray sorted. The diamonds from the Ventersdorp district typically average one carat in size. Alluvial diamonds, unlike the majority of stones recovered by the larger diamond companies from kimberlite pipes, retain both their quality and size thus giving them a gemstone grading.

<sup>18</sup> Etruscan, through its 51% owned subsidiary, Etruscan Diamonds (Pty) Ltd, has been acquiring strategic properties in the Ventersdorp Alluvial Diamond District. Etruscan Diamonds (Pty) Ltd is a Canadian-based company and is owned 75% by Etruscan Diamonds Bermuda Ltd and 25% by Mountain Lake Resources, Inc. In turn, Etruscan Diamonds Bermuda Ltd is owned 68.5% by Etruscan Resources, Inc. Etruscan Diamonds presently holds two mining permits and ten prospecting permits covering approximately 257 km<sup>2</sup> with an additional five prospecting permits under application. Etruscan Diamonds has two mines in the Ventersdorp district, the Klipgat Diamond Mine and Tirisano Diamond Mine. (Information obtained from www.etruscan.com)

<sup>19</sup> The new Minerals and Energy Laws Act was enacted in 2004. In addition to defining the ownership of and access to mineral rights, it makes provision for the requirement of a social development plan associated with mining operations. A social development plan is required on submission of an application for a mining licence.

<sup>20</sup> In accordance with the broad-based socio-economic empowerment charter for the South African mining industry, joint ventures or partnerships are required to grant a 25% equity plus one share to the community. (See Appendix for details of the charter.)

between Etruscan and other parties. Payment of the 26% of profits to the CPA is to be made on a monthly basis into the CPA's bank account.

Article 3 deals with the payment by the community for just 11% of the 26% equity stake, and states as follows:

*The parties acknowledge that it is the intent of the parties that the MaPhogole community pay fair market value for 11% of its 26% interest in the Klipgat Project. In recognition of the challenges faced by the MaPhogole Community in financing the acquisition cost of the 11% interest, Etruscan has agreed to accept payment for the 11% interest from the MaPhogole Community's share of profits from the Klipgat Project. Specifically, Etruscan and the MaPhogole Community agree that:*

- a) *With respect to the area to initially be mined by Basson as described in Schedule A, the MaPhogole Community shall direct that 50% of any distribution of profits which the MaPhogole Community would otherwise be entitled to receive pursuant to Article 2 in respect of its 11% interest in such area will be paid to Etruscan after Basson has processed 200,000 cubic metres of gravel from such area;*
- b) *With respect to any other areas developed on the Property, immediately following a bulk sampling on such area:*
  - i. *Etruscan will conduct a feasibility study including a valuation of the area on a 15% net present value basis;*
  - ii. *Eleven percent of the total amount of the valuation will be deemed to be the fair market value and purchase price of the 11% equity interest previously granted by Etruscan to the MaPhogole Community for the area covered by the valuation ("Purchase Price");*
  - iii. *The Purchase Price will be paid by the MaPhogole Community directing that any distributions of profits which the MaPhogole Community would otherwise be entitled to receive pursuant to Article 2 in respect of its 11% interest in such area will be paid to Etruscan until the Purchase Price is paid to Etruscan in full;*
  - iv. *Should parties not agree upon evaluation, an independent valuation will be sought by a suitable qualified independent expert.*
- c) *The parties herein confirm that reference to equity stake/interest means the following shareholdings: Etruscan 74% and the MaPhogole Community 26% of the mineral rights on the Property.*

In summary, in order to acquire this 26% interest share, the CPA was required to pay market value for 11% (but would actually receive 26%). Given that the CPA did not have capital to purchase the acquisition of these shares, Etruscan deducts the payment for these shares from the CPA's share of profits until the purchase price is paid in full. Neither the members of the CPA nor the general manager of Etruscan were able to quantify the actual amount of the purchase price nor how much the community had paid to date in lieu of its equity share. In addition, the community members were not clear about how the share arrangement was structured or how much money, if any, they were entitled to receive.

Gothoma Diggings, through Etruscan, is to pay the CPA a monthly surface access fee of R6,000 per month (adjusted for inflation) for the duration of the project as from the date of commencement. It is unclear how much longer the diggings will be operating on Klipgat, but the operations manager and general manager indicated that within one to two years the diggings could be exhausted. This will result in a loss of income for the community. In addition, the contractor was required to pay R30,000 on the commencement date and an additional R20,000 over a three-month period from the date of commencement as a 'boundary violation' fee.

Etruscan is required to keep the CPA apprised of all its activities by submitting quarterly reports including details of all explorations, financial and mining activities and other such information as the community may reasonably request. The CPA is entitled to go into the mining area in order to review any and all data and information associated with the operations on the property.

The benefits that are outlined in the Heads of Agreement document and which the community expects include the following:

- Support for the brick-making project through the provision of clay, a by-product of the diggings.
- The investigation of a beneficiation pilot project in consultation with an established diamond cutter and to approach the Department of Minerals and Energy and the Department of Trade and Industry for the setting up of a beneficiating training institution in an around the mine/region. (To date this has not taken place.)
- Etruscan is to actively promote employment and advance the social and economic welfare of the community in a sustainable way through the following initiatives:
  - The hiring of community members to fill positions based on capabilities and competence at all levels of the project.

- The training of community members to acquire basic skills to promote their employment in the project. Five community members were to be employed in the first month of operation and another five in the second month. Preference is to be given to the community on all future employment opportunities. (A total of five community members have been employed to date.)
- There is to be an increase in the ratio of women amongst the mine employees, including women from the Klipgat community, and an increase in the employment of historically disadvantaged South Africans at the mine. (One woman from the community is currently employed in the mining operations.)
- Etruscan is to pay R17,000 per month (adjustable annually based on the inflation rate) to the CPA for the duration of the Klipgat project (for as long as Gothoma is operating) in order to contribute to the following farming projects:
  - Building materials and wages for the 50-sow piggery. (Funds have apparently been contributed towards the piggery but it was not clear to the community members what the exact amount was.)
  - A poultry project. (None of the funds from Etruscan have as yet been directed to the establishment of a poultry project.)
- Etruscan committed itself to conduct first-aid training for teachers and day-care workers in the community, in addition to all the mine employees, and to supply educational materials to the planned school which is to house 55 learners. Etruscan is to assist in sourcing finances for the planned school, which was scheduled for construction in January 2006. (To date, no school has been established and training has only been conducted for some of those employed in the mining operations.)
- Etruscan agreed to use and pay an agricultural consultant to develop and finalise a business plan in consultation with the community, the municipality, and other spheres of government. (No comprehensive business plan has been developed and the community has not had the benefit of an agricultural consultant.)
- Etruscan is to assist with the creation of a small loan programme by the contractor to sponsor commercial initiatives involving members of the community.

(According to community members, they are unaware of any such loan scheme. They are, however, aware of a bursary having been granted to one young community member to study at tertiary level. The selection criteria and procedures for obtaining such a bursary were not clear to the community, but were apparently discussed with the chairperson.)

Under the terms of the operating agreement between Gothoma and Etruscan, Gothoma pays all production costs and is entitled to receive a percentage of total sales revenue from diamonds mined from the Klipgat mine ranging from 70% to 85%, depending on the value of diamond sales in each quarter. The agreement is effective for the term of the Klipgat mining permit. During the period 23 June 2005 to 30 November 2005, in excess of 5,600 carats were recovered from the Klipgat operation at an average grade of 2.02 carats 100 m<sup>3</sup>. From 1 December 2005 to 28 February 2006, in excess of 1,900 carats were recovered from the Klipgat operation at an average grade of 1.64 carats per hundred cubic meters. Diamond sales from the Klipgat Diamond Mine to 30 November 2005 averaged US\$454 per carat and US\$448 for the first quarter in 2006.<sup>21</sup>

According to Etruscan's news report of 6 December 2005, its alluvial diamond production for the three month period from September to November 2005 yielded a total of 2,858.32 carats recovered, and sales of 2,925.37 carats with an average price of US\$411.42 per carat. The total sales for this three-month period therefore stood at approximately US\$1,203,555 (a minimum of R7 million).

Based on the Bakwena community's 26% interest share, the community was due to receive an amount after the operating and production costs and less its payments for the purchase of the shares. The CPA was, however, unable to confirm the amount of money it had received and is currently attempting to clarify its financial status and the income received with the auditor appointed by the previous CPA committee.<sup>22</sup>

According to the CPA's business plan:

*Seeing that the mining company already assisted the beneficiaries with certain projects and due of good relationship with the mining company, no detailed investigation was necessary. The following suggestions*

<sup>21</sup> Information obtained from Etruscan website, [www.etruscan.com/s/SouthAfrica.asp](http://www.etruscan.com/s/SouthAfrica.asp)

<sup>22</sup> The committee is unable to trace the auditor and scheduled meetings have not been attended by the auditor. The arrangement with the auditor forms part of the current dispute between different groupings within the CPA and the community.



*were made to get compensation from the mining company:*

- *The mining company should hire beneficiaries as labourers.*
- *The mining company should assist with or provide grants for agricultural projects, business development, capacity building and housing projects (Business Plan 2004:14).*

The attitude expressed in the business plan would seem to suggest that the community was operating on the basis of good faith and that it trusted that the mining company would deal fairly with them and safeguard their interests. The lack of clarity and an inadequate formalised agreement between the parties leave the community in a potentially vulnerable position regarding benefits from its major asset.

## **Agriculture and other developmental activities**

### **The piggery**

Members of the community have established a piggery on the farm. There are currently 27 landrace sows, 3 boars and approximately 40 piglets. Weaners are sold locally.

The funds to establish the piggery were drawn from Etruscan's social development allocation from the mining operation. However, the piggery is still in need of heating for the newborn piglets and additional buildings are required as well as the renovation of the existing sties.

### **Livestock grazing**

Individual community members have access to grazing, which is currently being used for 20 cattle and 6 sheep. While the CPA constitution outlines that members are entitled to grazing rights, these rights have not been practically applied or formalised and there are as yet no guidelines detailing how rights are determined or to whom they are granted. The current grazing rights are informal.

### **Arts and crafts – Bead project**

A group of five women have established a bead-making project with the support of funds for training from Gothoma Diggings CC. They have undergone basic and intermediate training courses and are producing bead necklaces and earrings which they market at various tourist centres and lodges in the North West province. The beads are bought in bulk from a supplier in Johannesburg. The project currently

uses the garage adjacent to the farmhouse as a workshop and display area.

In addition, the women are exploring and learning a number of different crafts. The mining company has sponsored a glass-cutting machine and the women are also making lamp stands and intend using recycled glass bottles to make drinking glasses, candleholders and other items for sale.

### **Brick-making project**

Gothoma Diggings CC purchased a brick-making machine for the community and a group of community members have been trained in brick-making. The project has the potential to produce over one thousand bricks per day. It has supplied the Bakubung restitution claim with bricks and will be able to supply the Klipgat community once the intended housing project gets under way. The project has already built a row of single quarters for workers on the farm.

## **Proposed activities**

### **Settlement**

There are currently 12 families residing on the farm (approximately 31 people). Due to the lack of accommodation, in some instances three families share one house.

The intention is that the CPA will provide housing for 70 families over the short term and potentially for 130 families in the long term.<sup>23</sup> A portion of the land has been identified for housing development.

Some members have grown impatient waiting for housing, and at one stage indicated that they wished to build their own houses on the land. This was, however, opposed by the CPA and attempts are being made to speed up the planning for housing provision. The CPA is making contact with the DoH to better understand the People's Housing Process and the various subsidies that the community could access. Confusion exists about whether community members will have individual ownership of the houses built on communal land. Various options are being considered, including a common title deed for Klipgat with sectional title ownership for members. The CPA would thus remain the owner of the land while members would own their individual homes. However, not all the members would qualify for housing subsidies because they earn above the subsidy eligibility level. Additional information is necessary

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<sup>23</sup> Business plan (2004); Interviews: Members, June 2006.

and a more decisive support intervention from the DoH is required.

According to a member of the CPA Committee, many of the members are elderly and do not necessarily want to return to Klipgat because they are comfortable where they are, being closer to the facilities which they require.<sup>24</sup> This will serve to reduce the pressure on providing housing for all members.

In addition, the mine provides prefabricated housing for community members who work at the diamond diggings. This accommodation will not, however, be available once the mining operations close down.

### **Poultry**

A group of women are keen to establish a poultry project. They have experience in chicken farming but still require funding for building a poultry house and the initial outlay for the project.

### **Vegetable garden**

The CPA submitted a business plan for the establishment of a community vegetable garden but this has yet to be assessed by the Department of Agriculture. However, during the week of the research site visit, the Department of Health visited the farm and requested that the community establish a vegetable garden within two weeks as the Minister of Health was to be paying a visit to the farm. The community were confused and frustrated by this visit and the fact that no sustainable development was being encouraged or supported.

### **Literacy**

A member of the CPA committee outlined the need for mother-tongue adult basic education and training (ABET). She is busy investigating various options for ABET classes to be held.

### **Electricity supply**

Members of the CPA highlighted the difficulties experienced with the current electricity service and supply. The electricity supply to buildings accommodating some of the members is linked to the supply for the piggery but there is only one card meter. The residents intend separating the metering and payment of their domestic electricity supply from that used by the piggery.

Residents on the farm are required to buy electricity from Carletonville. Due to the recent municipal demarcations and the protest action in this regard, Klipgat residents were forced to buy electricity from one specific supplier in Khutsong. Travel costs to this supplier almost doubled the cost of their electricity.

The community has experienced difficulties in obtaining support from Eskom regarding improving their current electricity supply.

## **Sources of support**

### **Support from the Legal Resources Centre**

The claimant community was supported and represented by the LRC during the initial process of lodging and gazetting the claim and during the process of settlement. The LRC also supported the community thereafter by following up with the RLCC regarding the non-inclusion of agreed-upon grant allocations in the Settlement Agreement and the fulfilment of aspects of the Settlement Agreement, such as the disbursement of grants to the CPA.<sup>25</sup>

### **Support from the Regional Land Claims Commission**

Correspondence from the RLCC: North West to the LRC, representing the Klipgat community, shows that in 2002 the claimant had yet not received any post-settlement support in the form of grants. This indicates that it could not disburse these grants as the exact number of beneficiaries had not yet been verified. The RLCC had not, at the time, appointed a service provider to conduct the beneficiary verification process. To date, members of the claimant community have not received grant funding from the RLCC.

The project officer at the office of the RLCC has more recently been instrumental in linking the community with other potential providers of support, more specifically the Department of Agriculture and the local municipality. The project officer has secured financing from the RLCC's RDG budget to purchase a vehicle for the CPA at a cost of R100,000. The vehicle is due to be delivered in the near future. The project officer has drawn up a transport policy document to guide the community in the use and maintenance of the vehicle.

### **Support from the Department of Minerals and Energy**

According to members of the interim CPA committee, the Department of Minerals and Energy (DME) has played a

<sup>24</sup> Interview: J. Nape, June 2006.

<sup>25</sup> LRC Correspondence: LRC to RLCC: North West, 19 December 2000.



negligible role in providing information or support to the claimant community.

Interviews with the DME regarding Klipgat revealed a lack of understanding of the terms and conditions of the mining contract; the benefits that would accrue to the community; the current status and projected time frame of the mining operation; and the time frame and conditions of the rehabilitation process once mining operations have ceased.<sup>26</sup>

It would seem that the contract between the initial CPA committee and the mining contractor was not overseen by the DME, and the DME apparently made no interventions to protect the interests of the community.<sup>27</sup>

A number of the current tensions that exist within the community pertain to the arrangements regarding the mining contract. In particular, it is alleged that the original committee entered into a contract with the mining contractor without any monitoring of the mining operations, and the committee refused to share copies of the contract with the community.<sup>28</sup>

The Assistant Director: Mineral Laws at the DME indicated that the existing signed contract between the community and the contractor contained a number of critical gaps and could not be viewed as a fair or complete contract.<sup>29</sup>

### **Support from the Department of Agriculture**

The Department of Agriculture confirmed that the Klipgat business plan for a 20-sow unit piggery and vegetable garden had been submitted in October 2005 but that it lacked sufficient financial analysis and had been reworked. There is a large backlog of business plans still to be processed, reportedly due to a lack of capacity within the department (there are four economists and financial advisors within the department's North West office).<sup>30</sup> The Department of Agriculture has committed itself to providing training and technical support to the community once the plan has been approved.

According to the divisional manager for the Potchefstroom Local Development Centre of the Department of Agriculture, the department assisted the Klipgat CPA by



developing a proposal for crop production. It was given to the RLCC project officer at the time but nothing came of it thereafter.<sup>31</sup>

In addition, the divisional manager highlighted the department's concern with unsustainable developments which are encouraged by other agencies or government departments but for which no training or sustained support is provided. He cited the case of the Department of Health's promotion of a vegetable garden saying:

*The communication lines are not open, especially between the Department of Health and the Department of Agriculture. The Department of Social Development gives money for projects but then leaves the responsibility for maintaining and sustaining the project with the Department of Agriculture. We end up picking up the problems, without having been included in the initial process of setting up projects. You can't just throw money at communities and expect that they can fly with a project.*

A concern was raised by the divisional manager regarding the late stage at which the Department of Agriculture was brought into the restitution settlement processes:

*The department should be brought in right from the beginning. At the moment we are brought in too late. We are sometimes requested to do feasibility reports but then there's silence for a long time and the land gets bought and yet lots more should be happening in between and during these steps. In addition, farms can get vandalised in between the step after the farmer leaves and before the community moves onto the land.<sup>32</sup>*

<sup>26</sup> Interviews: DME officials, June 2006.

<sup>27</sup> Interview: Interim CPA committee members, June 2006.

<sup>28</sup> Correspondence: Bakwena ba Mare a Phogole Crisis Committee to Ms Lerato Molaudzi, undated.

<sup>29</sup> Interview: R. Mandiwana, June 2006.

<sup>30</sup> The North West office of the Department of Agriculture has at least 23 business plans that require assessment and processing.

<sup>31</sup> Interview: J. Swanepoel, June 2006.

<sup>32</sup> Interview: J. Swanepoel, June 2006.

The Department of Agriculture has various funds that it can draw on for supporting restitution projects. These include the Post-settlement Fund which can be used to purchase inputs such as seeds; a Poverty Alleviation Fund which is run in conjunction with the Department of Social Development and includes starter packs for establishing poultry or vegetable projects; the Provincial Infrastructure Grant; the Comprehensive Agriculture Support Programme to be used for infrastructure developments; the government Top-up Fund for providing support to communities (and which receives a contribution from the Department of Provincial and Local Government) which can be accessed for inputs and movable assets; and the *Letseme la Mantsha Tlala* (Food for the Nation) Project which addresses household food security through providing starter packs for chicken and vegetable projects. To date, none of these funds have been accessed by the Bakwena ba Mare a Phogole community.

### **Support from the municipality**

The RLCC: North West wrote to the Rustenburg Municipality inviting them to attend a CPA meeting on 26 October 2001 in order to discuss the resettlement needs of the community.<sup>33</sup> Various meetings have been held with the municipality, including the Ventersdorp Local Municipality.

The Klipgat farm features in the Ventersdorp Municipality's integrated development plan (IDP) and the IDP manager has shown interest in the development of activities on the farm, but as yet, none of the projects that are listed have received tangible financial or technical support from the municipality or other identified agencies.

The intention of the IDP manager is to ensure that the community is put in touch with the relevant service providers if the municipality cannot assist them directly. The municipality's monthly cluster meetings involving various government departments have enabled the municipality to raise the needs of different communities, including those of the Bakwena ba Mare a Phogole community, and to facilitate contact as necessary.

The IDP manager in the Ventersdorp Municipality indicated that the municipality viewed itself as having a duty to support the activities of the community at Klipgat:

*Because Klipgat is a restitution project, we have to provide to the community and fulfil our responsibility.*

*Our role as government is to provide basic services. The grants the communities get are not sufficient. After we have completed the process of formalising rural villages, we want to engage with the People's Housing Process for Klipgat. Right now, all the Department of Agriculture's proposed projects are with the bid committee for selection but we have supported them throughout.<sup>34</sup>*

She went on to say that the municipality could assist Klipgat with water tanks for the vegetable garden as a temporary measure and is planning to construct storm-water channels during the next financial year.

A member of the CPA committee indicated that they find it difficult to see which government department is funding what within the IDP. They have proposed that the IDP should give details regarding the different kinds of support provided and the source of the funding for these.<sup>35</sup>

### **Support from the Department of Health**

Besides the recent visit from the Department of Health regarding the establishment of a vegetable garden, the department's mobile clinic visits the area from time to time. Interviewees indicated that the mobile clinic does not always come on the days as scheduled and sometimes does not come at all. This has serious consequences for people who rely on the clinic for their medication supplies.

### **Support from the Department of Housing**

To date, the DoH has been approached for information regarding the various housing subsidies but, according to members of the community, has not shown interest in the development of housing on the farm.

In summary, there are a number of service providers and agencies that are aware of the Klipgat community's development needs. While some have engaged with the community and encouraged them regarding their various developmental aims, little concrete or sustained support has been provided to date. The bulk of the financial and training support received thus far has come from the mining operations on the farm. Most importantly, no agency is taking responsibility for supporting the community in the post-settlement phase, or systematically following up with government agencies to ensure that the expected benefits and services are actually delivered.

<sup>33</sup> Correspondence: RLCC with Rustenburg Local Municipality, 22 October 2001.

<sup>34</sup> Interview: M. Matuba, June 2006.

<sup>35</sup> Interview: M. Linchwe, June 2006.

## 5. Conclusions and strategic issues for consideration

Klipgat is a claim with considerable potential in terms of agriculture, residential development and mineral resources. In all areas, however, the potential benefits are either failing to materialise at all or remain at a level much lower than might be expected. Agricultural development on the restored land is slow and uncoordinated and housing development is not moving, while the community has been left on its own to attempt to obtain some benefits from the valuable diamond resources on its property. The CPA, the key institution representing the community, lacks the external support necessary to function effectively, and members are largely in the dark as to the various processes going on around them. While the local municipality and government departments, such as Agriculture, appear sympathetic to the needs of the claimants, there is a lack of coordination between agencies and a general failure to engage effectively with the claimant community. Many of these problems can be linked to the lack of overall support from the RLCC, which might be expected to ensure effective planning for post-settlement, to coordinate implementation, to support the CPA and to ensure that the necessary support from a range of agencies is actually secured and delivered at the appropriate time. This in turn can be related to a lack of effective planning by the RLCC to carry out this function itself, and its failure to appoint any other agency that might carry out such vital functions.

It is proposed that the following issues require consideration and act as strategic pointers for restitution claims of a similar nature:

- **The definition of membership remains unclear.** While membership is defined in the CPA constitution, the application of this definition remains confusing to the community, and needs to be resolved.
  - **Tensions within the CPA are threatening to undermine the progress made by the community.** As a result of significant issues not having been addressed during the early stage of the settlement and planning process, a number of issues have been allowed to fester and are contributing to a great deal of tension within the community. Comprehensive institutional support to the CPA is required.
  - **Discussions and planning have taken place but have not been followed through with action.** While a great deal of preliminary work has been done in terms of developing proposals and business plans, very little
- has actually come to fruition. Some of the reasons for this are the dysfunctional nature of the CPA committee, a lack of capacity in various government departments, poor coordination between agencies, and the lack of social cohesion within the community, partially as a result of many of the members living some distance away from the farm and not being integrally involved in its activities. Equally important, however, is the lack of any specific agency to drive the process and support the community.
- **The relationship between the mining company, which has mineral rights on the community's land, and the CPA remains an unequal one.** In addition, the terms and conditions of the agreement between the two parties are not well defined or understood by the community. The current agreement and the operations of the mining company have the potential of leaving the community in a very vulnerable and exploited position. This requires intervention from the DME. In addition, it remains unclear whether the community is entitled to compensation for the mineral rights it lost as a result of dispossession and/or whether the community would have been entitled to apply for a mining licence in their own right. The changes in the Minerals and Energy Laws Amendment Act 11 of 2005 regarding the ownership of mineral wealth as an asset of the state rather than that of the landowner, may have implications for the community, but these remain unclear. The community is unable to quantify or realise the potential benefits that might accrue from their valuable asset. There is no systematic monitoring of the agreement, and the CPA lacks the legal and commercial support services necessary to advance its interests. For the community to have entered into such a complex, and potentially valuable, arrangement of this sort with so little understanding of the process, and so little support from agencies such as the RLCC and the DME, is a cause for serious concern, and still needs to be addressed.
  - **The community remains unclear about whether projects that are established on the farm are to be viewed as communal projects or as individual projects.** While there is general consensus that the communal operations of the farm should not be privatised, there are also those who propose that the contributions made by individual members need to

be acknowledged. The piggery is run as a communal project, but those who participate in it indicate that they work hard on the project while others who are not involved stand to benefit from it. Likewise, the discussions around establishing a poultry project appear fraught with differences of opinion as to whether it will be a project set up by a group of individuals for their own benefit, or as a communal project providing employment to a group or members. These differences of opinion point to a lack of clarity regarding the rules of ownership and how the rights of individual members are vested. While the constitution outlines rights to assets and facilities on the farm, there is no clarity regarding whether a project set up by a group of residents on the farm using funds gained from the collective should be regarded as a community-owned project for the benefit of the broader community or for the sole benefit of those individuals working in the project. Basic information on the legal definition of a community claim, and the business options open to members, need to be fully understood by RLCC staff and clearly communicated to community members.

- **Housing settlement on communal land requires further investigation.** The community remains confused about the housing ownership rights of individuals who access subsidies for the construction of houses on communally-owned land. The servicing of such a housing settlement by the municipality also remains unclear to the community. Further intensive involvement of the DoH and of the municipality will be required to establish the status of housing developments on the land.
- **Material benefits have been slow to accrue to the community, and no clear plans are in place**

**for the management of financial resources.**

The implementation of the Klipgat settlement has dragged out over many years, and yet benefits have been extremely slow to accrue to the community. Restitution grants promised to the community have yet to be paid out, and there remains confusion (within the community and, seemingly, within the RLCC), as to the total value of such grants and the timetable for payment. Substantial benefits might be expected from the diamond mine on the community's land, but it could not be established how much revenue has already flowed to the community, what has happened to this revenue, and how much more is owed. Furthermore, no effective planning has been undertaken for the use of such revenue when it does materialise. The Klipgat community is clearly in need of professional support in its financial dealings, and it might be expected that this would be provided as part of a comprehensive settlement agreement.



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## 7. Key informants and contact details

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# 8. Appendix

## Broad-based socio-economic empowerment charter for the South African mining industry

### Vision

All the actions and commitments set out below are in the pursuit of a shared vision of a globally competitive mining industry that draws on the human and financial resources of all South Africa's people and offers real benefits to all South Africans. The goal of the empowerment charter is to create an industry that will proudly reflect the promise of a non-racial South Africa.

### Preamble

Recognising:

- The history of South Africa, which resulted in blacks, mining communities and women largely being excluded from participating in the mainstream of the economy, and the formal mining industry's stated intention to adopt a proactive strategy of change to foster and encourage black economic empowerment (BEE) and transformation at the tiers of ownership, management, skills development, employment equity, procurement and rural development;
- The imperative of redressing historical and social inequalities as stated by the Constitution of the Republic of South Africa, in inter alia section 9 on equality (and unfair discrimination) in the Bill of Rights;
- The policy objective stated in the Mineral and Petroleum Resources Development Act to expand opportunities for historically disadvantaged persons to enter the mining and minerals industry or benefit from the exploitation of the nation's mineral resources;
- The scarcity of relevant skills has been identified as one of the barriers to entry into the mining sector by historically disadvantaged South Africans (HDSA's);
- The slow progress made with employment equity in the mining industry compared to other industries.

Noting that

- It is government's stated policy that whilst playing a facilitating role in the transformation of the ownership profile of the mining industry it will allow the market to play a key role in achieving this end and it is not the government's intention to nationalise the mining industry.
- The key objectives of the Mineral and Petroleum Resources Development Act and that of the Charter will be realised only when South Africa's mining industry succeeds in the international market place

where it must seek a large part of its investment and where it overwhelmingly sells its product and when the socio-economic challenges facing the industry are addressed in a significant and meaningful way.

- The transfer of ownership in the industry must take place in a transparent manner and for fair market value.
- That the following laws would also assist socio-economic empowerment:
  - The Preferential Procurement Framework Act (No. 5 of 2000);
  - The Employment Equity Act (No 55 of 1998);
  - The Competition Act (No. 89 of 1998) (Also ref. to the Amendment Act No.35 of 1999 and subsequent amendments);
  - The Skills Development Act (No. 97 of 1998).

Therefore

The signatories have developed this Charter to provide a framework for progressing the empowerment of historically disadvantaged South Africans in the Mining and Minerals Industry. The signatories of this Charter acknowledge:

Section 100 (2) (a) of the Mineral and Petroleum Resources Development Act, which states that, to insure the attainment of government's objectives of redressing historical social and economic inequalities as stated in the Constitution, the Minister of Minerals and Energy must within six months from the date on which this act takes effect develop a Broad-Based Socio-Economic Empowerment (BBSEE) Charter.

### 1. Scope of application

This Charter applies to the South African mining industry.

### 2. Interpretation

For the purposes of interpretation, the following terms apply:

Broad-Based Socio-Economic Empowerment (BBSEE) refers to a social or economic strategy, plan, principle, approach or act, which is aimed at:

- Redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and
- Transforming such industries so as to assist in, provide

for, initiate, facilitate or benefit from the:

- Ownership participation in existing or future mining, prospecting, exploration and beneficiation operations;
- Participation in or control of management of such operations;
- Development of management, scientific, engineering or other skills of HDSA's;
- Involvement of or participation in the procurement chains of operations;
- Integrated socio-economic development for host communities, major labour sending areas and areas that due to unintended consequences of mining are becoming ghost towns by mobilising all stakeholder resources.

The term Historically Disadvantaged South Africans (HDSA) refers to any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation.

HDSA Companies are those companies that are owned or controlled by historically disadvantaged South Africans.

Major labour sending areas refer to areas from where a significant number of mineworkers are or have been recruited.

Ghost towns refer to areas whose economies were dependent on mining and therefore could not survive beyond the closure or significant downsizing of mining activities.

Ownership of a business entity can be achieved in a number of ways:

- A majority shareholding position, i.e. 50% + 1 share;
- Joint ventures or partnerships (25% equity plus one share);
- Broad based ownership (such as HDSA dedicated mining unit trusts, or employee share ownership schemes).

### 3. Objectives

The objectives of this charter are to:

- Promote equitable access to the nation's mineral resources to all the people of South Africa;
- Substantially and meaningfully expand opportunities for HDSA's including women, to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;
- Utilise the existing skills base for the empowerment of HDSA's;
- Expand the skills base of HDSA's in order to serve the community;

- Promote employment and advance the social and economic welfare of mining communities and the major labour sending areas; and
- Promote beneficiation of South Africa's mineral commodities.

## 4. Undertakings

All stakeholders undertake to create an enabling environment for the empowerment of HDSA's by subscribing to the following:

### 4.1 Human resource development

The South African labour market does not produce enough of the skills required by the mining industry. Stakeholders shall work together in addressing this skills gap in the following manner:

- Through the standing consultative arrangements they will interface with statutory bodies such as the Mines Qualifications Authority (MQA), in the formulation of comprehensive skills development strategies that include a skills audit;
- By interfacing with the education authorities and providing scholarships to promote mining related educational advancement, especially in the fields of mathematics and science at the school level;
- By undertaking to ensure provision of scholarships and that the number of registered learnerships in the mining industry will rise from the current level of some 1200 learners to not less than 5000 learners by March 2005; and
- Through the MQA shall undertake to provide skills training opportunities to miners during their employment in order to improve their income earning capacity after mine closure.

Government undertakes that:

- In its bi-lateral relations with relevant countries, undertakes to secure training opportunities for HDSA companies' staff, as well as exchange opportunities with mining companies operating outside of South Africa;
- Through the MQA and in collaboration with academic institutions, DME associated institutions, NGO's, and the Gender Commission, shall provide training courses in mining entrepreneur's skills;

Companies undertake:

- To offer every employee the opportunity to become functionally literate and numerate by the year 2005 in consultation with labour;
- To implement career paths to provide opportunities to their HDSA employees to progress in their chosen careers; and
- To develop systems through which empowerment

groups can be mentored as a means of capacity building.

#### 4.2 Employment equity

Companies shall publish their employment equity plans and achievements and subscribe to the following:

- Establish targets for employment equity, particularly in the junior and senior management categories. Companies agree to spell out their plans for employment equity at the management level. The stakeholders aspire to a baseline of 40 percent HDSA participation in management within 5 years;
- South African subsidiaries of multinational companies and South African companies, where possible, will focus their overseas placement and/or training programmes on historically disadvantaged South Africans;
- Identification of a talent pool and fast tracking it. This fast tracking should include high quality operational exposure;
- Ensuring higher levels of inclusiveness and advancement of women. The stakeholders aspire to a baseline of 10 percent of women participation in the mining industry within 5 years; and
- Setting and publishing targets and achievements.

#### 4.3 Migrant Labour

Stakeholders undertake to:

- Ensure non-discrimination against foreign migrant labour.

#### 4.4 Mine Community and rural development

Stakeholders, in partnership with all spheres of government, undertake to:

- Co-operate in the formulation of integrated development plans for communities where mining takes place and for major labour-sending areas, with special emphasis on development of infrastructure.

#### 4.5 Housing and living conditions

Stakeholders, in consultation with the Mine Health and Safety Council, the Department of Housing and organised labour, undertake to:

- Establish measures for improving the standard of housing including the upgrading of hostels, conversion of hostels to family units and the promotion of home ownership options for mine employees; and
- Establish measures for improving of nutrition of mine employees.

#### 4.6 Procurement

Procurement can be broken down into three levels, namely: capital goods; services; and consumables.

Stakeholders undertake to give HDSA's a preferred supplier status, where possible, in all three levels of procurement. To this end stakeholders undertake to:

- Identify current levels of procurement from HDSA companies;
- Commit to a progression of procurement from HDSA companies over a 3 to 5-year time frame reflecting the genuine value added by the HDSA provider;
- Encourage existing suppliers to form partnerships with HDSA companies, where no HDSA company tenders to supply goods or services; and
- Stakeholders commit to help develop HDSA procurement capacity and access Department of Trade and Industry (DTI) assistance programmes to achieve this.
- List of suppliers: It is envisaged that information on all HDSA companies wishing to participate in the industry will be collected and published. All participants in the industry will assist the DTI in compiling such a list that will *inter alia* be published by government on the Internet and updated regularly.

#### 4.7 Ownership and Joint Ventures

Government and industry recognise that one of the means of effecting the entry of HDSA's into the mining industry and of allowing HDSA's to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSA's. Ownership and participation by HDSA's can be divided into active or passive involvement as follows:

Active involvement:

- HDSA controlled companies (50 per cent plus 1 vote), which includes management control.
- Strategic joint ventures or partnerships (25 per cent plus 1 vote). These would include a Management Agreement that provides for joint management and control and which would also provide for dispute resolution.
- Collective investment, through ESOPS and mining dedicated unit trusts. The majority ownership of these would need to be HDSA based. Such empowerment vehicles would allow the HDSA participants to vote collectively.

Passive involvement:

- Greater than 0 percent and up to 100 percent ownership with no involvement in management, particularly broad based ownership like ESOPs.

In order to measure progress on the broad transformation front the following indicators are important:

- The currency of measure of transformation and ownership could, *inter alia*, be market share as measured by attributable units of South African production controlled by HDSA's.
- That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.
- The continuing consequences of all previous deals would be included in calculating such credits/offsets

in terms of market share as measured by attributable units of production.

- Government will consider special incentives to encourage HDSA companies to hold on to newly acquired equity for a reasonable period.

In order to increase participation and ownership by HDSA's in the mining industry, mining companies agree:

- To achieve 26% HDSA ownership of the mining industry assets in 10 years by each mining company; and
- That where a company has achieved HDSA participation in excess of any set target in a particular operation then such excess may be utilised to offset any shortfall in its other operations. All stakeholders accept that transactions will take place in a transparent manner and for fair market value. Stakeholders agree to meet after 5-years to review the progress and to determine what further steps, if any, need to be made to achieve the 26% target.

#### **4.8 Beneficiation**

This Charter will apply to mining companies in respect of their involvement in beneficiation activities, specifically activities beyond mining and processing. These include production of final consumer products.

Mining companies will be able to offset the value of the level of beneficiation achieved by the company against its HDSA ownership commitments.

Mining companies agree to:

- Identify their current levels of beneficiation.
- Indicate to what extent they can grow the baseline level of beneficiation.

#### **4.9 Exploration and prospecting**

Government will support HDSA companies in exploration and prospecting endeavours by, *inter alia*, providing institutional support.

#### **4.10 State assets**

Government will ensure compliance with the provisions of this Charter and be exemplary in the way in which it deals with state assets.

#### **4.11 Licensing**

To facilitate the processing of licence conversions there will be a scorecard approach to the different facets of promoting broad-based socio-economic empowerment

in the mining industry. This scorecard approach would recognise commitments of the stakeholders at the levels of ownership, management, employment equity, human resource development, procurement and beneficiation. These commitments have been spelt out in sections 4.1 to 4.9 above.

The HDSA participation required to achieve conversion within the five-year period on a company specific basis will be specified in the score-card, hereto attached as Annexure A.

#### **4.12 Financing Mechanism**

The industry agrees to assist HDSA companies in securing finance to fund participation in an amount of R100 billion within the first 5 years. Participants agree that beyond the R100 billion-industry commitment and in pursuance of the 26 per cent target, on a willing seller – willing buyer basis, at fair market value, where the mining companies are not at risk, HDSA participation will be increased.

#### **4.13 Regulatory framework and industry agreement**

Government's regulatory framework and industry agreements shall strive to facilitate the objectives of this Charter.

#### **4.14 Consultation, monitoring, evaluation and reporting**

It is recognised that the achievement of the objectives set out herein entails an ongoing process.

Companies undertake to report on an annual basis their progress towards achieving their commitments, with these annual reports verified by their external auditors. A review mechanism will be established which again provides flexibility to the company commitments.

Parties hereto agree to participate in annual forums for the following purposes:

- Monitoring progress in the implementation of plans;
- Developing new strategies as needs are identified;
- Ongoing government/industry interaction in respect of these objectives;
- Developing strategies for intervention where hurdles are encountered;
- Exchanging experiences, problems and creative solutions;
- Arriving at joint decisions;
- Reviewing this Charter if required.