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**RURAL RESTITUTION: THE PRODUCTION OF HISTORICAL TRUTH OUTSIDE THE  
ACADEMY**

By

Ashley Westaway  
BRC

And

Gary Minkley  
University of Fort Hare

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**Fort Hare Institute of Social and Economic Research**

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Contact: Anne King at [aking@ufhel.ac.za/](mailto:aking@ufhel.ac.za/)

## Introduction<sup>1</sup>

The Restitution of Land Rights Act was the first piece of legislation to be passed by the democratic parliament. Since its enactment, in late 1994, it has been the basis for the flagship land reform programme of the post-apartheid South African government. If anything, the prominence of the programme has risen rather than waned in the most recent period. This is partially due to the President's challenge that restitution should be wrapped up by 2005.

The restitution process is rights-based. More specifically, it provides for a 'measure of justice' to those that were dispossessed of land rights in the post 1913 period. This measurement (of dispossession and thus also of justice) takes place through the determination of particular historical evidence. 'Truth' is seen to reside in the facticity of these measurements – in terms of identifying land rights, measuring size and scale of 'land rights' and recording dispossession based on 'past racially discriminatory laws and practices'. Put very simply, if one was racially dispossessed of 8 ha of prime agricultural land, then one is entitled to the restitution of 8 ha of prime agricultural land.

The Restitution of Land Rights Act was drafted as a wide-ranging, broadly-encompassing piece of legislation. Its most controversial limitation is that it only applies to dispossession that was effected after the passing of the 1913 Land Act. But it applies broadly to dispossession of land rights wrought through discriminatory processes in the period 1913 – 1994.

In the initial legislative process betterment occupied an ambiguous position in relation to whether it fulfilled the criteria of the restitution programme. It appears, though, that in conceptualizing the Restitution of Land Rights Act as 'enabling legislation', the overall attempt was to accommodate various forms of dispossession, including that of betterment.<sup>2</sup> By 1996, though, the democratic government had taken a decision that dispossession effected through the implementation of betterment was deemed to fall outside the parameters of the restitution program. Instead, it was suggested that the legacy of betterment dispossession would be addressed through other land reform programs such as redistribution and tenure reform.<sup>3</sup> By October 2000, however, Chatha in the Eastern Cape had been awarded restitution on the basis of betterment dispossession, closely followed in 2001 by other Keiskammahoek villages.

This paper attempts to explore aspects of these developments in relation to betterment and restitution. Through a detailed case-study we wish to explore some of the ways that 'betterment' has been both a site

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<sup>1</sup> Note that at the time of writing the abstract for this paper, it was anticipated that it was going to explore production processes in all Keiskammahoek cases. However, as it turned out, the paper focuses primarily on the Chatha case.

<sup>2</sup> A Classens, personal correspondence.

<sup>3</sup> However, these programs were then (and still are) in a parlous state. Effectively therefore, government's decision amounted to the exclusion of (dynamics inside) the former homelands from post-apartheid land reform (clearly people affected by removals into the homelands through black spot, forced homeland consolidation etc could claim, but on the basis of dispossession outside).

and a vehicle through which knowledge about the present and the past has been constituted. In this sense we want to ask some questions about the changing ‘evidentiary paradigms’ associated with betterment and restitution and inquire into some of the ‘grids of intelligibility’ and historical narratives that produced particular forms of accredited knowledge and power at a particular time, for a particular contingent and in a particular way.<sup>4</sup> We also want, in the process, to see historically how “effects of truth” are produced within particular discourses.<sup>5</sup> As such, the paper argues that we need to think about betterment as a ‘dense site’ around which different notions of the ‘truth of dispossession’ have cohered and through which different pasts and presents are constructed and produced. At the same time we wish to reflect on aspects of restitution and sites outside of the academy as prisms through which historical knowledge is produced in differing ways.

### **Taking aim for ‘truth’**

Border Rural Committee, a land rights’ organization that operates in the central region of the Eastern Cape Province, took a long term strategic decision in 1998 to effect a fundamental reversal of government’s policy position. In order to achieve this, the organization implemented two short term strategies<sup>6</sup>, namely to select and resolve a precedent-setting case and to encourage the lodgement of as many betterment claims as possible.

In mid-1998 BRC went through a process of internal discussion about betterment. The issues of whether or not BRC should prioritise the ‘betterment and restitution’ issue, the selection of a precedent site and the strategic options for setting a favourable precedent were all considered in a parallel fashion. We briefly consider each of these discussions in turn. Before 1998 BRC had discussed betterment on many occasions, but an internal restitution programme meeting held on 21 April is the first recorded instance of consideration to practically grappling with betterment in terms of the restitution act. The main argument put forward to justify this approach was as follows: “If the case is successful over a million people removed due to betterment will benefit from that exercise.”<sup>7</sup> As far as case selection is concerned, the only site mentioned in those minutes was Gwili-Gwili in Keiskammahoek. With regard to the most appropriate way to set a precedent, the staff involved in the restitution program were unequivocal that the case should be taken through the legal route. The minutes read as follows: “...the case will bypass the commission and go straight to the land claims court.”<sup>8</sup>

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<sup>4</sup> See amongst others, C Ginzberg, A Stoler, G Denning, R Trouillot, DW Cohen

<sup>5</sup> M Foucault, Truth and Power, in Power/ Knowledge, p118. Foucault says “Now I believe that the problem does not consist in drawing the line between that in a discourse which falls under the category of scientificity or truth, and that which comes under some other category, but in seeing historically how effects of truth are produced ...” and the work that these effects of truth perform.

<sup>6</sup> Later in about 2000, BRC added further strategies, namely to apply the precedent at scale, to ensure that the precedent was made irreversible and to effect a re-opening of the lodgement phase of the restitution process for victims of betterment dispossession, but these were not on the agenda of the organisation in 1998.

<sup>7</sup> Internal unpublished BRC minutes entitled ‘Restitution Programme’ and dated 21 April 1998, p2.

<sup>8</sup> Ibid, p2

Despite the certainty that seemed to characterize the discussion, various concerns and questions are noted in the minutes. Principally, these were uncertainties about court timeframes and processes. In order to provide clarity on these issues and to enable the organization to move from discussion to decision, it was later decided (on 8 May) that a discussion document on the key issues would be prepared for internal purposes. It was stipulated that this document would recommend a betterment village on which future work would be focused.<sup>9</sup>

In June BRC considered this document, entitled 'Betterment – Options for Land Reform'. The document dealt not only with the selection of a village, but also considered the overarching issue of the advantages and disadvantages of attempting to address dispossession effected through the implementation of betterment, through the restitution program. Various concerns were raised in this regard. The following extracts from the document indicate some of the key issues:

- “the extent of land was not decreased – boundaries the same”
- “land rights were lost long before betterment”
- “[what is] the strategic aim of taking a betterment case to court. What would we like to achieve? ...This discussion should take place in the context of a restitution process which is not really working at present and has a huge number of claims submitted.”
- “the Court is being criticized for not taking decisions. I have been told that if you want to...have a chance of getting a favorable ruling you should have the support of the Commission or DLA. We don't have that.”<sup>10</sup>

The discussions that followed produced the following three key decisions: BRC would seek to address betterment dispossession through the restitution program; BRC would attempt to set a precedent in this regard through the court; and (pending our ability to secure the support of certain key stakeholders) the organization selected Chatha in Keiskammahoek as the test case in this regard.

It is important to emphasize that BRC took the first two decisions without being clear, convinced or confident about a positive outcome. Instead, the organization decided to pursue an unknown course, in the hope that benefits would somehow accrue to the people of Chatha and other communities located in the former homeland areas. Or put another way, BRC fixed its sights on the desired outcome and selected a strategic path that it thought may yield the outcome, before rigorously establishing the feasibility of ever reaching the end point, let alone traversing the chosen path.

In this context, BRC, as a NGO, enters restitution in the former homelands through the only apparent route open to it, given the 1913 cut-off point. This decision is motivated by a perceived opportunity to

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<sup>9</sup> Internal BRC document entitled 'Notes on Restitution Meeting – 8 May 1998'

mobilize resources for communities in the context of limited redistribution and tenure reform programmes at the time. BRC works, then, with what it sees as the strength of a rights based discourse – restitution - to enable better delivery. For BRC at the time, the truth of betterment as dispossession, and therefore as part of the restitution process was located in a notion of truth residing in ‘community’, in the history of the homelands and in development needs. For BRC it was the “cruel irony of restitution ... that those who had suffered the ravages of apartheid most severely in the homelands had been excluded ... [and] had consistently remained on the margins in the periphery in the post-1994 period”.<sup>11</sup>

This also meant that BRC developed, from the time of these decisions, an understanding of betterment as within restitution, based on the broad suffering, ravages and marginality of those subject to betterment in the homelands. The ‘legitimacy of claim’ then, was initially determined by a political ‘effect of truth’, and the historical narratives of apartheid homeland marginality provided the accredited knowledge to address justice and development wants and needs through restitution at this point.<sup>12</sup>

One of the factors taken into account by BRC in selecting Chatha, though, was also the availability of relevant research. Chatha was considerably more researched than Gwili-Gwili, and there seemed to be a significant amount of detailed information on the implementation of betterment in Chatha and the effects of the implementation. More specifically, Chris de Wet had undertaken considerable doctoral and post-doctoral work in Chatha, with a focus on betterment, and BRC held that the scope and status of this information would prove invaluable, for two reasons. First it would lessen the research burden that would have to be carried by BRC, and second it would lend weight to the cause of the organization if it could link political with academic historical truth . As de Wet later testified, his work “was conducted in a straight academic context, long before the idea of restitution had become part of the political debate in South Africa. I submit it therefore speaks all the more persuasively for the necessity for restitution for the community of Chatha.”<sup>13</sup> It was exactly this discourse of academic integrity, authority and credibility that the organization hoped would work in its favor. Hence Chatha was selected ahead of Gwili-Gwili.

### **In Pursuit of Truth through the Court**

For the second half of 1998, BRC focused on preparing the legal documentation required to successfully lodge a claim directly with the Land Claims Court. In this first instance this required securing the support of key roleplayers such as the community of Chatha, a reputable human rights lawyer (the services of

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<sup>10</sup> Internal BRC document entitled ‘Betterment – Options for Land Reform’

<sup>11</sup> Ibid.

<sup>12</sup> This characterization may be generalizable to some extent of exercises in the production of historical truth outside the academy. This points to some of the dangers facing the production of historical knowledge, for example manipulation and treachery in pursuit of the desired outcome, or less cynically merely wandering up the garden path without any actual evidence.

<sup>13</sup> Notice of Motion in the Land Claims Court of South Africa In the matter between: the community of the village of Chatha (Applicant) and the Minister of Land Affairs (Respondent), Annexure 3, p 11, 18 December 1998.

Clive Plaskett were obtained) and the Keiskammahoek Transitional Representative Council (the then local authority responsible for Chatha). Thereafter, it was necessary to decide on the legal strategy that should be selected and to implement it accordingly. It was decided that the Notice of Motion should revolve around a main affidavit to be made by a duly nominated representative of the Chatha community (ZW Gcilitshana was selected in this regard) and that this should be backed up by various supporting affidavits, to be made by other community members and by de Wet. The final quarter of the year was spent preparing the required documentation, which was ultimately lodged in the registry of the court on 23 December 1998.

Before taking a look at the substance of the documentation, and in particular of the main affidavit, it is useful to reflect briefly on the fact that the claim was lodged a mere eight days before the deadline for the lodgement of claims. This meant that the case would not be heard within the lodgement period, and would therefore fail to establish a precedent to inform whether or not betterment claims should be lodged. In retrospect BRC got this calculation badly wrong. Even if the legal papers had been lodged by mid-year it is likely that the verdict would not have been made by December. This observation underlines the organization's (acknowledged) inexperience with restitution in general and with the legal route in particular.

Because it realized that the precedent value of the claim would be limited to the post-lodgement phase of the restitution programme, a 'plan B' was hurriedly put together in about November 1998. This entailed two components. First it was decided that the fieldstaff of the organization would take direct responsibility to lodge all claims from the communal villages of Keiskammahoek district. (Ultimately, an additional seven claims were lodged in this regard.) Secondly, BRC staff met with delegations of many of the Transitional Representative Councils that covered villages that had been subjected to betterment dispossession in the former Ciskei and western Transkei areas. It was expected that councilors would then assist these villages to lodge their respective claims, but this tactic yielded disappointing results. As a result, by 31 December only a miniscule number of potential betterment claims had been lodged.

The affidavit of ZW Gcilitshana (written by Plaskett) is a wide-ranging 29 page document that comprises the following sections: the settlement of Chatha, legislation of relevance, betterment planning, betterment planning at Chatha, implementation of betterment planning at Chatha, consent to betterment?, the effect of betterment planning, and relief. Some sections are more coherent and compelling than others. Not surprisingly, for example, the section dealing with legislation provides a useful overview of the origins and evolution of betterment legislation<sup>14</sup>, which lays the basis on which to establish that it was undoubtedly racially-discriminatory in its intent and effects. The section on the effects of the implementation of betterment in Chatha is interesting, not least because of its crucial importance in relation to the validity of the Chatha case as a restitution claim. It makes mention of the following

consequences amongst others: the demolition of homes, dispossession of “members of the community of their rights to use and enjoy their residential sites, free from hindrance”, reduction in the size of residential sites, dispossession of arable rights and reduction of the size of arable land holdings, dispossession “of members of the community of their communal rights in the land” (eg collective community management of the land through the application of rules of customary law, flexible land use, etc).<sup>15</sup> Although this amounts to a useful qualitative assessment of the dispossession of land rights effected through the implementation of betterment, the affidavit does not provide any quantitative detail at all.

After some discussion between BRC and Plaskett, it was decided to demand that restitution should provide some of the developmental stimulus initially promised by betterment but never delivered. “[T]he compensation sought by the community relates essentially to the provision of services and development opportunities...”<sup>16</sup> The document then goes on to motivate for specific remedies in relation to the harm wrought by betterment. For example, “betterment planning has had a drastic and dramatic effect on the people of Chatha as a community. It has changed the way we live and the places where we live. It has brought us together physically. This has had the effect of making it necessary, for the better functioning of the community, to have a community hall, which we do not have at present.”<sup>17</sup> The full list of issues were prioritised for attention as part of the proposed compensation package: community hall, sanitation infrastructure, internal and external fencing, internal and external roads, conservation measures, skills training, income generation opportunities, and primary school. The proposed interventions were estimated to require expenditure of just over R 6 million.<sup>18</sup>

In sum the legal documentation lodged on 23 December 1998 is properly regarded as the first comprehensive attempt at formulating an evidence led ‘historical truth’ through the discursive lens of restitution pertaining to betterment dispossession, (in relation to the contextual opportunities that opened up through the passing of the Restitution of Land Rights Act in 1994.) This evidence is primarily legal and focuses particularly on the attempt to constitute betterment as racially discriminatory and as the dispossession of rights, and to establish Chatha betterment as a valid and precedent setting restitution claim. The use of this legal evidentiary paradigm meant that the specified nature, extent and value of land rights held by the people of Chatha were not included in the affidavit and in the legal framing of the claim. As Davidson says in a different, but applicable context, “legal evidence and historical evidence may overlap, but the former is in the service of establishing a just verdict, while the latter is relevant for securing a truthful account of events ... What is evidence for some purposes may be beside the point for

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<sup>14</sup> Ibid, main affidavit, 4 – 13.

<sup>15</sup> Ibid, 23 – 26.

<sup>16</sup> Ibid, 27.

<sup>17</sup> Ibid, 27, 28.

<sup>18</sup> Ibid, 27 – 29.

others. ... the regulative ideals of justice and truth are open to divergent interpretations of these ideals.”<sup>19</sup> In effect, he argues that there is “not some one notion of proof and evidence applicable by both the judge and the historian to their respective domains”.

This became particularly apparent in the next period as the key legal evidence, (exemplified in the affidavit and other legal correspondence), necessary for securing the broad regulative ideals of truth and justice in terms of betterment dispossession, ran up against the need for what might be termed the particular truth of historical and quantifiable evidence. This is explored in the next section.

### **In Pursuit of Truth through Negotiations**

During the first quarter of 1999, there were inconclusive, confusing interactions between the court, the department and BRC.<sup>20</sup> However, late in that period, the Chief Director of Restitution in the DLA (Jean du Plessis) proposed what he termed ‘one round of negotiations, without prejudice’. This meant that in the event that the negotiations process broke down, the parties would return to court, without either of their respective cases having being jeopardized through the negotiations process. The reason that du Plessis put forward for the negotiations was that it was that it would be more appropriate to resolve the Chatha case through negotiations than the court, because of its policy significance.

The first (and in fact only) face-to-face negotiation meeting took place on 16 April 1999. It was attended by representative of DLA, the RLCC, the Chatha community and BRC. After initial exchanges, it quickly emerged that the key issues related to the nature, extent and value of rights held by the people of Chatha and dispossessed through the implementation of betterment. Earlier there had been a question-mark over whether or not government disputed that betterment was racially-discriminatory in its legislative origins and implementation. However, this was not contested by government in the meeting, and never emerged subsequently as a controversial issue.

In an effort to assess whether or not there was possible convergence between the parties on these issues, it was agreed that the DLA would pen its understanding of the nature and extent of rights dispossessed, by 7 May 1999. Both parties emerged from the meeting optimistic that a negotiated settlement was possible. Du Plessis was quoted as follows in a Daily Dispatch article on 21 April: “We are not conceding the claim but have entered no-prejudice negotiations and we feel there is a strong likelihood that we can reach

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<sup>19</sup> See A Davidson, ‘Ginzburg and the Renewal of Historiography’, p307

<sup>20</sup> It should be noted that there was a vacuum of authority in the Regional Land Claims Commission at this time. Dr Mayende had resigned as commissioner, but his successor had not yet been appointed. Instead, Michael Worsnip had been installed by Min Hanekom as a ‘caretaker commissioner’. Worsnip’s main interest was to structure the office in an appropriate manner and to improve operational systems. He did not involve himself in policy discussions. Hence the RLCC was not involved centrally in the negotiations process until the final quarter of 1999, when the new commissioner, Tozie Gwanya, began making his presence in the commission felt.

settlement.”<sup>21</sup> Westaway from BRC laid out the upcoming challenge as follows: “We have to find a common understanding on the nature of rights lost and then put a value on those rights. If we reach an agreement on these issues, we will have an agreement.” He went on to add: “We believe that all cases where communal land rights were lost due to betterment should fall within the restitution process.”<sup>22</sup>

Over the few weeks that followed, du Plessis drew on the assistance of DLA consultancy capacity to prepare a departmental response. He duly delivered the promised document 7 May. DLA suggested that the most useful way to reach a shared understanding of the rights’ issues was to “break this claim into 2 component parts.

1. Rights to use and enjoy residential sites and arable allotments, and
2. Rights to decide upon the use of land, in particular common property resources such as grazing land.

This division is consistent with the fact that individuals and families generally have strong exclusive rights to residential plots and fields under customary communal systems, whilst control of “common property” such as grazing areas is generally exercised by the group under a more fluid “rules based” process.”<sup>23</sup>

DLA largely accepted the interpretation and understanding of the dispossession of individual land rights, as described in the Notice of Motion. The department went further by suggesting that these rights were properly regarded as prescriptive rights (and therefore, in terms of the White Paper, akin to full ownership). A further contribution of this document is that it broke new ground with regard to the outstanding issues of quantification and valuation. (The weaknesses of the Notice of Motion in this regard are explained above.) To quote from the DLA document:

“we would recommend that the areas of land which people used and occupied as fields and residential sites be quantified as well as the area of fields and residential land which they received in compensation. The second area should be deducted from the first and the “uncompensated” area thereby arrived at. Once an agreed valuation of arable and

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<sup>21</sup> ‘Government, community in bid to settle’, Daily Dispatch, 21 April 1999, 2.

<sup>22</sup> Ibid. This quote is significant for two reasons. First it indicates that although BRC had failed in its rather naïve attempt to oversee the resolution of the Chatha case before the cut-off date, it still held onto the hope that the its eventual resolution would nevertheless have broad policy implications, effecting all betterment cases. Second it shows that BRC had not yet adopted a strictly demarcated, phased strategy to dealing with the long-term advocacy challenge of betterment in relation to restitution, namely to eventually effect a re-opening of the lodgement process for those dispossessed through betterment. Once this strategy was in place, BRC decided not to indicate any support for a call to re-open lodgement until the government had uncontrovertibly reversed its policy stance as far as lodged betterment claims were concerned.

<sup>23</sup> Du Plessis, J (for the Department of Land Affairs), ‘Draft: without prejudice. Attempted description of the nature and extent of the rights lost through the betterment process at Chata’, 7 May 1999, p1.

residential land in the area has been determined this could be applied to the uncompensated area and offered to the claimants...”<sup>24</sup>

Whereas the DLA adopted an accommodating stance in relation to the dispossession of individual rights, its approach to what it termed the “second component part” of the claim was narrow and technicist. Perhaps this is not surprising given that this component was less tangible and quantifiable given that it dealt with the destruction of a tenure system and way of life, and more specifically the full dimensions of communal loss. In BRC’s terms, the department failed to see past two issues in this regard, namely that the outside boundaries had not changed and that there seemed to be no impediment preventing a return to pre-betterment tenure arrangements as far as the commonage was concerned. Thus the department asked, in bold typeface, “why is the remedy sought not the direct remedy to the problem cited, in other words that the right to allocate and decide on the use of the land be restored to the community”?<sup>25</sup> It went on to contend that “that there would be a problem with the department compensating people for land which they, as a community, have not in fact lost”.<sup>26</sup> On the basis of these and other points, the department argued that the “obvious remedy” was restoration to the community of the right to control communal resources. Beyond this, the department offered nothing, but it did leave one issue hanging, namely compensation for loss of effective use of the commonage from the implementation of betterment onwards, during what it termed the “long years”.<sup>27</sup>

During mid-May BRC and the community of Chatha attempted to formulate a position in relation to the position taken by DLA and an appropriate response to the position.<sup>28</sup> This was complicated by the fact that DLA had conceded part of the claim, but not the whole claim. Therefore it was decided to declare agreement in relation to the dispossession of individual rights but to push for concessions in relation to the issues of the destruction of the tenure system and dispossession of communal rights. The response that was sent on 28 May attempted to give DLA a fuller understanding of the consequences of the imposition of betterment on the community of Chatha. It is a passionate and pain-tinged document. The tone is set in the early paragraphs.

“The community control over the allocation of rights to residential and arable land, through the application of customary law, was fundamental and shaped community life and the organisation of the Chatha village.

Limiting the definition of what people lost to control over an extent of land and therefore the remedy to restoring the right to control land use would undermine what people lost as

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<sup>24</sup> Ibid, 2.

<sup>25</sup> Ibid, 3.

<sup>26</sup> Ibid, 3.

<sup>27</sup> Ibid, 4.

<sup>28</sup> On 23 May, after discussions between BRC and the Chatha leadership and general community, BRC was given a mandate to draft a response to DLA.

a community. We need to recognise the rights that made up that control and which rendered the removal of the control so devastating.

In addition to access to and control over an extent of land being removed, a quality and way of life and in fact, a communal tenure system, were destroyed by the removal of that control through betterment planning. The discussion of remedy must be based on a full understanding of what people lost and the nature of the damage that was inflicted through the dispossession.”<sup>29</sup>

The BRC document then goes on to summarise its understanding of: land rights exercised before and lost through betterment, the effect of the exercising of those rights in the pre-betterment period, and the effect of the loss of land rights. It asked for a further response from DLA by 11 June.<sup>30</sup>

The BRC response reflected an organisation that was still trying to come to terms with the limits of restitution. It was clinging on to a notion that restitution could undo the wrongs of betterment in a general sense, as opposed to the reality which was that restitution could only address this legacy insofar as it pertained to the dispossession of land rights specifically.

Not surprisingly, this is exactly what DLA emphasised in its June response. It was empathetic, but did not concede anything further.

“We acknowledge the terrible suffering caused by Betterment and by the many other aspects of apartheid. We acknowledge that people suffered the destruction of “a way of life and a system of tenure”. But the Act only allows us a certain distance in formulating a remedy. Insofar as you are concerned about the other losses suffered by the people, for example quality of life, you should in our view pursue other, mainly developmental, avenues of redress, and not the Restitution process...

We ... acknowledge that people in the situation of the Chatha claimants, and many others, deserve a remedy which goes beyond restitution of land rights. But the Restitution Act is limited to land and land rights.”<sup>31</sup>

In this way the ball was thrust back into the court of BRC and the Chatha community. The evidentiary paradigm required had shifted to the need to quantify rights and as such entered the scientific and technical expert grids of statistical evidence and proof.

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<sup>29</sup> Border Rural Committee, ‘Re: Description of the nature and extent of land rights at Chatha’, 28 May 1999, 1.

<sup>30</sup> Ibid, 1 –4.

<sup>31</sup> Du Plessis, J (for the Department of Land Affairs), ‘Description of the Nature and Extent of Land Rights at Chata’, 17 June 1999, pp 1 –2.

## Research truths: Technical productions and enlisted evidence<sup>32</sup>

BRC decided to consult with Plaskett, who advised that the community should accept DLA's understanding of the dispossession and the deal that would stem from it, because it was unlikely that the court action would yield a better deal. After a consultation meeting with the community on 8 July and subsequent telephonic exchange, it was decided that BRC would send a reply to DLA that would accept the offer, but press for a supplementary award for hardship and damages caused by betterment. This was sent on 29 July.<sup>33</sup> DLA responded on 3 September, welcoming the positive response of the community to the department's offer. But it noted that it was not possible to agree to the proposal of 10% for hardship, damages and effective loss without further information on the Chatha case as well as policy development on the side of the department. To take the claim toward settlement, du Plessis suggested that BRC should make research proposals about how to gather the information required to calculate individual compensation amounts.<sup>34</sup>

On 29 September, BRC proposed that the individual compensation (for dispossessed arable and residential rights) should be calculated in average terms<sup>35</sup>, based on de Wet's research. It was further suggested this work would assist with the compilation of a beneficiary list of individual claimants. BRC also made proposals about the valuation exercise, and offered to make arrangements for this exercise to commence.<sup>36</sup>

In early October BRC and DLA agreed telephonically that BRC would make proposals on the monetary value of the dispossessed rights. In order to do this, the organisation contracted an agricultural economist, Jock Danckwerts, to undertake the necessary work. Apart from commissioning Danckwerts to calculate the monetary value of the dispossessed agricultural and residential land, BRC also asked him to calculate the value of the loss of production resulting from the dispossession of arable land. (It should also be noted that BRC's instruction to Danckwerts was to maximise the monetary value of the claim without jeopardising his professional integrity.)<sup>37</sup> Furthermore, the organisation also set about placing a monetary value on the replacement value of dispossessed residential structures. By the beginning of December, all the initial valuation work had been completed, allowing BRC to summarise the findings as follows:

- Loss of arable land                      R 4 075
- Loss of residential land                R 5 880

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<sup>32</sup> L Daston, *Marvelous Facts and Miraculous Evidence*, in J Chandler, et al, eds, *Questions of Evidence*, Chocago, 1991. She argues that it is possible to imagine a kind of evidence that is intention-laden.

<sup>33</sup> BRC, 'Chatha Negotiation meeting - 8<sup>th</sup> July 1999', p 1.

<sup>34</sup> Du Plessis, J (for the Department of Land Affairs), 'Description of the Nature and Extent of Land Rights at Chata', 3 September 1999, pp 1-2.

<sup>35</sup> This was in line with community discussions in July. BRC, 'Chatha Negotiation meeting – 8<sup>th</sup> July 1999', p1.

<sup>36</sup> Tyacke, T (for the Border Rural Committee), 'Re: Chatha Land Claim – Proposal for Calculation of Compensation', 29 September 1999, p1.

- Loss of production (maize) R 7 820
- Loss of dwellings R15 466<sup>38</sup>

DLA raised various technical queries regarding the valuation methodologies and figures, which were resolved without much difficulty. In fact of the three aspects of the dispossession that were covered in the eventual agreement, one of the figures (namely that for arable land) is identical to that cited above, and the other two figures (namely for residential land and dwellings) are higher than the initial BRC valuations.

However, the two parties were unable to reach agreement about the loss of production. In late November, du Plessis repeated his concerns in this regard and stated categorically that these losses could not be included “in any settlement, without a firm instruction from the court”<sup>39</sup>. This is the final time that the matter of loss of production features in correspondence between the parties. It seems that BRC decided that the gains made and concessions forced in other aspects of the claim were not worth undermining or threatening for the sake of an issue that was not at the heart of the test case.<sup>40</sup> (This was not a test case regarding consequential loss, it was a case to test whether or not betterment dispossession could be addressed through restitution.) The timing of its disappearance as an issue is interesting: it is probably no coincidence that it happened at the same time that BRC managed to slip loss of dwellings into the deal through the side door, without it raising a whimper from anyone in the DLA.

It is notable that the Chatha case received a fillip in the final quarter of the year with two key people in the department, namely the Director-General Geoff Budlender and the newly appointed Eastern Cape Claims Commissioner Tozie Gwanya, both lending their support to the claim.<sup>41</sup> This was a significant development because up until that time Jean du Plessis had been solely responsible for negotiating the settlement on behalf of the department, and it is unclear how much support he enjoyed either in Pretoria or in East London up until Budlender and Gwanya entered the fray.

After the technical valuation issues had been resolved, the parties set about preparing a formal ‘Mandate to Negotiate’ and then monitoring and nurturing its passage through the department and ministry. This document was necessary to give the outcome of the negotiations ‘without prejudice’ formal departmental and ministerial support and to give designated officials a proper mandate to deal with all outstanding negotiation issues. For our purposes, the only significant aspect of this process are qualifying written

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<sup>37</sup> Westaway personally gave him this instruction during a meeting in Grahamstown in October 1999.

<sup>38</sup> Tyacke, T (for the Border Rural Committee), ‘Chatha Claim – MVOC – Authority Used’, 1 December 1999, p 2.

<sup>39</sup> Du Plessis, J, ‘Re: Fwd: Chatha Betterment Claim’ (e-mail message), 23 November 1999.

<sup>40</sup> Personal recollection.

<sup>41</sup> Gwanya, T, ‘Memo: Chatha Betterment Land Claim: MVOC Proposal’, 19 November 1999; Budlender, G, ‘Chatha Betterment Claim’ (e-mail message), 23 November 1999.

comments made by the acting Director-General Glen Thomas, when he approved the mandate, on 19 February 2000. He wrote:

“While in principle I agree with the recommendations made, I still strongly feel that the Commission should start...a process of developing policy on “betterment” claims which will guide the department in settling such claims.”<sup>42</sup>

The Minister endorsed Thomas’ remarks, which meant that the broader policy issue would have to be given priority and urgent attention, in order to avert delaying the final settlement of the Chatha case.

Before considering the manner in which BRC attempted to influence and manage the policy process (in furtherance of its advocacy objectives), it is worth noting a couple of points that emerge from the narrative of the nine month negotiation process that began in April 1999. First, BRC had vast and unrealistic expectations of the restitution programme, and quickly had to come to terms with its limitations. It was only after July 1999 that it focused its ‘truth’ production resources on the directly relevant issues. Second, despite the fact that the parameters of the restitution are clearly defined, there are many gray areas and outstanding policy issues. This brings a certain amount of unpredictability to the process of negotiations. For example in the Chatha case, the following can be listed as contested issues, amongst others: loss of production, loss of dwellings, hardship and damages, and consequential loss. In the case of restitution, the parameters of truth are fairly elastic and as we try to suggest above – multi-locational and definitional. No one truth prevails. This also demands a pragmatic approach on the part of those engaged in ‘truth production’ processes. Third, the case shows the importance of timing, and related to this, the contributions of particular individuals. The Chatha case was negotiated at the time of the waning of a legalistic approach to restitution and the waxing of the administrative approach, in which the commission was expected to play a lead role. This meant that particular forms of accredited knowledge around restitution cohered around the need for technical/ scientific and apparently objective quantifiable facts detailing the extent and nature of rights/ dispossession alongside a more intention-laden and ‘maximizing’ series of meanings linking restitution and rights to justice. Looked at from the point of view of this paper, an administrative ‘effect of truth’ produces an evidentiary paradigm that both relies on a notion of neutral and objective statistical fact overlaid with an intention-laden grid of intelligibility that produces a form of accredited knowledge that seeks to ‘maximize evidence’ and to exemplify a form of evidence that is anomalous and ‘constructed’.

Simultaneously however there was also a lacuna in the Eastern Cape, because of the resignation of Dr Mayende. This paved the way for Jean du Plessis to handle negotiations on behalf of government, almost single-handedly. Luckily, he was sympathetic, efficient and consistent. Also, people like Teresa Tyacke at

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<sup>42</sup> Department of Land Affairs, ‘Memorandum: Chatha Land Claim, Keiskammahoe, Eastern Cape: Request for Ratification of Negotiations Framework and Mandate to Negotiate a Settlement of the Claim’, April 2000, p7.

BRC played a huge role in producing the particular truth that was required to inform the Chatha Settlement Agreement. ‘Neutrality’ and ‘contamination’, individual influences and historical truths become matters of degree, not frozen into any one evidentiary scheme, not ‘fixed signposts forever pointing in the direction of a single conjecture’.<sup>43</sup> For, as Daston says, if they did facts would ‘lose their power to arbitrate between rival arguments or theories’.<sup>44</sup>

### **Securing ‘Truth’ through Policy**

In early April, BRC received word that the ‘mandate’ had been conditionally approved by the minister. Soon thereafter the organisation got access to the signed document, which indicated that the broad policy issue would require attention. BRC decided to play a proactive role in this process, and after consultations with the regional commissioner in late April<sup>45</sup>, prepared a document called ‘A Contribution to the Policy Process’. In this document BRC attempted to secure the precedent value of the Chatha and Mgwali<sup>46</sup> cases. The way that this was done was through setting out the cases in some detail, bolstering certain assumptions/ assertions underpinning the cases through supplementary academic (and by implication, ‘objective’ and ‘truthful’) argument, and then abstracting key approaches and understandings into policy positions.

Interestingly therefore, this is another instance of the usage of academic notions of truth production and ‘effects of truth’ to produce ‘truth’ in a nonacademic context. The main assertion that seemed to BRC at the time to require academic underpinning was that rights to residential and arable land in communal areas were vested in individual households during the pre-betterment period. Two types of academic work were used, namely social science (especially the research of Catherine Cross) and legal case work (done by Heinz Klug). The latter was particularly informative. Klug studied the nineteenth century case *Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale*. It is beyond the scope of this paper to explore the details of the case or Klug’s arguments in this regard. However some of the conclusions that he draws were very significant for the policy work of BRC. Most important he argues that strong individual rights were in the foundation of pre-colonial communal systems and that their destruction therefore lay at the heart of the colonial mission. By implication betterment can and should be seen as one of the key strategies of subjugation used by the apartheid regime. To quote from Klug:

“The creation of a segregated system of land holding in which African rights were confined to areas designated for African occupation could be justified only if the

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<sup>43</sup> L Daston, Facts and Evidence, op cit, p244

<sup>44</sup> Ibid.

<sup>45</sup> Border Rural Committee, Six-monthly Report: January to June 2000’, p37.

<sup>46</sup> Just as BRC had selected Chatha as its test case relating to betterment dispossession in communal areas, it had selected Mgwali as the case to test betterment dispossession in quitrent areas. Although the Mgwali case had not proceeded as far as the Chatha case, BRC and the RLCC (in particular Gwanya) had reached common understandings about the fundamentals of the case.

indigenous system differed from the British, so that reserves were, in terms of property law, to be reserves of the rightless, legally dependent on chiefs and communalism, despite documented patterns of individual use. A recognition that these observed patterns of individual use inside reserves were akin to ownership – even if individuals could not alienate – would have created the possibility of conceiving of such rights having existed outside the reserves or even have suggested that such rights might be established in areas designated for European colonial settlement...

Having constructed a vision for African land tenure under “customary law” in which the most important rights...were vested exclusively in the political authority embodied in the chief, it was a short step to the assertion that the loss of sovereign powers to the colonial authority made African land rights subject to administrative authority. This collapse of property rights into the realm of the chiefly authority had equally debilitating consequences for the political rights of Africans...[T]he preservation of native lands and traditional authorities became the justification for the exclusion of Africans from broader political participation.<sup>47</sup>

Klug concludes his paper by arguing that an understanding of how customary tenure was manipulated by colonial intervention paves the way for “a greater recognition of the land rights of individuals and families under indigenous law”.<sup>48</sup> BRC asserts in its policy document that the manner in which restitution was applied in the Chatha case, reflects exactly such a recognition.<sup>49</sup>

On 16 July 2000, the RLCC in the Eastern Cape convened a restitution indaba to attempt to reach consensus about ‘betterment and restitution’. BRC presented its paper to the meeting, and it was favourably received. Consensus was easily achieved.

After the indaba BRC was contracted by the Eastern Cape Regional Land Commission to amend<sup>50</sup> and then convert its ‘contribution’ document into a policy paper for government. This was done, and the document was formally ratified by the Commission for the Restitution of Land Rights (at national level) in November 2000. Subsequent public comments made by the Minister confirmed that the paper had been adopted by government as its new policy to deal with betterment claims that had been lodged before the end of 1998.

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<sup>47</sup> Klug, H, ‘Defining the Property Rights of Others: Political power, indigenous tenure and the construction of customary land law’, unpublished paper, 1995, pp 20, 21, 33 – 35.

<sup>48</sup> Ibid, 35.

<sup>49</sup> Border Rural Committee, ‘Betterment Removals and Restitution: A contribution towards the envisaged policy process’, June 2000, p9.

<sup>50</sup> In line with indaba discussions. For example, there had been advancements made with regard to the manner in which betterment claims should be settled through restitution.

In the meantime, the Chatha claim was settled on 7 October 2000. The terms of the agreement were as follows. The total value of dispossessed rights was R31 697. Half of this amount would be paid out as financial compensation and the other half was reserved for development, to be administered by Amatole District Municipality. In addition, government set aside restitution discretionary and planning grants for each of the beneficiary households, to be added to the developmental resources.

### **Revisiting the ‘Truth’ in the Aftermath of the Keiskammahoek Settlement**

One of the main emphases of BRC’s work in the wake of the successfully settled Chatha claim, was to apply the precedent that the claim set to all other lodged claims pertaining to communal villages in Keiskammahoek. The reason that this was considered important was to make the Chatha precedent (or put another way, revised government policy on betterment dispossession) irreversible. It is beyond the scope of this paper to explore the details of the historical production process in these seven cases (covering nine villages). Suffice it to say that these claims were favourably settled on 16 June 2002.

Of clear and direct relevance to this paper are the terms of the settlement agreement. The approved valuation amounts were as follows:

- Loss of arable land                      R    839
- Loss of residential land                R 21 938
- Loss of dwellings                        R 32 787

This gave a total valuation figure of R55 564 per household, well above the Chatha figure of R31 697. (On top of this, government added the restitution discretionary and planning grants, as was the case in the Chatha settlement.)

The disjuncture between compensation per household in the Chatha settlement and compensation per household in the settlement of all other communal claims in the Keiskammahoek district rankled in the minds of the Chatha leadership and broad community.<sup>51</sup> On the very occasion of the signing of the Keiskammahoek agreement, there was a group of Chatha residents (mainly people in leadership) to register their objection. This necessitated that Commissioner Gwanya had to address them publicly at the conclusion of the formal ceremony, arguing that the Chatha claim was settled on the basis of “scientific studies”, that its terms were conclusive and that the case would not be re-opened.<sup>52</sup>

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<sup>51</sup> It is necessary to note that by this time, mid-2002, the Chatha community was deeply divided over the terms of its settlement agreement. There was a large portion of the community, apparently under the leadership of former headman Jama, which opposed the allocation of 50% of the compensation to development. It was using various tactics to attempt to force the state to pay this amount to the claimants as financial compensation. With the disjuncture between the 2000 and 2002 settlement agreements, there was a risk of widespread social upheaval in Chatha. Thankfully, this situation was averted, not least because of effective local leadership.

<sup>52</sup> Westaway was present in Keiskammahoek on 16 June 2002.

However, this set of assertions did not satisfy or convince the Chatha leadership. Consequently they called BRC to a strategy meeting on 9 August 2002. In this meeting BRC explained that the disjuncture between the two compensation figures derived not from differences in valuation methodology. (In fact the Keiskammahoek valuator drew heavily from the methodology utilised in the Chatha claim. The values (per hectare/ square metre) were identical in relation to residential land and dwellings and in the case of the arable land, the Chatha value was in fact higher.) Rather the disjuncture derived from strategic research differences. It was explained that the Chatha research drew directly and exclusively from de Wet's work whereas 'primary research' had been undertaken in the other cases.

Furthermore, it was explained that BRC had involved Gwanya in the interpretation of the research data, which had had a consequence of maximising the quantification of dispossession. The Chatha leadership responded by arguing that it was fundamentally unfair that the community that opened the way for all others should be disadvantaged. It also maintained that it was common knowledge in the district that the Chatha land holdings had been the same size as or in fact larger than those in other communal areas of Keiskammahoek. In this sense, a further set of historical narratives and evidentiary paradigms are opened up here, this time from the side of 'lived experience' and the community.

Both parties agreed that the Keiskammahoek settlement shed new light on and provided new evidence that was directly relevant for the Chatha case. The later Keiskammahoek settlement demanded a re-look at the Chatha evidence. The parties resolved to engage Gwanya further on the issue.

This meeting was held on 27 September 2002. The commissioner indicated that he would not be prepared to take the case any further without compelling evidence showing that the research data used as the basis of the claim was flawed.<sup>53</sup> Thereafter BRC undertook the supplementary research to check the accuracy of the de Wet work. This research was undertaken by using two pieces of information located in the Keiskammahoek Rural Survey Volumes, namely a map of Chatha drawn in c1950 (showing areas used for residential, arable and grazing uses) and a photograph taken in c 1950 from the south western corner of Chatha (showing numerous huts). The map was used to derive alternative figures for the extent of dispossession of residential and arable lands, and the photograph was used to calculate the size of dispossessed dwellings. BRC emphasized the fact that the alternative research was based on evidence deriving not from the 1980s, but the 1950s. Using the Danckwerts valuation methodologies, this research suggests that the following compensation should have been applied in the Chatha case:

- Loss of arable land                      R 5 975
- Loss of residential land                R 14 218

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<sup>53</sup> Border Rural Committee, 'Six-monthly Report: July to December 2002', p24.

This amounts to a total of R52 152, which is close to the Keiskammahoek total.<sup>54</sup>

What did this mean? BRC mobilized a notion of documentary ‘primary’ truth (based on at the time evidence) as against De Wet’s more ethnographic and comparative study. The document – and perhaps as importantly – the 1950s map and the photograph – became strategically essential as representations of archival and real truth. That they were also visual documents ‘from the time’ added to their influence as bearers of ‘primary’ research and truth. It was these ‘documentary, visual effects of truth’ that were both recognized and used by BRC as the necessary and appropriate evidence for reconstituting the settlement agreement.

This use of this evidence as primary and accurate relates to two interconnected processes. On the one hand, the official betterment archive does not, itself, contain the necessary ‘facts’ in terms of quantifiable land rights and dispossession, because the apartheid state did not fashion the history of betterment in those terms. In a quite literal sense these ‘residences of the magistrate’ (these betterment archives) command the criteria of evidence, proof, testimony and witnessing to construct moral narrations that deny betterment as dispossession<sup>55</sup>. On the other hand, then, these facts need to be constructed from the gaps and grains of evidence as proof of dispossession. Measuring, proving, and providing the necessary evidence of dispossession, then, becomes much more visibly subject than is usually apparent, to the particular ‘regime of truth’ through which this historical knowledge is focused. And in the case of restitution, this ‘effect of truth’ is constituted through a sympathetic re-reading of the evidence of dispossession in terms of maximizing its possibilities in the gaps and grains of this racialised archive. Reading the archive from the site of restitution means privileging these moments and these documents as factual truths, even if, as histories they are ‘constructed accuracies’. In the overall history of betterment, related to restitution, related to dispossession, then, these are the necessary and real ‘effects of truth’ from the side of BRC, the commission and the communities affected.

Lorraine Daston has argued that “facts” are protean creatures, amalgamated of several different layers, like an archaeological site. ... Neutrality and contamination are matters of degree. ... Instead of asking

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<sup>54</sup> Border Rural Committee, ‘Research into the extent of dispossession at Chatha’, December 2002.

<sup>55</sup> This is so because the archive, itself, is a place of a particular truth. Foucault sees it as a ‘system of statements, those rules of practice that shape the specific regularities of what can and can’t be said’. Historical narratives are premised on previous understandings, which are themselves premised on the distribution of archival power (Trouillot). They contain documents of exclusions and monuments to particular configurations of power in themselves and are circuits through which facticities move. They are sites of the imaginary and institutions that fashioned histories as they concealed, revealed and reproduced the power of the state. Importantly See A Stoler, *Colonial Archives and the Arts of Governance*, in C Hamilton, et al, eds, *Refiguring the Archive*, Cape Town, 2002

whether facts are constructed, historical epistemology may prompt us to ask why we regard construction as a cardinal sin, incompatible with truth and intellectual honesty.”<sup>56</sup>

While BRC presented these research differences as one’s based on primary evidence (1950s maps and photographs) as against Chris De Wet’s more ethnographic and comparative, and more contemporary investigations, this needs to be understood as essentially strategic, rather than any claim for prior and absolute truth. What BRC did was locate the necessary archival facts, read them as ‘neutral’, and re-constitute them as enlisted evidence on the basis of the necessary narrative needed for restitution. Its presentation as ‘objective’ is strategic. BRC knows this, and in knowing this also recognizes that there is no real singular truth lying somewhere deeper in the archive, in other documents or in the academy, for in recognizing its own intentions and constructions, all other evidences are similarly opened up as equally, if differentially constituted.

The research was completed in late 2002, and presented to Gwanya in early 2003. Follow-up discussions were held with the Commissioner in February/ March and May. However, it was clear from these discussions that Gwanya was reluctant to re-open the claim. The two key unanswered questions that worried him were:

- If a claim is not concluded through a settlement agreement, when is it settled?
- What would the implications be on the larger restitution programme (and the target deadline) if the Chatha case were re-opened?<sup>57</sup>

Further discussions were planned, but in June Gwanya was appointed as Chief Land Claims Commissioner to replace Wallace Mgoqi, who had resigned earlier in the year. So the matter remains unresolved, and there is still a chance that the case may end up where it began, namely in the Land Claims Court.

## **Conclusion**

In the post-1994 period, the democratic government adopted (for reasons beyond the scope of this paper) a conservative macro economic policy framework. For BRC, this together with factors such as the absence of an integrated rural development strategy and weak or ineffectual line ministry programmes, has meant that few resources are being channeled into the former homeland areas in a consequential manner. Poverty in these areas is deepening.<sup>58</sup> Incongruously, the restitution programme emerged as one

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<sup>56</sup> L Daston, *Historical Epistemology*, pp284-5

<sup>57</sup> These discussions were held between Westaway and Gwanya.

<sup>58</sup> Work by the likes of Sampie Terreblanche shows that the poorest segments of South African society, which are concentrated in the former homeland areas, are getting poorer.

of the few mechanisms available to move fairly significant amounts of state resources into these marginalised areas.

Restitution is dependent on the production of a particular historical truth. Without it, claims cannot be settled. And it goes without saying that in restitution claims, the production of this historical truth does count. Despite the fact that there appears to be an important convergence between the demands of the restitution programme and an over-riding need of academic departments in universities in the current situation to be able to demonstrate relevance in the post-apartheid period, they have generally speaking been conspicuous in the restitution programme by their absence. They remain content to generate and produce historical truth that matters little and counts nothing in terms of restitution.

It is not too late to address this sad state of affairs. The challenges facing the restitution process in South Africa are going to be with us for a long time (despite what President Mbeki hopes and says). But this will require a new attitude from the academy; more specifically it requires that it commit to playing a role in the transformation of the country. And, we argue, they can only do this from a real understanding of what the particular forms of accredited knowledge and power require from the site of restitution itself, and not from the seemingly 'neutral' space of the academy, for it is particular 'effects of truth' and evidentiary paradigms that are not just required, but are restitutions' truth of the past. As Daston provokes, these explicit constructions might be more compatible with truth and intellectual honesty:

“The story ... [of Betterment] ... is not the same as you [whites] told us – you must tell the truth. ... The white man does not do as he promises ... The white men were coming and saying that there would be irrigation – [but] they wanted the countryside.”<sup>59</sup>

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<sup>59</sup> This is drawn from interviews and research conducted by Chris De Wet in Keiskammahoek, and reflected in his detailed and important book, *Moving Together, Drifting Apart*, p91.