

# Towards the delivery of effective post settlement support

## Dwesa-Cwebe: Brief Analysis

### 1. Background

Dwesa-Cwebe is a unique post-settlement case. Despite the large proportions of the restitution claim (both land area and number of beneficiaries), the publicity surrounding the claim, the high level political involvement and the time elapsed since the claim was resolved, very little has happened to give substance to the political, legal and administrative rhetoric. Certainly the area has received some infrastructural benefits in recent years, but these are not linked in any way to the claim – although it is probable that the publicity surrounding the claim drew attention to the plight of these remote and forgotten communities.

It is difficult to pinpoint the reason why there has been no post-settlement support, or even a finalisation of the land restitution claim, as the relevant government officials were not present during the investigative week. It has to be noted that, on the basis of the available information and performance, the general attitude of the relevant organs of government towards the Dwesa-Cwebe project appears to be somewhat contemptuous and at complete odds with land restitution policy and law.

As such this brief report does not dwell extensively on either what went wrong or on what has been done thus far. Rather it identifies key issues and outlines some of the steps necessary to get the project back on track and to address the short and long term needs of the communities involved.

### 2. Problem issues

#### 2.1 Implementation of the Settlement Agreement

The problems besetting Dwesa-Cwebe are difficult to analyse due to the restricted access of the participants to those officials who are responsible for implementing both the Settlement Agreement and post-settlement support. However, on the basis of the investigation carried out thus far, it is suspected that the following problems may be instrumental in preventing progress.

- Remote location with poor road infrastructure resulting in officials being reluctant to venture into the area and to allocate the necessary travelling time.
- Politically instigated Settlement Agreement which does not seem to enjoy the support of some of the signatory departments
- Overwhelmingly complex project requiring a high level of development skills to implement.
- Institutional confusion and a failure to co-ordinate government inputs.
- Large number of discrete communities who possess an inadequate and sometimes different understanding of the Settlement Agreement.
- Lack of progressive and determined leadership among the communities.
- No active legal representation for the claimant community.

- High turnover of Commission staff responsible for implementing post-settlement support. According to the Commission, this is understood to be the reason why the claim has not progressed. However, even if individual Commission employees only spent a few months each in their respective posts, one would expect some level of activity to have ensued. The fact that no progress has been made suggests that the high level political and administrative will to conclude the claim and provide the necessary support does not exist. Blaming the short tenure of inexperienced junior staff is not a credible excuse in this instance.

These issues seem to suggest that either government no longer supports the Settlement Agreement, or that it is beyond their abilities to implement it. In either case, it appears that officials prefer to do nothing and to say nothing, and to hope that they have moved on before the patience of the community runs out.

## **2.2 Restitution of the land**

The original approach adopted by government towards Dwesa-Cwebe may be flawed. It is now clear that there are two quite separate options to resolving the land claim issue in a sustainable manner. They are:

**Option 1:** Return the land to the community and ensure that they are capable of co-managing it in accordance with conservation practices and objectives.

**Option 2:** Do not return the land to the community on the basis that Government does not want the conservation status of the reserve to be compromised or threatened by inadequate community management, but permit managed access by the community. The community would then be entitled to be compensated for the full value of the land.

Instead of adopting one or other of these options, Government has crafted a hybrid solution that seems to have confused both the communities and the line departments responsible for nature conservation. Furthermore, the restitution that has reportedly taken place is in name only. Indeed, it is questionable whether land restitution has taken place at all.

The most unfortunate consequence of the approach adopted by Government is the confusion it has created among the communities. Access to the reserve seems to be more symbolic than a means of improving lifestyles. Access was denied during the Apartheid era and restored when the ANC came to power. The irony is that the so-called restitution of the land has resulted in a re-imposition of Apartheid restrictions with the community being denied access to the reserve, despite being the rightful owners of the land.

Regardless of the restitution option chosen, the community will only ever benefit from managed access. However, as non-landowners, the community would not have to shoulder the liability associated with managing a conservation area and a tourist facility. It could be argued that as owners of the land the community will benefit from tourism income. Unfortunately the income from tourism appears to be somewhat meagre. In the absence of private investors and competent operators it is difficult to see how tourism will be profitable in this remote area.

## **2.3 Legal representation**

Part of the reason why government inertia has continued for so long is that the community does not have access to good legal representation. The community are

aware of this limitation but point out that they never imagined that legal representation was necessary against a government that they perceived as being 'theirs' and working in their best interests. The sad aspect of this naivety is that certain government officials may have reinforced this belief in their dealings with the community and then exploited it to perpetuate non-delivery.

Another misconception held by the community on the issue of legal representation, is that it is expensive and that they have to pay for it. It is not clear what happened to legal NGOs such as the Legal Resources Centre or the Rural Legal Trust, or to the use of public funds for community legal representation. What is clear however is that the community is completely unaware of the existence of free legal representation, something that reflects poorly on the advice provided by government officials.

While the community leaders were aware of the various legal agreements that had been entered into between the government and the community, and whilst they claimed to understand the contents of these agreements, further questioning suggested that they possessed a poor understanding of the contents and rationale of these documents. This may have been a language issue as all documents are in English – and the English language skills of the community were clearly very poor. However, it may also be a consequence of some of the legal and technical terminology used in the agreements. For example, the phrase *{Sic}“in accordance with existing law applicable to protected areas”* in the Settlement Agreement has been, and is being, used by Park officials to render the access rights granted by the Settlement Agreement null and void. The author is not aware of any existing laws governing protected areas that preclude managed access by neighbouring communities, and certainly not when the community is the rightful landowner.

#### **2.4 Access to the reserve**

Discussions with community leaders and members revealed that access to the reserve is a primary emotive issue that binds and drives the community in the restoration of their land rights. It must be noted however, that it is more symbolic than substantive and the strength of feeling may vary among community members according to the distance they live from the coast and their historical usage of the coastal zone. Denied access to the reserve was a feature of the Apartheid era. Restored access was seen as a consequence of a new democratic government, albeit after the invasion of the reserve by the community to draw the attention of the new ANC government to their plight. The reintroduction of denied access by the Eastern Cape Provincial Government coupled with the regular arrests of local people (including a local councillor) by Park officials has confused the community leadership and angered many community members. The result of this is that the community is increasingly losing faith in its leaders who are viewed by some individuals as being a party to the repressive actions of the Park officials. In Cwebe, this lack of faith by the community has resulted in them recently denying their leaders a mandate to enter into any more agreements.

It should be pointed out that access to the reserve area will only benefit a small number of people and is unlikely to result in any individual enriching themselves at the expense of the natural resource base. The collection of medicinal plants, waste wood and thatch grass will not threaten the conservation status of the reserve. Shell fish collection has the potential to become a popular activity, particularly as low income families may want to supplement meagre food supplies. But this is easily controlled. As such the community cannot comprehend the restrictions that are currently imposed on them, restrictions that serve only to galvanise the community to adopt a more extremist and hostile attitude towards government. The prognosis, as seen by many community members, is that the situation is fast becoming explosive

and that the spark that will ignite a popular backlash could well be the prosecution of community members for trespassing on land that they own.

## **2.5 Communication**

It is quite mind-boggling to understand how, with a restitution project of this magnitude, so few resources have been allocated to communicating with the claimant households. In discussing this issue with community leaders it became apparent that many struggle to comprehend the content of meetings with government officials and the reasons for the prevailing inertia. Expecting these leaders to suddenly find the capacity and resources to convey this ambiguous information to their respective and highly dispersed constituents is beyond reason and completely out of context for a government that is supposedly committed to championing the rights (including the right to information) of the rural poor.

The failure to communicate the status of a restitution project to the beneficiaries for several years is guaranteed to fuel speculation, gossip and misinformation. This is certainly the case with Dwesa-Cwebe where everyone who was interviewed had a different perspective and explanation for non-delivery. However, it was alarming to discover that the local Park officials were misinforming community leaders, either intentionally or unintentionally, on a number of key issues pertaining to the restitution project. The most notable item of misinformation witnessed was that, until the community were given the title deeds to the land with their name on them, the Settlement Agreement and its provisions were of no effect. This is not so. The Settlement Agreement takes effect from the date of signing – 17 June 2001 – and its provisions are not subject to the issuing of title deeds.

## **2.6 Status of the prevailing legal agreements**

Bearing in mind that the author is not a qualified lawyer, the existing legal agreements between the community and government seem poorly crafted, vague and open to differential interpretation. The Settlement Agreement seems to act as a head agreement from which the others are derived. If this interpretation is correct then it follows that failings within the Settlement Agreement may impact on the validity of the subordinate agreements. For example, clause 4.1 states that the Reserve shall be co-managed by the Trust and DWAF. Had this been preceded by a clause stating that such a management regime should be negotiated and developed by a delegated party within say a six month period of the signing of the Settlement Agreement, then it is probable that adequate implementation of the co-management agreement would have followed. This was not the case. Similarly, it is stated in clause 7.1 that the Trust shall receive payment of an amount of R2.1 million within 6 months of the effective date in exchange for agreeing to the land being used for conservation in perpetuity. No monies have been received by the Trust. Both these aspects of the Settlement Agreement remain unimplemented to this day – some five years later.

Given that government has not honoured the Settlement Agreement, the community would be at liberty to apply to the Land Court to have it set aside. In such circumstances, the other agreements that stem from this Agreement, notably the Reserve Lease and the Co-management Agreement, would also be set aside. This may be one way of renegotiating a more community-friendly solution to the future of the Reserve together with a firm timeframe for the delivery of government obligations and commitments.

## **2.7 Land valuation and rental**

It is deduced from the available documentation that the land and improvements were valued at R4.2 million (R796 per ha unimproved) and that the annual rental for the property be set at R100 000 per annum or 2.4% of the assessed value. It is not known how this valuation came about and on what basis it was conducted, or indeed who conducted it. The mechanisms for valuing a multi-use asset such as Dwesa-Cwebe are well established and it should not prove difficult for an experienced valuer to place a market value on the reserve and its improvements. Discussions with people in the tourism industry have revealed that unspoilt coastal land that is zoned for nature conservation, tourism and recreation may be sold for amount of between R2 500 and R10 000 per ha depending on location and accommodation facilities. Moreover, discussions with the operator of the Haven Hotel revealed that a minimum price for the Hotel only would be R2 million but that a developer may be prepared to pay more than twice that amount if the necessary long term guarantees could be secured from government and the community. At present the Parks authority are only offering a 3-year lease on the hotel, which is insufficient to attract serious operators and investors.

The purpose of the valuation was to award the community 50% of the value of the land or R2.1 million in exchange for agreeing to it being set aside for conservation in perpetuity. From the above discussion, it would seem that the community has not got the best deal from the restitution of the land. A price of R2 500 per ha and a value of R2 million for the Haven Hotel, plus the replacement costs of the chalets and infrastructure, would yield a value in excess of R18 million. This would give the community a waiver fee of R9 million. At a standard leasing rate of 6% of the value of the land and improvements per annum, a rental income in excess of R1 million per annum should come to the community. It would seem that the absence of good legal representation has resulted in the Dwesa-Cwebe community getting a poor deal from Government.

## **2.8 Development Plan**

The Dwesa-Cwebe Development Plan is a comprehensive document that demonstrates consultation with the community and addresses all the main areas that one would expect to find in a rural development plan. However, its main weakness is the Implementation section. It is clear that the authors of the plan were out of their depth in designing a workable implementation mechanism and in securing the necessary inputs and guarantees from the various government role players. Although the primary needs of the community are well documented, these are not prioritised nor dovetailed with critical infrastructure investments. Consequently, in its present form the plan is an elaborate 'wish list' and has clearly served only to raise the expectations of the community. Mechanisms to enable the community to take ownership of the plan and to drive its implementation are missing. The Plan assumes a passive community that will be happy to accept whatever materialises and whenever it is delivered. No provisions have been made for communication with beneficiaries, monitoring, evaluation and reporting of post-settlement support, and no mention is made of how to render the investments sustainable, or indeed how to gauge sustainability.

Any attempt to implement the Plan in its present form will risk wastage of the funds allocated to post-settlement support.

## **3. Way forward**

The following measures are a suggested way of revitalising the Dwesa-Cwebe restitution process. It is a people-centred approach that seeks to revive the support and interest of the community for both land restitution and the rural development benefits that can stem from the considered use of post-settlement support.

1. A competent and committed legal specialist should be appointed to represent the interests of the community. The community should not be asked to pay for the services of this specialist. The first task of the legal representative should be to review the legal documentation and to chart the best way forward. This may entail providing the relevant government institutions with notice of legal action should land transfer and post-settlement support not be forthcoming. Renegotiation of Agreements, as discussed previously, may also be considered.
2. Consideration needs to be given as to whether the return of the land to the community is in fact the best approach to resolving this claim and ensuring the sustainable development of the area. The community require access rights to the reserve, tourism-related jobs and a portion of the revenues from tourism activities. It is questionable whether they want or can handle the liability that accompanies being a landowner; particularly since land ownership has few benefits.
3. The land in the Reserve needs to be re-valued using the records of coastal land sales over the last 10 years for properties with multiple land use designations that include nature conservation, tourism and recreation activities, tourism accommodation and limited residential use. The unit land values should be adjusted to net present values, averaged and then applied to the land at Dwesa-Cwebe. To this land value should be added the value improvements to the land including the Haven Hotel, Dwesa holiday accommodation and all infrastructure. The post-settlement support grant funding should then be adjusted accordingly. Government needs to regain the trust of the people at Dwesa-Cwebe and the appointment of a transparent land re-valuation process would be a useful way of achieving this.
4. A communication strategy needs to be developed whereby the claimants can be brought up to date with the status of the claim and informed of the process to be followed from now onwards. Consideration may be given to the publication of a quarterly newsletter in Xhosa.
5. The community need to take greater control of the post-settlement support process. To do this they will need to identify key local skills and then recruit some of these skills into paid short-term contractual positions to assist in implementing post-settlement support. The role of such people would be to:
  - Complement and support the work of the community leadership.
  - Staff and operate a Dwesa-Cwebe post-settlement support or Integrated Rural Development office located in the area.
  - Provide administrative and secretarial support to the Trust and various CPAs.
  - Assist in the co-management of the Reserve.
  - Implement the communication strategy.
  - Control the finances of the Trust
  - Provide support and liaison services to post-settlement support implementing agents.

- Function as a 'One Stop Shop' for local SMME support.
  - Co-ordinate ongoing monitoring and evaluation of post-settlement support.
  - Prepare the annual reports of the Dwesa-Cwebe Trust.
6. The appointment of a Project Co-ordinator should be put on hold until such time as the community have taken charge of the post-settlement support process and decided upon the way forward. Any expenditure thus far by the Amatole District Council on the appointment of a Project Co-ordinator should be for the Council's account and not the community account given that this person has yet to start work. Indeed, the role of the ADC in co-ordinating post-settlement support for Dwesa-Cwebe needs to be reviewed on the basis of their available capacity.
  7. The Trust needs to be given control over its post-settlement financial allocation. This may be joint control with the RLCC until such time as the Trust has proved itself capable of managing funds responsibly. Any funds spent without the explicit authorisation of the Trust must be replaced at the expense of the agency currently holding these funds.
  8. The needs and preferences of the beneficiary community should be prioritised and used as a basis for a revised business plan for post-settlement support. The needs of women, the elderly and the youth should be given special attention in this plan.
  9. The current Development Plan should be revised using the principles of Integrated Rural Development. Far more emphasis needs to be placed on the implementation of the plan and in particular, securing the commitments and inputs of institutional role-players. Ideally it should include written and binding undertakings from the various agencies to deliver inputs at certain times, failing which the Trust would be permitted to appoint alternative service providers and recover the costs from the original role-player.
  10. The Development Plan should focus on job creating and food-producing activities such as community road maintenance programmes, the construction of multipurpose community centres for each of the CPAs, expanded food gardens and mariculture, and blue gum harvesting. Badly needed infrastructure such as electricity provision and all-weather road bridges should be given priority in order to support local economic development.
  11. Previously mooted tourism options have unfortunately raised expectations among local people to unrealistic levels. Correcting this will entail recognising the factors that currently discourage tourism in the area and re-assessing the benefits that tourism can realistically produce for the community. A systematic process of identifying the obstacles to popular tourism and removing them should be conducted with the community. In time, a simple and manageable marketing strategy should be developed and implemented by the IRD Office using satellite broadband technology.
  12. It is recommended that stipends be offered to those community leaders actively involved in the Trust and in the implementation of post-settlement support to compensate them in some small way for the effort they make. The revenue that the community receives from the Haven Hotel averages R3 870

per month and should be more than adequate for this purpose. However, no one seems to know where that money is!

13. Community and CPA training should be put on hold for the time being to permit the community the time to identify the skills they require for implementing post-settlement support. This way training will be targeted and needs driven and not imposed by outsiders on the basis of generic capacity building.

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**Review prepared for Phulisani Solutions cc**

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