



Report on the  
Inquiry into  
Human Rights  
Violations  
in the Khomani San  
Community

Andriesvale-Akham area, Kaffrari

November 2004

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Front cover photographs: (left - top to bottom) 1 - Jan van der Westhuizen, 2 - Dawid Kruiper, 3 - Petrus Vaalbooi; (right - top to bottom) 1 - Dawid Kruiper, 2 - SAHRC Chairperson NJ Kollapen flanked by (right) SAHRC Commissioner T Manthata and (left) Chairperson of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Dr M Guma, 3 - Khomani San doing a traditional dance at dusk, 4 - Community attending the hearings.

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# ABBREVIATIONS

<b>African Charter</b>	African Charter on Human and People's Rights
<b>CPA</b>	Communal Property Association
<b>CPAMC</b>	Communal Property Association Management Committee
<b>DEAT</b>	Department of Environmental Affairs and Tourism
<b>DG</b>	Director-General
<b>DLA</b>	Department of Land Affairs
<b>DPLG</b>	Department of Provincial and Local Government
<b>DPP</b>	Director of Public Prosecutions, Northern Cape
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICD</b>	Independent Complaints Directorate
<b>KTP</b>	Kgalagadi Transfrontier Park (previously the National Kalahari Gemsbok Park)
<b>NGO</b>	Non-Governmental Organisation
<b>NKC</b>	National Khoi-San Council
<b>SAHRC</b>	South African Human Rights Commission (also referred to as the Commission in this Report)
<b>SANP</b>	South African National Parks
<b>SAPS</b>	South African Police Services
<b>SASI</b>	South African San Institute
<b>WIMSA</b>	Working Group of Indigenous Minorities

## FOREWORD

At the conclusion of our tenth year of democracy, we take great pride, as we correctly should, in the events that led to the peaceful transition of our society – from one predicated on racism, injustice and oppression to a society that recognises the equal worth and dignity of each person. However, it is clear that the vision of the constitution and the human rights guarantees contained therein have yet to be realised for many of our people. While great strides have been made in converting the promise of the constitution into reality, there are still many individuals and communities who battle on a daily basis to live in dignity and to develop to their full potential. Among such communities are the Khomani San, who, despite being the beneficiaries of a historic land claim that carried with it the promise of a better life, still find themselves very much on the margins of society.

In accordance with the South African Human Rights Commission's mandate to protect, promote and monitor the observance of human rights, on receipt of complaints from members of the Khomani San community, it was decided to undertake an Inquiry into the human rights situation of this group. The Inquiry was unique in that it sought to take a comprehensive and holistic view of all the matters that impact on the community. It was held within the community, in a rudimentary hall in Andriesvale and it was, as expressed by community members, the first real opportunity they had to articulate the matters that affect them, which threaten their survival, their culture, their language, their economic prosperity and their future as a people.

The Inquiry was conducted in the spirit of cooperation, and the willingness of the community, the various government agencies and departments, independent statutory bodies and civil society to come forward and openly, honestly and constructively engage the Commission and the issues it was investigating is appreciated.

This Report comprehensively sets out the findings of the Commission and our recommendations for the way forward. What we found was a community fast losing hope, which often lacked the means and the ability to function and survive in a world so

very different from that to which it is accustomed. We also found, at various levels, a sad story of neglect and of indifference.

On the positive side, there were many initiatives that, if properly implemented, will positively impact on the community and restore their sense of trust, faith and connectedness with those whose responsibility it is to provide services.

This Inquiry, bringing together as it did all the relevant role players, for three days, in the scorching and unrelenting heat of the Kalahari, demonstrates how a national institution such as the South African Human Rights Commission is able to use its mandate in a constructive fashion to inquire into and seek solutions to the human rights challenges of our times.

We trust this Report, and in particular the recommendations we make, will serve as a basis for the community, government and civil society to engage on the various matters raised, to consider the interventions suggested and ultimately to use this as a tool to enhance the survival of the Khomani San people.

I would like to take this opportunity to thank all who contributed to the Inquiry, in particular the community of the Khomani San, who allowed us into their lives and shared with us, in humility, their vision and their concerns. A special thanks also to my colleague Commissioner Leon Wessels, whose leadership of this project with great passion, sensitivity and respect for the people we were working with, ensured that we were able to conduct the inquiry in a fashion that truly embodied the spirit of human rights – respect, understanding and honesty.

**Jody Kollapen**  
**Chairperson**

## EXECUTIVE SUMMARY

In 1999 the Khomani San community successfully reclaimed large areas of land in the Andriesvale-Askam area of the Kalahari, in terms of the national Land Reform Programme provided for by the *Restitution of Land Rights Act 22 of 1994*. It seemed that a new time had begun for the community, after a long history of persecution, dispossession and marginalisation.

However, it came to the attention of the South African Human Rights Commission, through media reports and complaints from the community, that five years after the successful land claim, the Khomani San continue to live in abject conditions, without full enjoyment of their human rights. The Commission received complaints from the community of the murder of a community member, Mr Optel Rooi, by the police, as well as police victimisation and harassment, and of discrimination and sexual abuse of Khomani San children in the local school. There was talk of community division, and the involvement of too many external consultants, NGOs and other parties. In addition, it appeared government was failing in its duty to provide services and to support the community in the resettlement progress. It was therefore imperative that the Commission convene an Inquiry into Human Rights Violations in the Khomani San Community.

The Inquiry was launched early in 2004 and consisted of three phases: research, consultation (meetings and informal discussions with the Khomani San community and different stakeholders involved), and a public hearing. The terms of Reference for the Inquiry were: to investigate the observance of human rights, including the incidence of victimisation, harassment, neglect and abuse of the Khomani San, particularly the conduct of the police and the allegations of child sexual abuse at the local school, and to ascertain whether the promotion and protection of human rights has been advanced by public and private role-players. The Inquiry sought to determine the extent of human rights violations in the Khomani San community, to publicise development conditions in the Andriesvale-Askam area, improve the living conditions of the community, and to promote respect for human rights in the community and the area.

The Inquiry sought to identify key issues and the underlying causes of human rights violations in the community, as opposed to assigning guilt. Accordingly, individual names of alleged perpetrators are not mentioned in this Report. The purpose of the Inquiry was to address the needs of a community who feels the benefits of the South Africa Constitution have not yet reached them. As a national institution supporting democracy, the Commission aims to contribute toward alleviating the Khomani San's situation by identifying the human rights challenges in the community and charting a way forward.

This Report is based on background research and on the evidence and information presented to the Inquiry. It is anticipated that the report will provide insight into the key human rights concerns in the Khomani San community, and that the findings and recommendations it contains will help bring redress. The body of the Report consists of brief mention of the rights involved, before elaborating on key issues emerging through the Inquiry, in order to provide background and context to the findings and recommendations of the Panel, contained in the final section.

### THE INQUIRY

The Inquiry addressed a complex and intertwined set of challenges around relationships, cooperative governance, just administrative action, capacity-building and sustainable development. In the course of the Inquiry, several key issues emerged: the process of the land claim and resettlement, government's role and the provision of services, policing, education, social welfare, internal community conflict, and distorted relationships within the community and with other role-players.

#### Land Claim and Resettlement

A particular feature of the Khomani San land claim was that the initial claimants, the Kruiper family, decided to allow other San descendants to join in the land claim. The process of the claim involved reinventing a community from dispersed San descendants, without a unifying system of leadership. Consequent community divisions have contributed to problems in terms of the functioning of the Communal Property Association and

agreement over the management and utilisation of land.

Other problems with the land claim and resettlement include: lack of capacity within the Communal Property Association Management Committee, conflict between the community and South African National Parks with regard to the implementation of the Khomani San land claim in the Kalahari Transfrontier Park, and lack of support from the Department of Land Affairs, Commission on Restitution of Land Rights and other parties in the land settlement and management process. In addition, the involvement of many external parties, such as consultants, NGOs and the media, is said to have contributed to divisions in the community.

### **Government and Delivery of Services**

Local government has failed to provide for water, sanitation, waste management or development in general on the Khomani San land, despite receiving funding for this purpose. A local development plan, which would guide the provision of basic services, and which arguably should have been in place before the resettlement process, was submitted to the Commission on the Restitution of Land Rights for approval on 17 September 2004 (titled the Khomani San Settlement and Development Strategy). In addition, there is a need for clarification of the roles of different levels and departments of government, and for all spheres of government to fulfil their responsibilities in a coordinated manner. A Cabinet Memorandum strategising cooperative governance for Khoi-San communities was submitted to Parliament by the Department of Provincial and Local Government in October 2004.

### **Policing**

The Inquiry secured the prosecution of the two policemen involved in the fatal shooting of Mr Optel Rooi. The Khomani San community is subject to victimisation, harassment and abuse by members of the South African Police Services. The police in the area have historically farmed particularly on Witdraai, a farm transferred to the Khomani San in their land claim, and continue to undertake commercial ventures on Khomani San land. This has contributed to a distorted relationship between the community and the police.

In addition, the community does not understand policing and prosecution processes, and access to courts is hampered in that the nearest court is situated in Upington, some 200 kilometres away.

### **Education**

Levels of formal education in the community are low. Access to schooling is hampered in that schools are some distance from the community and no transport is available. In addition, sufficient measures have not been taken to incorporate the unique needs and cultural background of the Khomani San into the schools, socially, structurally and within the curriculum. Allegations of sexual abuse and harassment of Khomani San children at the local school have not been adequately addressed.

### **Social Welfare**

There is substantial alcohol and drug abuse within the community, indicative and contributing to serious social problems. The community's poverty results in malnutrition and illness, and the provision of primary health services is unsatisfactory, with only one nursing sister at the clinic several kilometres away. The local social worker does not have the capacity or infrastructure to adequately provide for the community.

### **Community Division**

There are serious divisions within the community, most particularly between the original claimants and their traditional leadership, and those that joined the land claim and who have a more 'modern' outlook. There is the threat of a formal split between the community factions.

### **Relationships**

It appears that many of the issues involved are exacerbated by and contribute to distorted and impaired relationships, within the community and between the community and other stakeholders. Poor communication between parties contributes to the breakdown of relationships.

## FINDINGS AND RECOMMENDATIONS

This Report contains findings that some may consider critical of their actions. The intention is not simply to be critical, but to draw from the submissions and evidence recommendations that can move matters forward.

The key recommendations, following the findings of the Panel, are:

- That those South African Police Services officials involved in the fatal shooting of Mr Optel Rooi be prosecuted and brought to trial as soon as possible;
  - That the Cabinet Memorandum of the Department of Provincial and Local Government submitted to Parliament, which addresses issues such as traditional leadership and representation in government structures, be prioritised and finalised as soon as possible.
  - That the Local Council of Mier sees to the implementation of the Khomani San Settlement and Development Strategy without delay;
  - That two external managers (a farm manager and general executive manager), with the Department of Land Affairs as overseer, be appointed to assist the Khomani San community to manage and cultivate the land, and to understand the rights and assets afforded to the community by the land claim;
  - That all agreements which accompanied the land claim process be reconsidered so as to identify all the pending and outstanding commitments and responsibilities of the different stakeholders involved;
  - That the different state departments involved recognise the Khomani San as an extraordinary group with unique composition and status, and consistently aim to see to the needs of the community as part of structured development plans;
  - That access to courts for the Khomani San community be facilitated through the initiation of a circuit or periodic court in the Andriesvale-Askham area;
  - That the District Office of the Department of Education and Educational Support Services embark on education and monitoring programs to deal with child abuse, and ensure that such programs take into account the needs and interests of the children of the Khomani San;
  - That the local schools see to the practical integration of children from different historical and cultural backgrounds, as well as to the management of their unique needs (being accustomed to spatial freedom, for example);
  - That the social welfare of the Khomani San community and those involved with the community is fortified by the implementation of programmes that address the specific social problems experienced. Additional workers should be employed and capacitated with the necessary infrastructure to execute this task. With regard to social welfare issues, the related needs of the South African Police Services and other officials working under difficult conditions in the Andriesvale-Askham area, should also be addressed;
  - That with the assistance of the appointed general executive manager, the roles and functions of the traditional leadership and the Communal Property Association Management Committee be clarified and documented in unambiguous terms; and
  - That the Khomani San community and all relevant government departments and civil society structures should embark on a process for the improvement of relationships, and ensure that the principles of transparency, accountability and consultation form the basis of such relationships. Contact between parties should be regularised, and requires an understanding of the Khomani San community.
- The Report contains further more detailed and specific recommendations to various role-players.
- The indignity and suffering of many who shared their experiences with the Panel is disquieting, and highlights the necessity for all role-players to address the identified issues in a cooperative manner, within a human rights framework based on dignity and the achievement of equality. The remote location of the Khomani San community and the nature of its predicament should not make

the realisation of human rights seem unattainable. This should rather be seen as a challenge in the tenth year of South African democracy, to secure constitutional rights for the marginalised.

## INTRODUCTION

The South African Human Rights Commission (SAHRC) is one of the independent constitutional bodies supporting democracy established in terms of Chapter 9 of the *Constitution of South Africa*. It derives its mandate from the Constitution and from the *Human Rights Commission Act 54 of 1994*. The SAHRC is mandated by Section 184 of the Constitution to:

- Promote respect for human rights and a culture of human rights;
- Promote the protection, development and attainment of human rights; and
- Monitor and assess the observance of human rights in South Africa.

In order to fulfil its mandate, the SAHRC is empowered by Section 184(2) of the Constitution:

- To investigate and to report on the observance of human rights;
- To take steps to secure appropriate redress where human rights have been violated;
- To carry out research; and
- To educate.

The SAHRC has always been particularly concerned with ensuring the Bill of Rights makes a tangible difference to the vulnerable in society.

In 1999 the Khomani San achieved a historic victory, securing a R15 million land claim settlement which returned land to these 'first people' of South Africa. However, since 2003, the SAHRC has received several complaints related to human rights violations in the Khomani San community of the Askham-Andriesvale area. In January 2004, the community member Mr Optel Rooi was killed. Members of the local police were involved in this killing, and the subsequent investigation did not satisfy the community. In addition, allegations of sexual abuse and harassment of Khomani San children in the Askham

School came to the fore. A need to investigate the actions of the South African Police Services (SAPS) and the Department of Education was identified.

Complaints were also received about the general living conditions of the Khomani San community. Government service provision, mismanagement of communal funds, social welfare problems and community divisions emerged as some of the challenges. Initial investigations by the SAHRC revealed that the promotion and protection of human rights by both public and private role-players needed interrogation. In consequence, the SAHRC decided to convene an Inquiry to investigate human rights violations in the Khomani San community, in fulfilment of the Commission's mandate and its commitment to protect the most vulnerable in society.

For this purpose, the SAHRC invoked the powers conferred on it by the Human Rights Commission Act to:

- conduct an investigation into any alleged violation of human rights;
- call any person to appear before it and produce to it all articles or documents in his or her possession, or under his or her control, which may be necessary in connection with such investigation; and
- ask any person who appears before it to give evidence under oath or affirmation.

### PURPOSE OF THE INQUIRY

The purpose of the Inquiry was to assess the extent to which human rights have been realised in the Khomani San community, to investigate the incidence of victimisation, harassment, neglect and abuse of this community, and to ascertain whether the human rights of the Khomani San have been advanced by public and private role-players. The Inquiry aimed to establish the underlying causes and the impact of possible human right violations in the Khomani San community.

The Inquiry aimed to:

- Determine the extent of human rights violations in the Khomani San community;

- Publicise developmental conditions in the Andriesvale-Askham area, Kalahari;
- Improve the living conditions of the community; and
- Promote respect for human rights in the Khomani San community and in the Andriesvale-Askham area.

The purpose of the Inquiry was not to find anybody culpable in a sense of guilt or innocence, nor is it seeking to embarrass. Rather, the aim is to understand how human rights have been advanced, if they have been advanced, and what the challenges are to such human rights being furthered in this community. As a national institution supporting democracy, the SAHRC conducted the hearing to explore how the Commission, in conjunction with the community and other role-players, can ensure that the Khomani San community comes to fully enjoy their constitutional rights.

The Panel decided that the individual names of alleged perpetrators could be mentioned at the hearing. However, the report does not include names, as the purpose of the Inquiry was to identify broad trends and the underlying causes of human rights violations rather than assign guilt, and since judicial prosecuting procedures are pending.

The Inquiry attempted to describe the living conditions of the community, and the way in which the Khomani San community perceives the conditions under which they live. It sought to create a platform for the different role-players to understand each other. It tried to unpack the relationships that exist within the community between the ‘modern’ and the ‘traditional’ Khomani San people, and the community’s interaction with government officials, NGO representatives and other external parties. The testimony of community members expressed great pain and suffering. The reality of the community needs to be voiced, listened to and accepted by all role-players in order to change perceptions and behaviour and bring progress towards human rights and sustainable development.

### TERMS OF REFERENCE FOR THE INQUIRY

The terms of Reference for the Inquiry are set out in the Government Gazette<sup>1</sup> as follows:

1. To investigate the observance of Human Rights including the incidence of victimisation, harassment, neglect and abuse of the Khomani San people as it relates to:

The conduct of the South African Police Services in general towards the Khomani San and in particular –

- The investigation into the fatal shooting of Mr Optel Rooi as well as subsequent steps/measures taken thereafter by the Independent Complaints Directorate and the Directorate of Public Prosecutions, and
- Allegations of child sexual abuse and harassment in Askham School as well as subsequent steps/measures taken thereafter by the South African Police Service, Department of Education and other stakeholders.

2. To further ascertain whether –

The promotion and protection of human rights have been advanced by public and private role-players such as the departments of Agriculture and Land Affairs, Housing, Provincial and Local Government, Health, Welfare and Social Services and Population Development, Education, Justice and Constitutional Development, the Communal Property Association, consultants and NGOs that work with the Khomani San Community.

### THE THREE PHASES OF THE INQUIRY

#### First Phase: Research

The first phase of the Inquiry entailed research by staff of the SAHRC and commissioned research from independent experts. The research reflected on the history of the Khomani San, their successful land claim, and issues relevant to a better understanding of the complexity of the challenges experienced by the community. The research was based on primary sources and various research reports by anthropologists, the Khomani San land claim lawyer, journalists, NGOs and consultants involved with the community.

## Second Phase: Consultation

As the second phase, members of the SAHRC visited the Andriesvale-Askham area to publicise the Inquiry and to encourage different parties to engage with the Inquiry by making submissions. An important aspect of this phase was to leave the members of the community with a sense of ease and confidence with regard to the Inquiry and its related processes.

## Third Phase: Public Hearing

The third phase entailed a three-day public hearing in Andriesvale. The SAHRC chose to conduct the hearing within the Khomani San community in order to encourage people to attend and participate. During the course of the hearing, the Commission collected evidence from a range of role-players and stakeholders, including community representatives, the Communal Property Association Management Committee (CPAMC), NGOs, SAPS, the Independent Complaints Directorate (ICD), the Directorate of Public Prosecution, Northern Cape (DPP), representatives of South African National Parks (SANP) from Kgalagadi Transfrontier Park (KTP), and local and provincial government departments. In particular, the Departments of Land Affairs (DLA), Education, and Social Services and Population Development attended the hearing.

## METHODOLOGY AND RULES OF PROCESS

The Rules and Procedures for the Inquiry are those set out in Section 9(6) of the Human Rights Commission Act. In terms of these rules of procedure, the SAHRC called for submissions to the Inquiry on any matter included in the Terms of Reference. Submissions were called for from all interested parties, whether representing a group of people or acting as an individual.

The deadline for these submissions was 27 September 2004. The SAHRC thereafter invited individuals, institutions, organisations and government departments to attend the public hearing from 26 – 28 October 2004 to make oral submissions. The public hearing was presided over by a panel comprised of two commissioners of the SAHRC, Chairperson NJ Kollapen and Commissioner T Manthatha, and the Chair, Dr M Guma of the Commission for the Promotion and

Protection of the Rights of Cultural, Religious and Linguistic Communities.

After the hearing the SAHRC Chairperson and members of the Panel prepared this Final Report on the Inquiry. The Final Report considers all submissions, allegations, responses and points of law and fact. Following an analysis of the evidence submitted, the Panel made findings and recommendations. The Final Report of the Inquiry and the findings and recommendations will be submitted to Parliament and made public at meetings to be convened by the SAHRC.

## STRUCTURE OF THE REPORT

The Report strives to reflect the information that was provided to the Inquiry and which forms the basis of the findings and recommendations of the Panel. The Report begins with a brief outline of the central human rights at stake, as enshrined in the South African Constitution, and discusses the international instruments specifically for the protection and realisation of the rights of indigenous people. The main body of the report presents in detail the central issues that emerged in the course of the Inquiry, specifically:

- The land claim and resettlement;
- Government and the delivery of services;
- Policing;
- Education;
- Social welfare;
- Community division; and
- Relationships within and with the Khomani San community.

This section is compiled from research, from the written submissions received and the oral evidence heard. It is arranged to follow the findings and recommendations of the Panel, and is intended to provide the context and background to the findings and recommendations. The Report concludes with the Panel's findings and recommendations.

## HUMAN RIGHTS INVOLVED

The Khomani San community faces complex and intertwined human rights challenges. This section outlines the rights and national and international

human rights instruments in place for the protection of the community, and which demand redress of its condition.

## CONSTITUTION OF SOUTH AFRICA

At the core of the *Constitution of South Africa Act 108 of 1996* lie the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Chapter 2 contains the Bill of Rights, which defines the human rights of all the people of South Africa. With regard to the predicament of the Khomani San community, several sections of the Bill of Rights are particularly pertinent. These include:

- recognition of human dignity and the right of the Khomani San people to have their dignity respected and protected;<sup>2</sup>
- the right to life;<sup>3</sup>
- the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources and not to be treated or punished in a cruel, inhuman or degrading way;<sup>4</sup>
- the right to privacy, which includes the right of people not to have their home or property searched or their possessions seized;<sup>5</sup>
- the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;<sup>6</sup>
- the state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on equitable basis;<sup>7</sup>
- the right to access to health care services, sufficient food, water and social security and assistance is also protected;<sup>8</sup>
- the right to a basic education;<sup>9</sup>
- the right to use the language and to participate in the cultural life of their choice;<sup>10</sup>
- the right to administrative action (including police conduct) that is lawful, reasonable and procedurally fair;<sup>11</sup> and

- the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.<sup>12</sup>

## INTERNATIONAL INSTRUMENTS

Many indigenous groups of the world experience similar human rights related challenges as the Khomani San community.<sup>13</sup> The international discourse of indigenous peoples' rights revolves around a central paradox: on the one hand, there is a desire to preserve traditional indigenous cultures and ways of life; on the other, there is recognition of the demoralised state of so many indigenous peoples and their desperate need for development and modernisation. At their best, the provisions for indigenous people in international human rights instruments express a vision of facilitating the rebuilding and socio-economic advancement of indigenous peoples, without running afoul of other core principles such as respect for indigenous culture and self-determination.<sup>14</sup>

International human rights instruments clearly state indigenous peoples' inherent right to development, and that the state has an obligation to facilitate and contribute to the development process. Such instruments give indigenous peoples enhanced power to demand that state action be taken, even action that might be classified as too extreme, progressive, or costly for the population as a whole. This paradigm applies to indigenous rights ranging from non-discrimination to development.<sup>15</sup> A consistent theme is that states must demonstrate and act upon genuine respect for indigenous peoples and their cultures.

The draft of the United Nations' International Declaration on the Rights of Indigenous Peoples<sup>16</sup> determines that indigenous peoples have the right to practice and revitalise their cultural traditions and customs, including the right to maintain, protect and develop the past, present and future manifestations of their cultures. It also states that indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information. It is expressly provided that indigenous people have

the right to access adequate financial and technical assistance, from states and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development. In terms of this instrument, indigenous peoples have the right to *special measures* for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security. It also provides that states take effective measures to enable indigenous peoples to understand administrative, legal and political rules and procedures, and to be understood in relation to these matters.<sup>17</sup>

South Africa is bound under the *International Covenant on Civil and Political Rights (ICCPR)* and the Optional Protocol, which authorises the United Nations Human Rights Committee to receive complaints under the Covenant. Article 27 of the ICCPR deals with the rights of minorities and has arguably been the most utilised international instrument over the years for the protection of indigenous rights.<sup>18</sup> South Africa is also bound by the African Charter on Human and People’s Rights (African Charter) and the Protocol establishing the African Court of Human and People’s Rights. The African Charter determines that all people have the right to economic, social and cultural development, with due regard to their freedom and identity, as well as giving protection to human rights in general.

## ISSUES ADDRESSED BY THE INQUIRY

### LAND CLAIM AND RESETTLEMENT

#### Introduction

The San people (the generally applied term for the aboriginal hunting and gathering peoples of Southern Africa) known today as the Khomani San (collective term for the group of San that has been identified as the dominant San group in the southern Kalahari since the 1920s) are part of a group of distinct San tribes inhabiting the southern area of the vast Kalahari ecosystem. During 1970, these people were dispossessed from the then National Kalahari Gemsbok Park (now the KTP),

their traditional land in the Kalahari, and were dispersed through South Africa, living in small groups or ‘clans’ as a *de facto* underclass. In common with other displaced indigenous people, the San had become to a large degree assimilated into, or dominated by, local communities. The ancient San cultural practices, mainly nomadic in nature, were sporadically maintained in isolated groups.<sup>19</sup>

The transition to democracy in South Africa and the formal protection of human rights in the country led to the *Restitution of Land Rights Act 22 of 1994*.<sup>20</sup> These changes brought some parts of the San community together, in the effort to claim back their land in the southern Kalahari, in what was seen as part of the journey towards the restoration of not only their land-rights, but also their lost dignity and sense of belonging.

In 1991, the core surviving Hanaseb San group, with Mr Regopstaan Kruiper as their traditional leader, came to settle in the tourist resort of Kagga Kamma, a game farm near Ceres in the Western Cape Province. In 1992, this Kagga Kamma San group (a mixed group including Khomani, Auni and Namani San people) began a process of learning more about their constitutional and human rights. The community came into contact with the human rights lawyer, Mr R Chennels, who explained the new land legislation of South Africa in the light of the Constitution.<sup>21</sup> These laws gave the community the right to restitution of the losses it experienced as far back as 1913. Anthropology-based research indicated that the Kagga Kamma San could clearly establish land rights based on their origins in the National Kalahari Gemsbok Park. The Kagga Kamma San launched a land claim with the help of two NGOs, the South African San Institute (SASI) and Working Group of Indigenous Minorities (WIMSA). By this time Mr Kruiper and the Kagga Kamma San had completely associated themselves with a ‘reinvented’ Khomani San ethnic identity.<sup>22</sup>

The claimant group, at this stage largely consisting of the Kruiper family, took the important decision to ‘let others onto the bus’.<sup>23</sup> The metaphor ‘let others onto the bus’ refers to Mr Dawid Kruiper’s (current traditional Khomani San leader and son of the late Mr Regopstaan Kruiper) decision that the original claimants should strengthen their own

land claim and benefit as many San people as possible by allowing additional San families to register as land claim beneficiaries, when they did not necessarily originate from the land that was claimed back. These people came from areas such as Rietfontein, Loubos, Olifantsthoek, Keimoes and Upington and had been exposed to a more 'modern' outlook. After the land was successfully claimed back, Mr Dawid Kruiper asked SASI to assist in locating dispossessed beneficiaries and any San people who might still know the ancestral language.

In 1999 the first phase of the land claim was settled. The extended claimant group received six farms totalling approximately 40 000 hectares of land, namely Witdraai, Scottiesford, Andriesvale, Erin, Miershooppa and Uitkoms. The six farms were to be used for the benefit and development of all Khomani San people that formed part of the newly established Communal Property Association (CPA)<sup>24</sup> trust and that were identified as co-owners of the reclaimed land.<sup>25</sup> On the 21 March 1999 the then Vice President Mr Thabo Mbeki signed a Land Claim Settlement Agreement that transferred the title deeds of the six Kalahari farms to the CPA. At the time of signature, 297 San people had been registered on the Khomani San CPA. The first CPA constitution and the constitutions that followed upheld the existence and importance of the 'traditional leader' of the Khomani San. In terms of the CPA constitution, the members of the CPA elect the traditional leader. Mr Dawid Kruiper has been elected three times to this office since the implementation of the CPA constitution.

In addition to the six farms, the Khomani San CPA received rights to part of the KTP, to be managed as a 'contract park' in conjunction with 25 000 hectares of land awarded to the Mier community, subject to further negotiations. The remainder of the allotted capital value of the claim was available for the purchase of additional land or the development of the newly owned land. The intention was that the reclaimed land (with the potential to be run on a commercial basis) be used for game farming, eco-tourism and other related activities. The entire claim was valued at R15 million.

The initial agreement allocated a further sum of money to the original Khomani San claimants, to

be used to purchase communal land around Welkom, and provided the State would retain a residual custodianship right over this land.<sup>26</sup> Early in 1999, after it became known that the original land claimants, the Kruiper family, would be outnumbered by far by the other Khomani San that were allowed 'onto the bus', the Minister of the DLA made special provisions for Mr Dawid Kruiper and his immediate family from Welkom. The Minister announced that money would be made available to purchase land adjoining Welkom for the original San people of Welkom and their descendants. The Minister took this decision as an indication of DLA's appreciation for the Kruiper family's willingness to 'let others onto the bus'.

It was agreed that for a period of two years, the second phase of the land claim, the agreement clarifying the rights and obligations of the Khomani San community with regard to the acquired part of the KTP, was to be held in abeyance to give time to the newly established Khomani San community to organise their own self-government, and to commence the novel process of managing their resettlement on the communally owned farms.

The finalisation of the !Ae!Hai Kalahari Heritage Park Agreement was accompanied by inevitable standoffs and points of disagreement between the parties involved. The agreement was, however, approved by national government, the SANP, and the Khomani San and Mier communities. This approval was celebrated at a formal function at Twee Rivieren on the 31 August 2002, during the World Summit on Sustainable Development in Johannesburg. In retrospect, some of the parties involved claim that the finalisation of the Kalahari Heritage Park Agreement was rushed in order to fall within the World Summit celebrations.

In terms of this agreement, ownership of 25 000 hectares of land on the southern boundary of the KTP was transferred to the Khomani San community. In this part of the KTP, the community is to be free within the limits of the 'contract park agreement', to carry out cultural practices, to hunt, gather food from the bush and conduct eco-tourism ventures, with specified areas for commercial, symbolic and cultural use. The development of a Community Nature Park, in collaboration with the Mier community, and an application for an International Heritage Site listing were also planned.

Many stakeholders and interested parties put a great deal of effort into ensuring the success of one of the first and most extensive land claims in terms of the *Restitution of Land Rights Act*. The Khomani San land claim stakeholders agreed to a well-planned and not too rapid land claim process, so as to ensure the outcome was successful, substantial and sustainable. It was decided to base the land claim upon a solid foundation of practical research, which would not only confirm the rights of the community to the land in question, but also capture the history and culture of the community for the benefit of the development process that lay ahead. Five years have passed since the completion of the first phase of the Khomani San land claim. However, the Khomani San's living and social conditions have not substantially improved. It appears too much was invested in the strategies and plans for the initial land claims process, while the people involved and their basic human rights fell behind.

The land claim and resettlement process was uniquely challenging in the sense that the Khomani San community had dispersed to the point where no central coherence remained. Elected representatives, in conjunction with an elected traditional leader, had to lead this re-constituted and 'virtual' community without the benefit of past policies or practices. Many of the underlying principles of democracy had to be learned and, in the absence of a functioning 'tribal council' or other indigenous authoritative body, legislation required the elected representatives and the traditional leader to operate in accordance with western notions of 'representative democracy'. In addition, as a re-constituted community, and with Dawid Kruiper's decision to 'let others on the bus', the Khomani San grouping consists of a mixture of 'traditional' people and those with a more 'modern' outlook, and these groups are not always in accord. (Although this distinction between traditionalists and modernists was rejected by some at the hearing as artificial and divisive.)

## Challenges

### CPA Management Committee

Once every two years a CPAMC is elected to manage the communal land of the Khomani San. This committee has many responsibilities and

duties, ranging from the general management of the Khomani San farms to financial planning and the management of all communal assets. The CPA is elected on a democratic basis and in terms of its constitution. Based on the written submissions and oral evidence, several matters at the core of the Inquiry relate to the formation and operation of the CPAMC.

The membership of the first CPAMC was divided evenly between the 'original claimant' group and those who are regarded as having a 'modern' background. The term of the first CPAMC ended in bitterness in April 2001, when members were found responsible for gross mismanagement of funds by an official audit called for by the DLA. This audit found funds in excess of R150 000 unaccounted for, and recommended criminal investigation against senior office-bearers. No prosecution followed, as the Director General (DG) of the DLA declared it was by and large a lack of capacity and knowledge that contributed to the degeneration of the CPA's financial affairs. The CPA financial officer at that time, for example, only had schooling up to standard four. Following the audit results, it was stated by the DG of the DLA that none of the committee members would be allowed to stand for office in the CPA again. The exact implications and scope of this finding were never documented.

A new CPAMC was elected in July 2001, excluding most of the previous committee members, and began its new term with promises of sound performance and structural renewal. As part of the second phase of the land claim, the CPAMC was required to operate under the supervision of a task team, comprising of representatives of a broad range of state departments. The departments of Education, Housing, Agriculture, Conservation and Local Government were represented on the task team. In addition, a series of workshops were held to decide on relevant settlement, development and administrative issues. It was formally agreed by the CPAMC that management plans would be drawn up for the acquired land, while guidelines and policies would be put in place to ensure that income would be sustainably generated for the benefit of all land claim beneficiaries, and that such income would be appropriately managed and equitably distributed. The CPA discussed the type of activities that could possibly contribute to

continued income generation. It also expressed the need for a farm manager to be employed to assist in the initial management of the entire reclaimed estate. As far as could be established by the Inquiry, the supervising task team dissolved and none of the management plans, guidelines or policies, or the employment of a farm manager ever materialised.

This CPAMC also buckled under the pressure of expectations and lack of executive capacity. It ended its term of office in relative disarray, with recurring legal crises relating to the sale of game, the attempted sale in execution of the farm Erin in September 2002 to cover CPA debts, and the admitted breakdown of virtually all attempts to manage the CPA land. The DLA launched an application to the High Court to place the administration of the CPA under the DG of the DLA on the basis of mismanagement. The application was not opposed and was granted in November 2002. Evidence presented to the Inquiry showed there has been no effective implementation of this court order, which thus did not bring about improvement in the general management of the Khomani San land.

The current CPAMC was elected in July 2003, with significant state involvement (as has become practice) and in accordance with the new and very comprehensive CPA constitution, drafted with assistance from the Legal Resource Centre. This constitution stipulates new constituencies and representation and provides for a 'council of elders' and a form of 'traditional leadership'. However, in theory, the CPA is still under the administration of the DLA, following the November 2002 court order, and accordingly without its normal powers granted under the CPA Act.

During the public hearing the CPAMC submitted two of its newsletters, dated May–November 2003 and January–June 2004. These revealed that by June 2004, the CPA 'now only consists of 11 members actively involved and present at meetings', while the CPA constitution makes provision for at least 23 different positions; that the cattle bank 'likely has a bank balance of R60 000' and that SASI is assisting the CPAMC, which operates without a central administrative office, with administrative resources such as the use of a telephone, fax machine and internet facilities. It is

evident that the CPAMC lacks capacity, infrastructure and support. It experiences difficulty in keeping its members together and in effectively managing the reclaimed land. As was declared at the hearing, '*We were not fully equipped or trained. When we were trained, we did not understand. The State was supposed to help us but they refrained from doing so. Their lines were always busy.*'

The Inquiry does not disregard the current CPA. It acknowledges the attempts of the current CPAMC to salvage the situation of the CPA and the Khomani San community. These attempts include the organisation of a financial training session and an information dissemination session on the CPA constitution, in collaboration with Farm Africa. The Inquiry also takes note of the CPA's contentions that a 'land use plan' and 'game management plan' have been drafted, with the assistance of Farm Africa. A scheme for the borrowing of stock (a cattle-bank), to the benefit of both the CPAMC and community members, has also been initiated. It is claimed that the current CPA suffers from low morale following continued failure to perform and that performance is hampered by lack of capacity, resources, management, guidance and budget as well as by continuing rifts within its constituency. It has also been highlighted that the CPAMC members are not otherwise employed and should accordingly not be seen as 'volunteers' to uplift the community. They should rather be seen as employees of the CPA and be paid a little more than the nominal rate for work actually done.

During the Inquiry, calls were made for the appointment of managers that can assist the CPAMC at different levels of operation. Some people expressed the view that executive functions should be delegated to a competent external manager, an accountable authoritative agent who should not have any vested interests in the outcome of the community initiatives. Rather than functioning as an 'executive team', the CPAMC should be used for consultation and to formulate policy on all matters involving land use, housing, grazing, the KTP, commercial ventures, licenses and projects. However, thus far all CPA's have been reluctant to establish a position for a general executive manager.

Such action would address allegations made by some members of the Khomani San community that the CPAMC fails to ensure the basic rights of its constituency. Such allegations stem, for instance, from claims that the Khomani San members living in Andriesvale have had their water cut on numerous occasions because the CPAMC failed to pay the fees. The CPA was supposed to pay the fees from CPA funds, but the Andriesvale residents were willing to contribute from their personal incomes, as the CPA did not have enough available funds. The people living on Witdraai farm had access to a borehole and pump but the use of the pump was then denied and the pipes have been cut, it is unclear by whom. The CPAMC did not take reparatory action in this regard.

### **Lack of Land Management Capacity and Post-settlement Support**

The successful land claim restored to the Khomani San community a significant portion of the Kalahari land from which they originate. The farms and additional land received are to be managed in such a way as to ensure sustainable development that will generate income and preserve the area for generations to follow. There is, however, a total and visible lack of management of the farms, housing and grazing lands, both by the CPA in its management capacity and by individual Khomani San members residing on the land. Since the finalisation of the land claim procedures, there has been no capacitated body or person to enforce ‘good practice’ with regard to land management. The impression created in the process of the Inquiry was that it was always generally acknowledged that the Khomani San community would need ‘hands on assistance’ in order to manage the responsibilities that came with the successful land claim. However, such assistance has not been adequate.

### **Land Use Disputes**

The written and oral submissions revealed conflict within the community with regard to the utilisation of the six farms, in particular. Parts of the community want to use the land for traditional purposes and self-supporting activities (such as small-scale agriculture), while parts of the community visualise the land being used for economic purposes, such as commercial hunting,

livestock ranching and tourism. Adding to the dispute is the fact that the CPA constitution specifies that fifty percent of the land must be allotted to traditional purposes only.

There are allegations that individual community members meet with resistance from the CPAMC when attempting projects such as vegetable gardens, initiatives with trackers or the development of a ‘tentepark’ on the farm Witdraai. Some submissions raised concerns that the CPAMC and its subsidiary committees arbitrarily decide on issues of land administration and allocation and applicable land use rights. Decisions that have implications of a wide extent and which impact on the CPA communal land, property and assets, should be taken strictly according to the CPA constitution and on a democratic basis.<sup>27</sup>

### **Implementation of the !Ae!Hai Kalahari Heritage Park Agreement**

The Inquiry found dissatisfaction within the Khomani San community with regard to the implementation of the !Ae!Hai Kalahari Heritage Park Agreement.<sup>28</sup> Despite SANP’s stated intention to find ways to link the Khomani San heritage with the identity of the KTP, there are allegations that the Khomani San are denied free access to the KTP. Submissions indicate that the Khomani San community is not at ease with the existing procedure, whereby they have to sign a register and be accompanied by a KTP ranger when entering the park.

Allegations have also been made that SANP, as senior and capacitated partner in the Park Joint Management Board, has up to now not facilitated any initiatives to implement the provisions of the agreed upon Contract Park Management Plan. These relate to capacity building, small business development, and adequately maintained infrastructure (such as water supply) on the KTP land belonging to the Khomani San community. The community indicates they have a lack of understanding or control over important KTP rights and processes, which include two commercial lodges in which the Khomani San may have a significant stake. It is also alleged that the community has not yet received all of the land to be transferred by the KTP in terms of the land restitution agreements.

There have been calls for not only the CPA, but also the original Khomani San claimants (in their personal capacity) to be represented on the management forums of the KTP. The original Khomani San claimants were all born in the KTP, and the KTP area, including the utilisation of the land and any other developments, is therefore of grave importance to them. Since many of the CPA members originate from other areas in the country, the original Khomani San claimants fear a lack of interest or less need to actively take part in KTP matters from the broader Khomani San community as represented by the CPA.

### **The Welkom Commonage Trust and Welkom Declaration**

In terms of the 1999 land claim settlement, the Minister of the DLA made money available to the Kruiper family to purchase land in the Welkom area for the original San people of Welkom and their descendants. An amount of R517 000 was paid over to the Kruipers and the Welkom San in respect of the value of two farms they intended to buy for this purpose. However, the farms the Kruiper family had in mind were not yet for sale. The money was invested in the Welkom Meentgrond Fonds (Welkom Commonage Trust), under management of the Khomani San land claim lawyer, where it is currently invested.<sup>29</sup>

In September 2002 an amount of R226 829,61 was paid to the DLA from the trust fund to save the sale in execution of the farm Erin, and this amount was not paid back to the fund by the DLA, despite continuing requests. Following this Inquiry, the capital and interest have been paid back. The trust fund at this point in time totals approximately R790 000.

Members of the Khomani San community and the CPAMC have indicated they do not have sufficient knowledge about the state of the fund and require formal documentation regarding the management and protection of this investment. However, not all of these community members are primary beneficiaries of the fund, whose monies are not to be used by the CPA for general purposes or monthly expenses, but solely for the purpose of securing land for the Kruiper family and Welkom Khomani San.

On 6 February 2004 a document titled the 'Welkom Declaration' was presented to government outlining the issues and concerns of the original Khomani San of Welkom.<sup>30</sup> The Declaration requested government to allow this part of the Khomani San community to assume ownership of the farms Erin, Witdraai and Miershooppan, and to undertake independent management and development of this land. In essence, the Welkom Declaration pleaded for a split between the CPA and the Khomani San people originating from Welkom.

### **Involvement of the Department of Land Affairs and the Commission on Restitution of Land Rights**

The DLA is the key government department responsible for the management and administration of land restitution processes.<sup>31</sup> This department is said to have contributed to a great extent to the success of the Khomani San land claim. In terms of the second phase of the land claim agreement in 2002, the intention was also for the state to render assistance to the Khomani San for a period of at least three years, through the office of the Regional Land Claims Commissioner in the DLA, to enable the Khomani San to manage their resources and become self-determining. DLA has been criticised for not adhering to this, and other obligations in terms of the *Communal Property Associations Act*<sup>32</sup>, for refraining from giving effect to the November 2002 High Court order, for neglecting to budget for and see to the appointment of experienced individuals with management capacity, and for overlooking the importance of drafting a development plan, as was provided for in the land claim agreement.

The DLA has further been called upon to ensure coordination and cooperation between different spheres of government and other parties involved with the community, such as NGOs and consultants. The Commission on Restitution of Land Rights has limited powers of intervention in the management of the Khomani San land. The onus is therefore placed on the office of the Regional Land Claims Commissioner and essentially the DLA to facilitate the appointment of managers (an executive manager and a farm manager) to act as the central 'access points' through which external stakeholders and other

government departments liaise with the community and cooperate with the CPAMC.

In response to the dissatisfaction with its performance, the Department claimed that the duty of DLA and the Regional Land Claims Commission is primarily to see to the transfer of land. The Department, however, admits that 'government has a responsibility to give priority attention to the development of land claim beneficiaries' and it asserts that 'the local authority, as a line function department is expected / accepted to see to this development'. During the public hearing it was acknowledged by the DLA that in essence, monitoring of the execution of this duty remains its responsibility. The DLA claims that the mandate of the Department to see to the post-settlement support of the Khomani San community only arose as part of the 2002 land claim agreement, but many problems of this community arose long before this agreement. While DLA submitted that it has erected structures, contributed to the development of the CPA constitution, and set up committees, including the KTP committee, it appears the Department has neglected the basic needs of the community it helped to resettle.

At the public hearing, the Siyanda District Municipality acknowledged that it was directed by the DG of the DLA to manage and coordinate the Khomani San area. The District Municipality's specific duties were to see to the coordination of responsibilities and services of all role-players and to assist with the capacity building of the CPA. A task team was formed following the finalisation of the transfer of land to the Khomani San community in 2002, which dissolved in 2003 with little achieved, and its functions were purportedly transferred to the Regional Land Claims Commissioner and the Premier of the Province.

### **Too Many Fingers in the Pie?**

The San people of South Africa and other parts of Africa have generally attracted the attention of researchers and human rights groups. The Khomani San community and their efforts to reclaim and resettle their land has drawn a great deal of interest from several external parties, included NGOs, national and international media, specialised experts, tourists and researchers. Given the historical dispossession and consequent

impoverishment of the San community, the input, participation and support of people who value their interests is important. This external involvement has contributed to the realisation of some entrepreneurial projects. However, it is alleged that the uncoordinated involvement of too many external people and organisations makes it difficult for the Khomani San community to develop a communal identity and manage group dynamics, and hampers the community's ability to determine its own future.

It was stated that although the intentions of many external parties and service providers may be noble, their support does not benefit the community as a whole, and will not do so until such a time as the Khomani San are allowed to function independently as a cohesive community, with the internal capacity to engage with external parties in a structured manner. Government departments see the involvement of too many external parties as undermining government efforts to help the community in its own development. Allegations have been made that some individuals or organisations may also be involved for personal gain. Calls were accordingly made for a central body to coordinate the involvement of external parties.

## **GOVERNMENT AND DELIVERY OF SERVICES**

### **Introduction**

It appears that government has been remiss in the settlement and development process subsequent to the successful land claim. A number of the immediate needs of the Khomani San community relate to the provision of basic government services, which is particularly the responsibility of local government. There is dissatisfaction with the Local Council of Mier, in that water, sanitation, waste management and development in general have not yet been realised for the Khomani San community. In addition, the process of producing the necessary plans for settlement and development of the Khomani San land was only completed at the end of 2004, and plans await approval, while the responsibilities of various levels of government and government departments are still to be clarified and fully acted on.

## Challenges

### Municipal Services

The Khomani San people were historically nomadic, with their basic needs provided for by nature. The community involved in this Inquiry and residing on land within the municipal borders of the Local Council of Mier expressed the need for sufficient infrastructure for water, sanitation, electricity and management of waste. The demand for these services emanates not only from the adoption of 'modern' practices, but also from the requirements of effective management of the acquired land.

The Local Council of Mier has failed to provide water, sanitation or waste removal services to the Khomani San community, despite having an annual budget of R18 million. The primary defence in the Local Council's written submission to this Inquiry is that formal town-establishment in terms of the Development Plan is still to be approved by the Commission on the Restitution of Land Rights (see below). The local authority successfully applied to the government for an amount of R2,6 million for the provision of bulk-water services on the Khomani San land. The implementation of this programme has, however, been put on hold, also pending the approval of the Development Plan. With regard to the delivery of free basic services to qualifying families, the Local Council of Mier again offered the approval of the Development Plan as the reason for failure to deliver. An amount of R2,5 million has been obtained from the Development Bank of Southern Africa to establish water infrastructure on farms and to improve the existing hunting and tourism infrastructure in the area. Of this amount, R1,5 million must be utilised specifically to meet the said objectives on Khomani San land. As far as could be established, this project has not as yet been initiated.

In addition, the Local Council of Mier obtained funds from Department of Environmental Affairs and Tourism (DEAT) for the development of two Art and Culture Centres. One centre is to be developed on the farm Erin for the use and benefit of the Khomani San community, and the other on the farm Rietfontein for the communities living there. It is unclear when the process of erecting such centres will begin. The development of a communal lodge in the Contract Park in the KTP,

to the benefit of both the Khomani San community and the Local Council of Mier, is currently in its planning phase. As far as could be established, progress on the project is slow and the Khomani San community is not adequately informed or involved.

With regard to the development of CPA institutional capacity, the Local Council of Mier, during the course of the public hearing, stated its intention to include the CPAMC members in a training programme as part of the 'Municipal Support Programme'. It also offered to assist the CPAMC with the management of its financial statements and outstanding financial auditing processes.

The local authority expressed the opinion that mutual respect and communication between local government and the Khomani San CPA will contribute to the successful implementation of the said projects and programmes. It was stated that the Khomani San community does not seem to fully understand that although they have become the lawful land owners, the land still falls within the judicial borders of the local government authority, which has certain powers and duties to conduct. Community members at times feel the execution of powers and duties by the Municipality of Mier constitutes 'interference' on Khomani San land. The municipality's fulfilment of its duties should benefit the Khomani San community, and requires their cooperation.

### A Local Development Plan

The presence of a unique constituency of people in its municipal area arguably requires government to make specific provision for this community. Such provision should be made by drafting, approving, implementing and monitoring development plans, strategies and policies provided for by national legislation pertaining to local government. Such documents may include an Integrated Development Plan, a Spatial Development Framework and an Environmental Structure Plan. A development plan would address many of the issues now key to this Inquiry, including realistic planning within set timeframes, and the clarification of the roles, obligations, and services to be rendered by various departments and spheres of government.

In September 1999 the CPAMC began to express the need for the drafting of a ‘development plan’. The CPAMC, however, did not have the capacity to undertake this endeavour without the assistance of local government or DLA. Only in February 2004 did the Commission on the Restitution of Land Rights approach a local contractor, Stabilis Development, to begin the process of drafting a development plan – which arguably should have been in place in 1999, prior to the transfer of the land.

Stabilis Development drafted a ‘Khomani San Settlement and Development Strategy’ (also referred to as the ‘Masterplan’). A socio-economic survey and a ‘Draft Scoping Report for the Development of Housing at Selected Sites in the Mier Municipal Area’, including an environmental impact assessment, are annexed to the ‘Masterplan’. This was submitted for approval to the Commission on the Restitution of Land Rights on 17 September 2004.

The Khomani San Settlement and Development Strategy aims primarily to ‘ensure an orderly process of settlement and to promote the socio-economic development of the Khomani San community’. In short, it strives to:

- Lay a firm basis for feasible and realistic development planning within given time frames;
- Render a clear framework for succeeding in detailed planning activities (such as the development of a Khomani San town on their reclaimed land);
- Commit government bodies responsible to the conducting of their roles, provision of services and participation in Khomani San planning and implementation processes; and
- Serve as basis for monitoring and evaluation purposes.

Although the Khomani San community did not comment on the ‘Masterplan’ in the Inquiry, the existence of a development strategy is certainly progress, and addresses such pressing issues as the establishment of a town (including a clinic and a school) where the Khomani San community can settle. It appears there was community participation in the development of the strategy. The document states: ‘Stabilis Development made

use of a process called Public Rural Appraisal (PRA) to give every individual Khomani San member the opportunity to make inputs to the development objectives and activities planned for their farms and other land. This process is designed for situations where people are not functionally literate or have low levels of schooling, as in the Khomani San community.’

The Settlement and Development Strategy determines that, although the Commission on the Restitution of Land Rights initiated the process, the implementation thereof, and accompanying development will *‘be governed by the leading Local Authority, Mier Municipality, in collaboration with the management committee of the Khomani San CPA’*. The dissemination of the policy and the implementation thereof now becomes the responsibility of local government.

### **Coordinated and Cooperative Governance**

The realisation of human rights for the Khomani San requires coordinated and cooperative governance from all levels of government and relevant departments. The Inquiry questioned in particular the contributions and responsibilities of the Department of Provincial and Local Government (DPLG). The Khomani San Settlement and Development Strategy states that *‘support from Local and Provincial Government...is imperative for the short and long term success of the resettlement and development of the Khomani San community’*.

Following questions and requests from the SAHRC and the Panel, DPLG presented to the Inquiry its Organisational Review Report for the period 1994–2004.<sup>33</sup> This DPLG Report reflects on the National Khoi-San Council (NKC), established on 27 May 1999. The NKC consists of 21 members representing the main groups that identify themselves as Khoi-San. The San community, which is one of the 21 groups, and which includes the Khomani San, is represented. The NKC was established as an interim body to:

- Serve as a liaison mechanism between government and the broader Khoi-San communities;
- Assist and support research processes with regard to the Khoi-San communities; and

- Make proposals relating to their constitutional status, their rights and their governance.

During 1999–2000, the DPLG and the NKC carried out research and compiled a comprehensive report on areas such as the recognition of Khoi-San traditional leadership structures and such leaders’ representation on local, provincial and national government structures, land claims restitution processes and the protection of the Khoi-San heritage. In October 2002, the Minister of the DPLG met with the NKC to discuss the report. At this meeting, a task team was established to draft a Cabinet Memorandum to address issues such as the realisation of the Khoi-San’s constitutional rights, governance, development and service delivery. The Memorandum identified the government departments responsible for addressing the following key issues:

- Traditional leadership and representation in government structures: DPLG;
- ‘First nation’ and/or ‘indigenous people’ status of Khoi-San communities and ratification of international instruments: Department of Justice and Constitutional Development;
- Language and heritage: Department of Arts, Culture, Science and Technology; and
- Historical land claims and restitution: DLA

Initially it was thought that the Traditional Leadership and Governance Framework Bill would include Khoi-San traditional leadership and representation in government structures. It was subsequently agreed that a separate legislative process was required in order to see to the specific traditional leadership needs of the Khoi-San communities. Accordingly, in September 2003, DPLG met with the NKC to amend the initial Memorandum, which at that stage had not yet been submitted to the DG of the DPLG, and to agree to the details of a separate policy and law-making process for the recognition of Khoi-San traditional leadership. A task team was established to finalise an action plan for the updating of the existing Memorandum and the compilation of a Discussion Document and a Policy Proposal Document, by April 2004.

During the public hearing, DPLG announced that the Memorandum had been submitted to Parliament. This Memorandum may clarify the roles of the government departments involved, so as to ensure cooperative governance. It is hoped it will also put in place a mechanism to monitor government performance. The DPLG and the SAHRC await a response.

## POLICING

### Introduction

The fatal shooting of Mr Optel Rooi in January 2004 brought to public attention the need for investigation into police conduct in the Andriesvale-Askham area. This shooting is not the only incident of alleged unlawful police conduct in the area. The police are said to be visibly reluctant to play a constructive role in the Khomani San community. The Panel received submissions containing specific allegations against the police in general and particular SAPS members. These were brought to the attention of both the Independent Complaints Directorate (ICD) and the Director of Public Prosecutions (DPP) of the Northern Cape.<sup>34</sup>

Generally, the substance of these allegations is that:

- SAPS members intimidate Khomani San community members (specifically in the Witdraai area), both by the use of repugnant and degrading language and by acting in an aggressive manner, in most instances for no apparent reason;
- SAPS members were allegedly responsible for the removal of the water pump on the farm Witdraai that was utilised (with the necessary consent) for an economically feasible garden of indigenous plants, a small scale nursery and for drinking water for the community and for game;
- Khomani San members are body-searched and questioned and their property seized without the SAPS members concerned explaining procedures or providing reasons for such conduct;
- Following investigations by ICD of charges laid against the police, DPP either declines to prosecute, or takes an unreasonably long

period of time to make a decision regarding prosecution. Without making specific allegations against these two authorities, the Khomani San community is generally distressed about the time-consuming prosecution processes, while the unbearable situation in the Witdraai area continues;

- The Khomani San community feels reluctant to report cases with SAPS members involved. These cases remain unreported and unaddressed and cause increasing tension between the police and the community; and
- Some of the members of SAPS carry out commercial activities on Khomani San land.

In addition, the submissions indicate the need for a circuit, periodic or special court in Askham or Rietfontein, as access to courts is hindered because the court nearest to the Khomani San land is in Upington, approximately 200 kilometres away. The Inquiry revealed the Khomani San community's lack of awareness of not only the distinctive roles of SAPS, ICD and DPP, but also the processes to be followed by victims when submitting cases for investigation.

Despite of the allegations made, the community appears to have respect for the role SAPS should play in the area. One of the complainants closed his testimony by commenting: *'But I am still a friend of the police because without control and judicial intervention of the police, there will be no order in the country or among its people'*.

Allegations against the SAPS are countered by the assertion that police are challenged in the fulfilment of their duties by the burden of functioning in a remote area.

## Challenges

### The Fatal Shooting of the Mr Optel Rooi

The Khomani San community's dissatisfaction with the investigation into the police shooting of Mr Optel Rooi, the slow progress and limited reporting, served as one of the key reasons for the Inquiry.

On 3 January 2004, Mr Silikat van Wyk and Mr Johannes 'Optel' Rooi stopped at the Molopo

Lodge Bottle Store to fetch water to carry home. Two SAPS members arrived with a *bakkie* – they claim to have acted upon a charge of housebreaking and theft or attempt thereof. No evidence or details of such charge were brought before the Panel. On the arrival of the police, Mr van Wyk and Mr Rooi were frightened and ran away. A shooting followed, with apparently no witnesses. On 4 January 2004 it became known that Mr Optel Rooi had been killed. The police never informed the relatives of Mr Rooi of the incident, but did generally assist with funeral arrangements that included the transportation of the body and the provision of wood and vegetables.

This matter was investigated by ICD. The DPP received the docket on 7 April 2004 and the matter was referred to two senior advocates. The DPP states that immediate attention was given to the matter, and a decision was taken to decline to prosecute and to request the investigating officer to investigate 'certain other aspects'. This decision was conveyed to ICD on 22 April 2004. The SAHRC was also notified of this decision. The relevant dockets were returned to the DPP and a statement from the investigating officer informed the assigned advocates that one of the involved SAPS members was not prepared to make a statement, although compelled to by law. In the light of this development, and also as a result of certain allegations made on an actuality programme on national television on 25 May 2004, a meeting with the investigating officer was arranged. During this meeting, the advocates requested that all allegations be fully investigated and issued certain instructions for the investigation.

The investigating officer reported back on 15 July 2004, indicating no sworn statements to substantiate the allegations made on the television broadcast could be obtained. The SAPS member was still not prepared to make a statement and the assigned advocates consulted with the DPP on the way forward. The SAHRC was informed about this.

At the hearing the DPP indicated that delays up to that point were caused by the need for further investigation and to obtain a statement from one of the SAPS members involved. On 28 October 2004, the DPP announced at the hearing that the decision had been taken to prosecute both SAPS

members involved on a charge of murder in the High Court. A date for trial will be determined after consultations with the legal representatives of the accused. The exact facts of this case will be thoroughly investigated as part the prosecution procedures to follow.

### **Incidents of Assault**

During the Inquiry, several members of the Khomani San community indicated that they were involved in unreported incidents of assault by members of the SAPS operating in the Witdraai area. Although of great concern, in order to protect both members of the Khomani San community and members of SAPS, the details of these incidents will not be elaborated on.

At the hearing, DPP indicated all processes that followed ICD investigations pertaining to specific submissions of community members received by the SAHRC. In one of the cases prosecution will follow. In this case, one of the SAPS members involved in the murder-case of Mr Optel Rooi is involved. Due to a lack of evidence no other prosecutions will follow.

### **Private Economic Involvement**

Prior to 1999, one of the six farms transferred to the Khomani San, Witdraai, was effectively owned by SAPS. Over the decades, SAPS members had developed a culture of farming on Witdraai, which they regarded as ‘their farm’ in compensation for the remoteness of the police station. The transfer of ownership is said to have contributed to distorted relationships between the Khomani San beneficiaries and members of SAPS in the area.

Since the Khomani San community took ownership of their designated land, the police have not cease to farm the area, specifically the farm Witdraai. Allegations were made that members of SAPS still had privately owned horses and sheep grazing on Witdraai and other Khomani San land. This took place on the basis of informal or private ‘agreements’ forged under dubious circumstances with the CPA, Khomani San leaders or individual community members. Although in possession of hunting licences, letters of consent obtained from the Khomani San CPAMC and other documentation, the private economic involvement

of members of SAPS on Khomani San land was criticised by the Khomani San community and IDP.

### **Police Working Conditions**

At the Inquiry it was asserted police have to operate under difficult working conditions, and this contributes to the failure of SAPS to adequately serve the Khomani San. The area is isolated, and few opportunities or facilities exist for recreation. Members of the police join in hunting and farming ventures with local farmers, their personal friends. Police are accused of being ‘hand in glove’ with these farmers, and of conspiring with them to harass the Khomani San.

In many instances, police members operating in the Witdraai area have to see to cases involving drunkenness, the illegal use and possession of *dagga* and complaints of nuisance and disorderly conduct. It was stated that these tasks may be tedious, and may result in preconceptions and biased behaviour towards the Khomani San.

## **EDUCATION**

### **Introduction**

The SAHRC received complaints of child sexual abuse, harassment and negative conduct towards some of the Khomani San children and their parents in Askham School. Concerns were also raised about the failure of the school to manage the integration of children from different backgrounds and with traditional ways of living – socially and within the learning curriculum. The Khomani San are not fully accustomed to formal education, and efforts should be made by government departments and other stakeholders to ensure that members of the community can access formal education in a way that contributes to their development and that of the community.

### **Challenges**

#### **Sexual Abuse, Harassment and Discrimination**

In May 2002, a father from the Khomani San community submitted a written complaint to the Area Manager in the Siyanda District Office of the Department of Education, alleging sexual abuse and molestation of children at the JJ Adams

Combined School in Askham. The District Office left the complaint in the hands of the headmaster of the school, who only reported back to the District Office four months later. As far as could be established, the headmaster could find no evidence of molestation or other forms of sexual abuse or harassment. No action was taken against any of the teachers or other school personnel, but in its response to the concerned father, the District Office indicated it would conduct a formal investigation into the matter.

Written submissions as well as oral evidence indicate that no such investigation took place, as it was found that the *'air at the school had been cleared'*. A general feeling of dissatisfaction with the way the local headmaster and the Siyanda District Office of the Department of Education handled the allegations prevails in the community. The referral of the issue to the local social worker came to a dead end due to a lack of capacity, and because she has no means of transport at her disposal.

In May 2003, there were general allegations about the discriminative behaviour of non-Khomani San children and parents towards Khomani San children and parents. Although no formal complaints were made, a meeting to address this and related issues was held in May 2003 with the acting District Director, the Human Resources official, the Educational Administration official and the Education Support Services official, as well as several parents. It is unclear to what extent the Khomani San parents were represented. The issues discussed included discipline at the school, insufficient supervision, the discriminatory behaviour of children, sexual harassment among the children and a lack of support services. Following this meeting, Educational Support Services offered to assist and interview distressed children where necessary, and the headmaster discussed the issues with his personnel, who committed themselves to the general improvement of conditions at the school.

In June 2004, the Circuit Manager of the Department of Education visited Askham Combined School and found the general condition of the school and its buildings to be unacceptable. The headmaster was instructed to immediately start renovations, in collaboration with the school board.

A month later no improvements had been made, and the headmaster of the school received a final written disciplinary notice in this regard. It has been reported that renovations have subsequently begun.

### **Transport**

The majority of Khomani San children live on Andriesvale and Witdraai farms but the nearest primary school is 16 kilometres away. Families do not have private transport, and no bus service or other form of public transport operates between the school and the Andriesvale-Askham area. Since many Khomani San households cannot afford boarding fees, children attend school on a sporadic basis or not at all. The nearest secondary school, Rietfontein Senior Sekondêr, is situated approximately 140 kilometres away from the KTP and Welkom area, and again there is no transport available to the Khomani San children.

### **Traditional Khomani San Children and Tourist Exploitation**

One of the challenges experienced by the teachers and management of the schools is to keep the Khomani San children within the boundaries the classrooms, school premises and hostel. The Khomani San children experience difficulty in functioning in a confined or enclosed environment when they are used to being free to move about the land. In addition, they are lured from school by the money they can make entertaining tourists at stalls selling 'traditional' Khomani San artefacts. The stalls are not necessarily situated in the Andriesvale-Askham area and children are exposed to dangers as they travel long distances from home seeking tourist money. Tourists pay to see children who are often in a neglected state.

After press coverage in July 2004 of young Khomani San children entertaining tourists in Brits, the Siyanda District Office of the Department of Education, in collaboration with the Deputy Principal of Askham, took action and brought the children back to Askham where they resumed school. However, there is concern that these children will return to a lifestyle where they can make up to R200 a day by entertaining tourists. A report by the Community Development Officer of the Department of Education indicated that merely

one month later, three of the five retrieved children were absent from school. As asserted at the Inquiry, in the Andriesvale-Askham area, *'tourism and education are clashing'*.

## Learning Curriculum

The opinion was expressed that the local schools in the Andriesvale-Askham area should equip children with a broader education than that contained in traditional curricula. The learning curriculum should combine learning needs related to the immediate environment and the unique cultural composition of the Khomani San community, with those of the formal curricula and the realities of the wider South African and global context.

## SOCIAL WELFARE

### Introduction

The reclaiming of the land appears not to have substantially improved the social welfare of the Khomani San. The community's current poverty results in malnutrition and illness, while the abuse of alcohol and *dagga* are indicative of, and lead to serious social and other problems. Complaints have been made that the social ills of the community are not adequately addressed by the social workers involved.

### Challenges

#### Alcohol and *Dagga* Abuse

The local liquor store in the Andriesvale-area runs a thriving trade selling 'Killing me softly', the pet name of the Khomani San community's favourite alcoholic brew. There is alcohol and *dagga* abuse among members of the Khomani San community, including children, and this causes conflict with other community members, SAPS, and problems at the local schools. No evidence was put to the Inquiry of intervention strategies to address these issues from the Department of Social Affairs or other bodies involved in the community.

#### Health Services

The provision of basic health services in the Andriesvale-Askham area is unsatisfactory. There

is only one nursing sister at the Askham clinic, several kilometres from where the Khomani San community lives. Widespread tuberculosis, fuelled by malnutrition and poverty, is just one of the ailments in need of medical intervention. It was alleged that it is primarily the responsibility of the provincial sphere of government to see to the proper provision of health services.

### Capacity

The submissions received and oral evidence from the local social worker indicates a lack of capacity to fulfil her responsibilities. She needs to cover a vast area and the Khomani San community is not the only community she is responsible for. It is alarming that she does not have access to transportation in an area of hundreds of hectares.

## COMMUNITY DIVISION

### Introduction

The metaphor of 'taking onto the bus', the deeper meaning thereof and especially the consequences of the open land claim should not be underestimated. It seems as if in general the Khomani San cherish a shared vision of a developed, peaceful and sustainable community on the land they rightfully claimed back. This shared vision has become distorted by the different approaches towards the utilisation and management of the land by the more traditional Khomani San members (the original claimants) and those who were exposed to modern practices and ideas (those who were invited 'onto the bus'). It also became evident that parts of the community welcome the involvement of external parties, while others are of the opinion that these are the cause of community division. The role of the CPA and the traditional Khomani San leaders' involvement in management and decision-making processes causes further division and discord.

### Challenges

#### The Traditional Leader and the CPA

Tension between the two sections of the newly formed Khomani San community were evident already in 2000, when a workshop at Kalahari Trails mooted the possibility of a 'divorce' between

the original/traditional claimants from Welkom and the others. Subsequently, in addition to the Welkom Declaration referred to earlier, Mr Dawid Kruiper has indicated that he will no longer participate in CPA meetings, even though the CPA constitution obliges him to do so. He is of the opinion that he is only brought into play to sign documents that are not explained to him, in order to access Khomani San funds. He also expressed uneasiness with the CPA constitution providing for the election of a successor to the Khomani San traditional leader, when San culture has been based on inherited leadership.

It is unclear what the ramifications may be of Article 6.1.3 of the constitution of the CPA, which states that should the traditional leader be constitutionally discharged as member of the CPAMC, he will also be discharged of his office as traditional leader. However, Article 6.1 7 states that the CPAMC, after inputs by the traditional leader as member of the CPAMC, may in due course develop standing rules regarding the functioning of the traditional leader and cooperation between the traditional leader and the CPAMC.

A community split is the relief sought by the Khomani San traditional leader. Mr Dawid Kruiper expresses his vision of ‘an ongoing road towards where it is green. The road, however, splits so that in some cases even friends need to part’. The CPAMC alleges their traditional leader does not sufficiently involve himself in decision-making process and addressing community problems, and gives too much attention to dealing with external parties such as the media and NGOs.

## RELATIONSHIPS

### Introduction

Written submissions and several emotional addresses at the hearing made it evident that many of the problems experienced by the Khomani San community result from distorted and impaired relationships. These impaired relationships emerge from and feed the issues raised above. At stake are the relationships between

- the SAPS and Khomani San community members;

- external parties and the community;
- different spheres of government involved;
- white farmers and the Khomani San community;
- the ‘traditional’ Khomani San and those who have a more ‘modern’ outlook; and
- the CPAMC and the remainder of the land claim beneficiaries.

### Challenges

### Communication

Relationships between internal and external parties are undermined by poor communication. Communication is hampered not only by the lack of infrastructure, but also by the absence of efforts to address prejudices, misconceptions and misunderstandings. Poor communication between the broader Khomani San community and the CPAMC, and between the CPAMC and local government was highlighted during the course of the Inquiry. In addition, members of the Khomani San community allege that continuous attempts to communicate with the Minister and DG of the DLA, and the Minister and DG of the DEAT have failed. They claim to be ignored by these government departments and that this amounts to an infringement of their right to be heard by civil servants, to just administrative action and to benefit generally from cooperative governance.

### Role Clarification

This Inquiry illuminates the pressing need to clarify for the Khomani San the roles, functions and responsibilities of different government departments, external parties and other bodies involved in the process of resettlement and development. The Khomani San expressed the need to know when to approach whom with specific challenges and problems experienced. One community member’s oral evidence claimed: ‘*We don’t know exactly what government department should assist us in getting information on, for example, what land is included in our land and what land is not. We are referred to laws but we don’t know of, or understand laws*’. In addition, there is the need to identify the exact role of the CPAMC and the traditional leader in guiding the Khomani San community.

# FINDINGS AND RECOMMENDATIONS

## LAND CLAIM AND RESETTLEMENT

### Findings

- Due to a variety of reasons, there currently exists a situation of disarray among the Khomani San people that benefited from the land claim process and a situation of incoherent management of the Kalahari land (the six farms and the land in the KTP).
- Certain backlogs in terms of the Khomani San community's development exist due to:
  - The omission/failure by the DLA in terms of the High Court order of November 2002 to effectively put the Khomani San CPA under the Department's management;
  - Related to the former, the failure/omission by the DLA to appoint an executive manager and/or a farm manager for the Khomani San community and the land they now reside on;
  - A general misapprehension of the provisions of the extensive but highly technical CPA constitution;
  - The inability of all management committees of the CPA thus far to take effective management of the reclaimed land, and the imminent division between the traditional Khomani San people and those that 'were allowed onto the bus'; and
  - The delay in drafting the Khomani San Development Strategy by the Commission on Restitution of Land Rights and the resultant delay in basic service provision by local government.
- It is the general feeling of this Inquiry that a great deal of effort went into the planning and achievement of a successful land claim. The implementation phase, however, failed to initiate a process of sustainable development at different levels, to protect basic human and other rights of the land claim beneficiaries, as well as to capacitate

the long-disadvantaged Khomani San people.

- The scope and meaning of many acquired land rights and assets, such as the rights pertaining to the KTP and the management of the Welkom Commonage Trust, are still unclear for the broader community.
- Too many external parties are involved with the Khomani San without this involvement and participation being regulated or coordinated.
- The Inquiry was advised that the problems experienced with and by the CPA are not unique to the Khomani San, but are problems that many CPA's registered in South Africa experience.

### Recommendations

- The DLA, immediately and until such time as the management capacity of the CPAMC improves, needs to give practical effect to its obligations in terms of the 2002 High Court order.
- It is recommended that the former be achieved by the appointment of a farm manager and an executive manager to work within the Khomani San community and together with both the CPA and the traditional leader.
- The CPA Constitution should be revised by means of a public participation process so as to create a Khomani San-friendly document, which addresses issues core to the management and operation of the CPA. The synergy between the management and administrative role of the CPA and the leadership role of the traditional leader needs to be carefully explained in this document.
- The Khomani San Development Strategy should be implemented by the Local Council of Mier without delay, in close co-operation with the DLA appointed managers.
- The Board of the KTP should make provision for representation of not only the CPA but also the traditional leader of the Khomani San community.
- The reasons for controlled access to the KTP should be clearly explained to all Khomani San community members. It

should be made clear that it is not the intention to 'watch over Khomani San people's shoulders' or to keep them out of the park, but that administrative control is merely for safety reasons.

- The traditional leadership should immediately come on board the development and decision-making processes of the mutual lodge in the KTP, and that on completion of the lodge in the KTP, Khomani San people should benefit from jobs created. Current Khomani San employment in the KTP should also be investigated.
- The DLA, by means of the managers to be appointed, should see to the coordination, structured involvement and principled participation of all external interested parties.

## GOVERNMENT AND DELIVERY OF SERVICES

### Findings

- Many of the pressing needs and human rights-related challenges of the Khomani San people directly relate to basic services to be rendered by local government.
- The local authority of Mier refrained from providing many of these services, with the drafting and acceptance of the Khomani San Development Strategy and formal town-establishment in terms thereof, as justification.
- In instances where good reasons exist for not rendering basic municipal services, the local government failed to communicate these to the Khomani San community so as to try and find a working solution or to retain good relations with community members.
- Members of the Khomani San community initially experienced problems in realising and understanding the scope of forming part of a municipal structure when they obtained their land.
- The Khomani San Settlement and Development Strategy is responsibility of the Local Council of Mier. This document serves as guideline and indeed a 'masterplan' for most processes

accompanying settlement – for example, the provision of electricity, sanitation and the socio-economic development of the community. An important aspect of the plan is the provision for formal town establishment and residential development on at least two of the farms, which will benefit approximately 250 families.

- The finalisation of the Khomani San land claim drew a great deal of attention during the World Summit on Sustainable Development in 2002. The southern part of the Kalahari involved in the Khomani San land settlement is an ecologically sensitive and environmentally important area. Regardless of this, not much has been done in terms of sustainable environmental management, either by interested external parties, the community itself, or the different government departments involved. It is alarming to see that the Scoping Report annexed to the Settlement and Development Strategy, does not take into consideration the *National Environmental Management Act 46 of 2003*, which ultimately aims to protect a community's constitutional right to a non-harmful and protected environment.

### Recommendations

- It is recommended that the recently approved Khomani San Development Strategy be implemented by the Local Council of Mier with immediate effect;
- The Local Council of Mier should be held to its official undertaking to provide municipal services on the Khomani San farms with effect from January 2005.
- The Local Council of Mier must implement systems to see to the delivery of basic services such as water provision without delay.
- Funds obtained from the Municipal Support Programme must be utilised to the benefit of the Khomani San community without delay.
- Provision needs to be made for a Khomani San representative to serve on the Local Council of Mier, and a programme should be initiated to communicate to the Khomani San people how the municipal structure

works and what the community's responsibilities are.

## POLICING

### Findings

- The police in the Witdraai area are in need of a fundamental change in attitude, accompanied where possible by a change in personnel, in order to restore relationships with the community and to be able to accomplish the ultimate aspirations and objectives of the SAPS.
- Several serious allegations have been made against the police operating in the area where the Khomani San community resides. Most of these allegations have either been proved true, or at least left the community with a sense of being without local safeguard and protection.
- Most of the members of the Khomani San community do not understand policing processes, methods used to combat crime or the course of SAPS-related ICD and DPP procedures.
- A pressing need exists for a circuit or special court in the Andriesvale-Askham area.
- Members of the SAPS should not dismiss complaints or allegations against SAPS members, even if only a small fraction of the community it serves is involved. Every South African citizen has the right to be 'served and protected' whether part of a minority group or not.
- The private economic involvement of SAPS members on the land of the Khomani San community creates many areas of conflict with the community and should therefore not be allowed to continue.
- There is the need to strengthen the existing Community Policing Forum by including members of the Khomani San community within its ranks and by rebuilding relations with the community.

### Recommendations

- It is recommended that the prosecution procedures related to the death of Mr Optel Rooi be given the highest possible priority.

- Strong consideration must be given to a regime change within the SAPS operating in the Khomani San community, in order to restore distorted relationships.
- Policing procedures and processes should be communicated in an accessible way to every member of the community, including children.
- The Department of Justice should consider the establishment of a circuit or special court in the Andriesvale-Askham area.
- The private economic involvement of SAPS members on Khomani San land must be brought to an official end immediately.

## EDUCATION

### Findings

- The serious allegations of child sexual abuse and harassment have not been satisfactorily addressed. Submissions on the issue received from school management and representatives of the Department of Education are vague while the content thereof tends to differ from oral submissions and submissions from the Department of Social Affairs.
- The Department of Social Affairs tends to neglect the basic needs of the Khomani San children, citing community division and the 'foreign cultural background' of the children as obstacles. Mere recognition of existing social problems such as alcohol and drug abuse does not suffice as a contribution to the improvement of the general living conditions of the Khomani San community.
- It is principally the headmaster and school board's responsibility to see to the effective and speedy address of any accusations related to sexual abuse, harassment or discrimination from any part of the community the school serves.
- The current curriculum of the Askham Combined School does not adequately take into account the unique composition of its community and their special needs with regard to culture and language.
- Efforts to bring about change at Askham Combined School, to improve general

conditions, or to address the important issues and problems of children and parents at the school, do not take place at acceptable speed.

- Lack of daily transport for the Khomani San children, who live at some distance from the schools, means that many children do not attend school on regular basis.
- A mere 3,6 percent of the Khomani San community matriculated and only 1,1 percent of the community received tertiary education or other post-school training.

**Recommendations**

- It is recommended that future allegations of child sexual abuse or harassment be addressed immediately by the management of the school involved, the SAPS, as well as the Department of Social Services and Population Development.
- Management components of the schools attended by Khomani San children need to develop new and innovative ways to address the education-related problems experienced by the Khomani San community.
- Consideration should be given to the establishment of a transport system for school children of the Khomani San community. Such a system may improve school attendance, and may combat the problems experienced when Khomani San children are forced to board at the school, including children running away and the occurrence of harassment.
- The management component of the schools involved, in partnership with the Department of Social Services and Population Development, should seek methods to address problems related to alcohol and drug abuse.
- Priority should be given by the Department of Education to further the language project, aimed at encouraging the use of indigenous language among Khomani San children.

**SOCIAL WELFARE**

**Findings**

- The Socio-Economic Survey that accompanies the Khomani San Settlement and Development Strategy indicates that most of the community’s families have an income less than the national minimum income standard. Poverty is a serious issue.
- Many social problems occur within the Khomani San community, of which the abuse of alcohol and *dagga*, and ill treatment within families are significant.
- No evidence was provided of any specific programme in place that aims to address or manage the specific social problems of the Khomani San children.
- The Department of Social Services and Population Development and its vision to serve the community has not translated into reality for the Khomani San community. The reasons for this may be:
  - o Preconceived ideas about the Khomani San community; and
  - o A lack of capacity, and infrastructure such as transportation for the local social worker.
- The Panel does not agree with the social worker’s claim that ‘social services cannot do anything about issues such as alleged sexual abuse among children unless a complaint has been lodged with the police’, and it is in general not satisfied with the work of the Department of Social Services and Population Development in the region.

**Recommendations**

- It is recommended that national, provincial and local spheres of the Department of Social Services and Population Development should develop a strategy in order to address the poor social conditions of the Khomani San community. Particular attention should be paid to alcohol and drug dependency and to the needs of the Khomani San children.
- Immediate attention should be paid to the infrastructure and capacity of the Department of Social Services and

Population Development as far as operations in the Andriesvale-Askham area are concerned, including staffing and other resources.

- Issues of a procedural nature should not hamper the alleviation of the pressing social needs of the Khomani San community.

## COMMUNITY DIVISION

### Findings

- The Welkom Declaration reveals the reality of a possible split within the Khomani San community.
- It seems as if the challenges and deterioration experienced by the community over the past five years have caused 'traditional' Khomani San people and those 'allowed onto the bus', who are accustomed to more 'modern' practices, to experience even sharper divisions.
- The wish has been expressed that the original claimants of Welkom (primarily the Kruiper family) want to reside on land specifically reserved for them. They also want to manage and develop this land independently from the CPA.

### Recommendations

- While a strong call was made for the division between the original claimants and others a split carries with it considerable complications. We recommend that this request be put on hold pending the appointment of an executive manager and farm manager and at least the partial implementation of the Settlement and Development Strategy.
- The Welkom Commonage Trust money should be utilised for obtaining land for the exclusive use of the traditional Khomani San people and their children, who will thus become landowners outside and independent of the authority of the CPA. Should the land be part of the municipal area of Mier, the provision of basic services and infrastructure should be extended to include the newly obtained land.

## RELATIONSHIPS

### Findings

- Many of the issues raised and the incidents that have occurred since the resettlement of the Khomani San, may be ascribed to poor relationships and communication at several levels.
- The relationships between the Khomani San people and the Local Council of Mier, the DLA and the DPLG need immediate attention and drastic intervention;
- The relationships and roles of different spheres and departments of government should be analysed and where necessary improved, so as to ensure just administrative action and cooperative governance.
- It has been the finding of the ICD, as supported by the Panel, that 'a good relationship between the police and the community members is non-existent'. It is not the responsibility of communities to understand government structures or bodies; it is important for institutions such as the SAPS communicate these systems to the community – especially to marginalised communities such as the Khomani San.
- Offering a dedicated service to the community is the responsibility of every member of the police. Many of the problems experienced in the Khomani San community may be addressed by successful policing based on mutual trust.
- The relationships between the traditional Khomani San and the CPA, and between the CPAMC and its members need to be addressed and restored in order to ensure development of the collective group of Khomani San people.

### Recommendations

- The realisation of many of the recommendations made up to this point will result in the improvement of some of the existing distorted relationships.
- All Khomani San people, government departments involved, NGOs and other external interested parties should conduct

their activities in the spirit of the unique nature of the Khomani San land claim, which was a collaborative effort requiring compromise and coexistence.

- As far as the distorted relationship between the CPA and the traditional leader is concerned, a distinction must at the outset be drawn between ‘leadership’ and ‘management’. These concepts should be discussed and understood by the CPAMC as well as the traditional Khomani San leaders.
- A capacitated facilitator should be utilised to assist the traditional Khomani San people and other factions of the CPA to understand the root causes of their different perspectives and to find working solutions for the resultant tension-causing issues.

## CONCLUSION

The mandate of the SAHRC is to take the culture of human rights to all South Africans, especially the most marginalised and remote communities. The Khomani San of the Andriesvale-Askam area is one such community. Following a history of persecution and dispossession, the Khomani San regained ownership of their land in the southern Kalahari, but they continue to live in poverty and neglect. It is difficult for the outsider to imagine the sadness and disappointment of the community. The SAHRC and the Panel, through this Inquiry, hope to make a difference in the lives of the Khomani San. No doubt exists that the situation in the Andriesvale-Askam area needs the drastic attention of all spheres of government and all stakeholders. We hope this Inquiry will be the start of the journey towards the realisation of human rights and sustainable development in the Khomani San community.

During the public hearing, Mr Petrus Vaalbooi pleaded: *‘Maak ons mense slim’ / ‘Make our people clever’*, while another community member ended his oral evidence with: *‘We feel as if we stand in front of Babylon’s confusion’*. Mr Dawid Kruiper reflected on the Khomani San’s successful land claim: *‘I saw an area that would exist for years and years and for all my children and their*

*children.’* These statements should provoke reflection and action from all involved.

The Inquiry revealed, in the words of the SAHRC Chairperson, ‘a sad story of neglect’. It is hoped that the next chapter of the story will be the realisation of the vision of the Khomani San successfully developing their land ‘for years and for years and for their children and their children’. The expectations of the community and those involved are high. These expectations should not be betrayed.

# ACKNOWLEDGEMENTS

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## Written submissions

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### State Departments

Department of Land Affairs  
Department of Education  
Department of Social Services and Population Development  
Independent Complaints Directorate  
Local Council of Mier

### Khomani San Community Members

Piet Patrick Faroo  
Anna Festus  
Patrick Kaffers  
Dawid Kariseb  
Feitjie Kleinman  
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### Affidavits

Dawid Kruiper  
Ben Noubitsteyn  
Jan Tieties  
Silikat van Wyk  
Jan van der Westhuizen

### Oral Evidence

#### State Departments

- SAPS  
(Mr Matthys)  
(Sup Nel)  
(Captain De Beer)
- Department of Land Affairs – Regional Land Claims Commission for the Free State and Northern Cape  
(Mr P Mokomela)
- Siyanda District Municipality  
(Mr JP Mpanka)
- Department of Provincial and Local Government  
(Mr J Meiring)
- ICD

(Dr J Snyman, Dr T Tshabala and Mrs McKenzie)

- DPP  
(Adv Cloete)  
(Mr Swartz)
- Department of Education  
(Mr Barends, Mr Manjora and Mr Nel)
- Department of Social Services and Population Development  
(Mrs Jooste)
- Mier Local Municipality  
(Ms SC Coetzee)
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### Khomani San Community Members

- Mr Dawid Kruiper
- Me A Festus
- Mr P Vaalbooi
- Mr J van der Westhuizen
- Mr G Bok
- Mr J Tieties
- Mr D Noubitsteyn
- Mr A van Wyk

### Research and Background

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### General

All those who enabled the pre-visits and the public hearing in Andriesvale, including the CPA and Mr Tieties

All Khomani San members for their involvement and patience during the course of this Inquiry

All Panel Members

Dr Leon Wessels and all of the involved members of the SAHRC

The interpreters who assisted at the public hearing

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Please note that the factual content of this Report has been drawn from the following written sources in a combined and inter-linked fashion:

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#### Documents and Reports

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- *Indigenous Peoples and Conservation: Workshop Presentation by the Khomani San of South Africa*
- *The Khomani San Constitutional Crisis Issues Around the Traditional Leader*
- *The Khomani San Land Claim* (Paper submitted at Indigenous Rights in the Commonwealth Project Africa Regional Expert Meeting, Cape Town, 16-18 October 2002)
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- *Mier and Khomani San Findings by Monitoring and Evaluation Directorate, April 2002*
- Department of Provincial and Local Government
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*Draft Khomani San Community Scoping Report for the development of housing at selected sites in the Mier Municipal Area, August 2004*

*Du Plessis, AA Inquiry into Human Rights Violations of Khomani San People, Andriesvale-Askham area, Kalahari, South Africa Background Information Document September 2004*

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*Kalahari Heritage Park Agreement*

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*Khomani San Settlement and Development Strategy Socio-Economic Survey* (as was prepared by Stabilis Development (Pty) Ltd) September 2004

*Page, AM International Law Respecting Indigenous Peoples' Rights* October 2004 (as submitted to the SAHRC in connection with the Inquiry into Human Rights Violations of Khomani San People)

#### **SAHRC**

- *Research Project: Indigenous People's Rights*

#### **South African San Institute (SASI)**

- A history of San Peoples of South Africa <http://www.sanculture.org/sw582.asp>
- The San Community of South Africa Who are the San of South Africa? <http://www.san.org.za/sasi/community.htm>
- The Khomani San Land Claim [http://www.san.org.za/sasi/ann\\_rep\\_2002.htm](http://www.san.org.za/sasi/ann_rep_2002.htm)

*Tweede Grondwet van die Khomani San Vereniging vir Gemeenskaplike Eiendom, 4 Mei 2002*

*The Welkom Declaration, February 2004*

#### **Legislation and International Law**

- *African Charter on Human and People's Rights* [African Charter] (ratified on 9 July 1996)
- *Communal Property Association Act* 28 of 1996
- *Constitution of South Africa Act* 108 of 1996
- *International Covenant on Civil and Political Rights* [ICCPR] (ratified on 10 March 1999)
- *Restitution of Land Rights Act* 22 of 1994
- *UN Draft Declaration on the Rights of Indigenous Peoples* [UN Draft] 1994 <http://www1.umn.edu/humanrts/instree/declra.htm>

## (Endnotes)

<sup>1</sup> *Government Gazette Notice 1958/2004, GG No 26775, 10 September 2004*

<sup>2</sup> Section 10

<sup>3</sup> Section 11

<sup>4</sup> Section 12

<sup>5</sup> Section 14

<sup>6</sup> Section 24

<sup>7</sup> Section 25

<sup>8</sup> Section 27

<sup>9</sup> Section 29

<sup>10</sup> Section 30

<sup>11</sup> Section 33

<sup>12</sup> Section 34

<sup>13</sup> Page, *AM International Law Respecting Indigenous Peoples' Rights*

<sup>14</sup> Page, *AM International Law Respecting Indigenous Peoples' Rights*

<sup>15</sup> Page, *AM International Law Respecting Indigenous Peoples' Rights*

<sup>16</sup> The United Nations Working Group on Indigenous Populations submitted this declaration to the United Nations in 1993, but it has not yet been accepted.

<sup>17</sup> UN Draft Declaration on the Rights of Indigenous Peoples

<sup>18</sup> Page, *AM International Law Respecting Indigenous Peoples' Rights*

<sup>19</sup> Du Plessis, *AA Background Information Document*

<sup>20</sup> The Act was promulgated primarily to provide for the restitution of land rights for persons or communities dispossessed under the racially discriminatory apartheid regime in South Africa.

<sup>21</sup> Chennels, R *Conflict Prevention and Peace Building Case Study*

<sup>22</sup> Du Plessis, *AA Background Information Document*

<sup>23</sup> *The Welkom Declaration*

<sup>24</sup> The restitution of communal land rights procedure in South Africa involves an observance of the *Communal Property Associations Act 28 of 1996*. This Act enables communities to form juristic persons, to be known as Communal Property Associations or CPAs, in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution. As a prerequisite for obtaining the claimed land, the Khomani San formed a CPA.

<sup>25</sup> Chennels, R *Conflict Prevention and Peace Building Case Study*

<sup>26</sup> Residual custodianship means that while ownership is transferred to the Kruiper family, the government must play a custodian role, so problems with the land and its management must be addressed by the state.

<sup>26</sup> The Communal Property Association Act specifies principles to be accommodated in CPA constitutions. These include:

- Fair and inclusive decision-making processes in that, for example, all members are afforded a fair opportunity to participate in the decision-making processes of the association;
- Equality of membership;
- Democratic processes, in that all members have the right to, for example, receive adequate notice of all general meetings of the association, to

inspect and make copies of the financial statements and records of the association, and to have access to a copy of the constitution;

- Fair access to the property of the association, in that, for example, the association shall manage property owned, controlled or held by it for the benefit of the members in a participatory and non-discriminatory manner; and
- Accountability and transparency in that, among other aspects, there shall be effective financial management and recording of the transactions of the association.

<sup>27</sup> The *Communal Property Association Act* states that a CPAMC may not dispose of or encumber or conclude any prescribed transaction in respect of the whole or any part of the immovable property of the association, or any real rights in respect thereof, without the consent of the majority of members present at a general meeting of members.

<sup>28</sup> *Kalahari Heritage Park Agreement*

<sup>29</sup> Chennels, R *The Khomani San Land Claim*

<sup>30</sup> *The Welkom Declaration*

<sup>31</sup> *Restitution of Land Rights Act*

<sup>32</sup> The *Communal Property Association Act* states that the DG of the DLA may appoint a conciliator to assist in resolving any dispute between a CPA and its members or between members and committee members. A key provision is to be found in Section 10(8) of the Act, which provides that the Minister of the DLA may, in consultation with the Minister of Finance, institute other programmes for the provision of assistance to communities or CPAs for the purposes of the Act. It provides for monitoring and inspection procedures and compels the DG of the DLA to annually submit a report to the Minister concerning existing CPAs and the extent to which the objects of the Act are being achieved, to be tabled Parliament. It is important to note that the Act does provide for the delegation of powers and assignment of duties by the DG of the DLA.

<sup>33</sup> Department of Provincial and Local Government *Organisational Review Report*.

<sup>34</sup> In addressing issues related to policing in the Andriesvale-Askham area, the roles of the ICD and DPP need to be outlined. The basic function of the ICD is to ensure that complaints regarding misconduct or offences allegedly committed by members of the SAPS are investigated in an efficient and effective manner. The ICD is also mandated to investigate deaths as a result of police action and alleged misconduct and acts of criminality by SAPS members. Only on the completion of such investigations are the relevant dockets referred to the DPP for a decision as to whether to prosecute. Invariably, the DPP's office only receives these dockets months after the charges were originally laid. The DPP has no knowledge of complaints against the police before they receive such dockets. On receipt of a particular docket, it is assigned to two state advocates and if there is enough evidence in the docket and both advocates are in agreement, the docket with the instruction to prosecute is returned to the relevant authorities. Sometimes a docket will be returned to the investigators with a request for more information and/or further investigation. This is to enable the assigned advocates to reach an informed decision.

