

Reflections on the Challenges Facing Public Interest Lawyers in Post-Apartheid South Africa

Case Study:

Balancing the Interests of Land Claimants with the Need for Low Cost Housing in Cato Manor

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I. INTRODUCTION

This Article, through the use of case studies and reflections, will conclude that finding the “Middle Way” has become the singular challenge facing teachers, students, and practitioners of public interest law. It is a challenge, as an activist against apartheid injustice, to contemplate the Middle Way as anything but a compromise position. Hopefully, however, those working in public interest will see the Middle Way as the best option for the achievement of social justice.

Clients, during the apartheid era, emerged primarily from the ranks of activists who fought against the system in South Africa. In the post-apartheid era, however, clients sometimes emerged from the ranks of those who upheld the repressive state machinery. This situation was the case in 1996, when the staff, students, and teachers of the Campus Law Clinic of the University of Natal, Durban, (the

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Clinic) were called upon to represent individuals who were formerly clients and protagonists of the apartheid state, in Truth Commission Amnesty Hearings and before the Land Claims Court. After these experiences, the only possible conclusion was the one inspired by indiscriminate compassion and wisdom. These two principles guided the Clinic team through its difficult journey to the Middle Way.

II. THE AMNESTY APPLICATION

On July 26, 1995, the State President agreed to enact the Promotion of National Unity and Reconciliation Act.¹ This Act created what is commonly known as the Truth and Reconciliation Commission (Truth Commission)—one of the pillars upon which the new democratic order was built. The framers of the interim constitution viewed the Truth Commission and the resulting process as an historic bridge. The past reflected a deeply divided society. The future promised a society founded in human rights. The framers realized that South Africa could move toward a just and peaceful society, but only if it found and walked the Middle Way. They believed that the adoption of the Constitution laid a secure foundation to transcend the divisions and strife of the past.²

At the core of this transcendence were the amnesty provisions that exempted successful applicants from criminal and civil liability. These provisions led to intense public debate and had the potential to cause further strife within the country. On the one hand, it was evident that the perpetrators would not come forward and fully disclose their actions if they were not exempted from criminal and civil liability because they had no incentive to do so. On the other hand, victims of human rights violations, political parties, and service organizations labeled these provisions “blanket amnesty” and argued that it allowed perpetrators to act with impunity.

1. Promotion of National Unity and Reconciliation Act 34 of 1995.

2. See Post-amble, “National Unity and Reconciliation” to the Constitution of the Republic of South Africa Act 200 of 1993, available at <http://www.polity.org.za/govdocs/legislation/1993/consti15.html> (last visited Dec. 15, 2001).

During the negotiation process and parliamentary hearings, the conflicting views formed the subject of a deeply emotive and strategically important debate. At one point, the outcome of the negotiations was wholly reliant on the outcome of these debates. Eventually, a compromise was reached and the legislation was promulgated. In the end, the negotiators accepted that the amnesty system was necessary to ascertain the truth and understand the workings of the apartheid state, even if those who perpetrated gross human rights violations could walk free.

The compromise certainly did not satisfy everyone in South Africa. For some, the battle against blanket amnesty was not yet over. A political party, the Azanian People's Organization, and relatives of political activists killed during the apartheid era (including the relatives of Steve Biko) launched an application to declare the Promotion of National Unity and Reconciliation Act unconstitutional.³

The judges held, after considering the intention of the framers of the interim constitution, international law, and the definition of "amnesty" in the South African context, that

it would be impossible to achieve the reconciliation and reconstruction referred to in the post-amble if amnesty were to be limited to the granting of pardons in respect of criminal offences as it was unlikely that anyone would seek immunity in the knowledge that, although he would escape criminal liability, he would nevertheless expose himself to civil proceedings.⁴

They consequently dismissed the application on the basis that reconciliation was authorized by the interim constitution. The amnesty process continued.

The world watched as grown men and women helplessly relived the pain and anguish of their experiences. The nation's psyche was turned inside out. In the midst of this, the Clinic was called upon in 1996 to provide legal representation to three right-wing warlords who

3. AZAPO and Others v. Truth and Reconciliation Commission, 1994 (4) SA 562(C).

4. *Id.* at 575E-F, 576 A/B-B/C.

applied for amnesty.⁵ They were the faces of the “Third Force.” The Third Force referred to the hit-squads of KwaZulu Natal, which were offensive paramilitary forces. These squads were formed as a result of a request from then Chief Minister Buthelezi, that was ratified by the State Security Council and carried out by the South African Defense Force.⁶

Essentially, our clients were those who implemented the decision of the leading politicians and apartheid military intelligence with the purpose of weakening the liberation movement. Our clients were recruited as young boys and trained to become mercenaries. Those of us working in the Clinic had lived our lives fighting against this system and were now being called upon to represent the face of the repressive apartheid state and to unmask it. We had little idea of how difficult it would be. At first, we disclosed our past political affiliations and secretly hoped that our old political adversaries would decide that they could not trust us. Ironically, they developed greater trust instead and we had no option but to represent them.

During this period, we learned that the popular romantic image of the public interest lawyer would have to give way to the truth of how traumatic it was. It would have been easier, in some ways, to oppose their applications by acting on behalf of one of the many families they had scarred, ruined, and destroyed. Nevertheless, these clients were under witness protection and had turned state-witnesses in the criminal prosecutions of apartheid generals.⁷ They were in need of a

5. Amnesty Applications of Daluxolo Luthuli and Others, AC/99/0332. *See generally* <http://www.truth.org.za> (last modified Sept. 21, 2001).

6. *See* H. Varney & J. Sarkin, *Failing to Pierce the Hit Squad Veil: An Analysis of the Malan Trial*, 10 SA J. CRIM. JUSTICE 141 (1997). This is also discussed in the final report of the Truth Commission. *See* Truth and Reconciliation Comm’n, *Final Report*, at <http://www.polity.org.za/govdocs/commissions/1998/trc/index.html> (last visited Dec. 15, 2001).

7. Unreported decision of Justice Hugo, Durban and Coast Local Division of the High Court of South Africa, in the case of *State v. Peter Msane and Nineteen Others*, Case Number CC1/96. The Malan Trial had great significance as it was the first (and perhaps only) opportunity to hold senior politicians and security force members accountable for attempts to eliminate political opponents by violent means. It was a lost opportunity, as all the accused were acquitted. The case also had great significance for the work of the Truth and Reconciliation Commission, as it meant that perpetrators—particularly those from the military, “who were waiting for its outcome before deciding whether or not to apply for amnesty had less incentive to do so.” Varney & Sarkin, *supra* note 6, at 142. “As a result, less of the truth may be known in relation to the involvement of politicians and security force members in ‘third force’ activities.” *Id.*

lawyer who would help them to testify fully—not one who would help cover up the roles of high-profile perpetrators, who were the ones that gave the orders.

At the amnesty hearings, our clients asked for the forgiveness of the families of the victims. The hearings were simultaneously sad and joyful. The statements described, in harrowing detail, the group attacks on communities and anti-apartheid activists. They described the impact that these activities had in their own lives. They could not be certain as to the number of people who were killed or injured. Nevertheless, the families of the victims embraced our clients and forgave them, possibly because of the remorse they perceived and because of the frankness and detail presented. It was more likely, however, that the forgiveness was a demonstration of the *ubuntu*, or “generosity of spirit,” that has become the landmark of the South African experience.

A. What is the Middle Way?

This case marked the commencement of our pursuit of the Middle Way. At first, the journey was simply a means to placate our own consciences. Eventually however, it guided our work in other cases and in other communities. The challenge of the Middle Way was to represent individuals in an individual amnesty application and also to be guided by the interests of the community at large—victims and perpetrators, observers and activists. It meant steeling oneself against the contents of the story and dealing instead with the process. The process demanded that the facts be told truthfully and completely. It demanded that perpetrators be given an opportunity to implicate others who were involved and to demonstrate remorse for their own actions. As lawyers, we were required to facilitate this process for them.

B. What We Learned

We learned that even perpetrators were victims of their own actions and of the inhuman apartheid government strategy. We learned that the anguish of the perpetrator survives forgiveness. Our clients were overwhelmed by the fact that the communities were able to forgive them despite the horrors they conducted.

We also learned that lawyers have an immense power to disclose all of the truth, not just what is necessary to obtain a favorable decision. We encouraged our clients to provide as much detail as possible with regards to the involvement of other high-profile participants.

We learned, in representing these clients, that the challenge was to find the middle ground between anger and remorse—between revenge and forgiveness. In the end, many clients were granted amnesty and were forgiven by the victims' families.

III. THE CATO MANOR LAND CLAIM

Shortly after we lodged the amnesty applications, we were confronted with the next big challenge: a land claim in Cato Manor on behalf of 2,500 applicants who had lost their land during the apartheid era.

A. Background to the Land Reform Policy

A second pillar of the new democratic order was, and remains, the Land Reform Policy.⁸ This policy was designed to, *inter alia*, restore rights in land to those who were dispossessed under apartheid and to implement a land redistribution and land reform policy that would result in equity and justice.

The newly elected government recognized, early in the transition to democracy, the need for legislative intervention in this area. Three acts⁹ were passed by Parliament during Nelson Mandela's presidency. They were introduced despite much debate and vigorous

8. White Paper on Land Reform Policy 1966. *See generally* White Paper, at <http://land.pwv.gov.za/white%20paper/whitetab.htm> (last visited Dec. 15, 2001).

9. *See* The Restitution of Land Rights Act 22 of 1994 (providing for the restitution of land rights to persons or communities that were dispossessed under racially-based discriminatory law); *see also* The Land Reform (Labour Tenants) Act 3 of 1996 (providing security of tenure for labour tenants and persons occupying or using land on account of their alliance with labour tenants, and for the acquisition of land and land rights by labour tenants); The Extension of Security of Tenure Act 62 of 1997 (facilitating long-term security of land tenure by State assistance, regulating the conditions of residence on certain land, regulating the conditions and circumstances under which the right to reside on land may be terminated, regulating the conditions and circumstances under which persons whose right of residence was terminated may be evicted from land).

opposition from the established Agricultural Union and other conservative bodies.

B. Historical Background to the Cato Manor Land Claim

Cato Manor comprises some two thousand hectares of land just outside the city of Durban. It is a lush, green, hilly stretch of land that is both fertile and rich in minerals. It had a vibrant sub-culture of Indian market gardeners who lived beside African market gardeners. It was rich with *shebeens* (beerhalls), musicians, and artists. Creativity thrived in the neighborhood. This description seems to convey an idyllic island of non-racism in South Africa, but Cato Manor was also the scene of the 1949 race riots. At that time, a riot broke out between the Indian and the African peoples. Many theories emerged to explain the cause of the upheaval. Some claim that white people covered with black polish were the real culprits. Others talk of an incident that occurred between an Indian shopkeeper and an African customer. The ensuing riots ultimately saw the death of hundreds of people—even more were injured. It was a particularly dark moment in South African history.

A more complete explanation focuses on the power relations at the time. Unlike Whites and Indians, the African people were generally not allowed to own land. The system of education was designed to ensure that African people remained a “serving and subservient” class of people. The education system, public amenities, facilities, and opportunities available to people of Indian origin were far greater than any person of African descent could imagine. These and many other factors led to serious tension, resentment, suspicion, and general separation between the two groups. The situation was extremely volatile.

The history of forced removals in Cato Manor is even more complex. Historians divide the removals into three categories. The first category consists of the wide-spread expropriation of Indian landowners with negligible compensation in 1952 pursuant to the Group Areas Act.¹⁰ Historians describe the compensation paid to the dispossessed landowners as bordering on “legalized theft.” Prior to

10. Group Areas Act 41 of 1950.

the expropriation, many of the Indian landowners' tenants were African, and when their land was expropriated, the City Council became the *de facto* landlord of the African tenants.¹¹

The second category of removals was carried out pursuant to the Prevention of Illegal Squatting Act,¹² the Slums Act,¹³ and the Native Urban Areas Act of 1945.¹⁴ "Squatter camps" were established for people who were removed from other areas around the city. It was later discovered that these camps were located on what is now a lucrative quarry generating profits in excess of fifteen million rand per annum for the city.¹⁵

After Cato Manor was largely declared a white group area, African landowners (in so-called "black spots") were removed. In this third category, the African landowners affected by the Group Areas Act were consequently forced to give up full title of ownership in exchange for weak tenancy rights in the townships.¹⁶

The stories told by some of the survivors of the Cato Manor removals evoke tears. People were often literally loaded onto trucks and taken away while their homes were bull-dozed. Children returned home from school only to find there was no family and no home. Many were told that their families were sent to KwaMashu or Umlazi, the townships created to entrench racial separation. According to one commentator, about eighty thousand Africans were officially relocated, but some thirty to forty thousand people "disappeared," having either returned to rural areas or taking up residence elsewhere.¹⁷

It was against a background of the space created by the dismantling of institutional apartheid and the introduction of constitutional democracy that people shed tears of hope—hope to return to mango and avocado trees and playgrounds; hope to return to

11. Iain Edwards, *Cato Manor: Cruel Past, Pivotal Future*, 21 REV. AFR. NAT'L ECON. 421 (1994).

12. Prevention of Illegal Squatting Act 52 of 1951.

13. Slums Act 53 of 1934.

14. Native Urban Areas Act 25 of 1945.

15. Dubazane and Others, Case Number LCC 9/2000 (application for restoration of rights in land—Ridgeview Quarry Case), at 13.

16. See generally LAURINE PLATZKY & CHERRYL WALKER, *THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA* 99-112 (Raven Press 1985).

17. Edwards, *supra* note 11, at 420-21.

the place where lovers met and married and to the burial sites and graveyards of their loved ones. This newly created space presented a unique opportunity for families, friends, and whole communities to reclaim their history and heal old wounds. It presented an opportunity to mend the interracial wounds created by apartheid—especially those between the Indian and African people.

This, however, was neither a shared hope nor a shared vision. It was not long before all the hurt and anger returned. Cato Manor had become a highly contested geographical territory during the intervening years.¹⁸ Despite the expropriations for white residential usage, the land remained largely uninhabited for many years due to large-scale resistance against the Group Areas Act. This resistance cut across race and class boundaries.¹⁹

The Indian House of Parliament (House of Delegates) began to deal with the issues raised by Indian landowners who were forcibly removed from Cato Manor during the era of the apartheid tricameral system.²⁰ Among other things, the House of Delegates constructed about three hundred small, single-storey, detached houses and allocated them to persons on the House of Delegates waiting list, comprised largely of Indians. Before they could occupy their new homes, however, large groups of African people invaded the area and seized control of the houses. In response, groups of Indian people occupied other housing developments in the area.

Meanwhile, many Indian families remained in Cato Manor and refused to move. They formed the nucleus of a residents' association and challenged the government's policy of Separate Development. They were, in fact, part of the United Democratic Front, the African National Congress aligned alliance that housed the major organizations of the liberation movement.

Soon after the Mandela government took office, it declared Cato Manor a "Presidential Lead Project."²¹ The primary aim was a

18. *Id.*

19. *Id.*

20. Constitution Act 110 of 1983 (creating this initiative). The Separate Development system of the then-existing government created a parliament which incorporated Indian (House of Delegates), Colored and White people in separate houses of Parliament. African people, however, were placed within the Homeland System.

21. A non-profit company, the Cato Manor Development Association, was appointed to

holistic development of low cost housing, economic development, and preservation of the history and culture of Cato Manor. This endeavor was one of the flagship projects of the Reconstruction and Development Program of the new government.²² The project envisaged a city with a complete infrastructure of residential and commercial areas, schools, hospitals, libraries, recreational facilities, and places of worship. The project engineers envisioned a proposed development that would generate substantial employment opportunities for residents of the greater Durban area and a significant boost for the regional economy.²³

At the same time, the newly elected democratic government implemented legislation to enable the forcibly removed Indians to submit applications for the restitution of their right to the land.²⁴ These applications prevented any further development on the claimed land from the time they were gazetted until they were finalized. In response, the Transitional Metropolitan Council (City Council) petitioned the Land Claims Court to declare the whole of Cato Manor exempt from restoration.²⁵ If the City Council prevailed, all the hope the claimants had of returning to the land would be lost. The City Council's intent was to expedite the government's low-cost housing and small business development projects and to build the infrastructure necessary to support them. Land claims could delay the planning and implementation process.

In this context, the Regional Land Claims Commissioner asked the Clinic to assist claimants who were applying to recover their previously expropriated land. It was clear that the claimants did not understand that a Land Claims Court decision in favor of the City Council would prevent them from ever returning to their land. They needed legal advice, and they needed it urgently. The Clinic suddenly

plan, manage, and implement the development project in Cato Manor. For more information on the development project, see <http://www.cmda.org.za> (last visited Dec. 15, 2001).

22. See White Paper on Reconstruction and Development, Reference No. WPJ/1994, available at <http://www.gov.za/gazette/whitepaper/index.html#1994white> (last visited Dec. 15, 2001).

23. Ex Parte North Central and South Central Metro Substructure Councils of the Durban Metropolitan Area and Another 1998(1) SA 78 at 81 H/I – 82 A/B, available at <http://wwwserver.law.wits.ac.za/landclaim/LCC1996-1999.htm> (last visited Dec. 18, 2001).

24. Section 34 of Restitution of Land Rights Act 22 of 1994.

25. *Id.*

found itself representing some three hundred clients. At that stage 2,500 claimants had lodged their claims out of a potential 200,000.

C. Beginning the Process

What were we to do? How could we, a mere law clinic help? How would we even know where to begin? Why us—we're not trained for any of this?

While we were overwhelmed by the challenge that we faced at the Clinic, we were mindful of the need to stretch our imaginations to the outer limits and meet the challenges head-on. We attended client meetings and heard their stories and aspirations. At first, the goal was simply to advise as many claimants as possible about the implications of the City Council's application and to gauge the prevailing attitude. Someone suggested that we use the radio and newspapers to announce a day when all claimants could come to be advised about the application. We then recruited a team of volunteer lawyers, trained law students, and other volunteers from other public interest law firms for the interviews. On one Saturday, our team organized the first interview with forms and systems to enable a speedy completion of some three hundred interviews.

At the interviews, the clients were visibly devastated by the information that we gave them. Our team of students and staff encountered signs of intense disappointment in the faces of the older applicants. As many as three generations of a family would gather together for a single interview. They often arrived with the impression that their stories about their experiences of forced removal would be heard for the first time. They believed that they were finally going to get some help to heal that part of their lives. Instead, they discovered that the City Council was instituting an application to *prevent* their return to the land. At that point, finding the balance—the Middle Way—seemed the only revolutionary option.

D. Lessons Learned at the Start

We learned that representing three hundred applicants against the might of the City Council was not an insurmountable task, especially since we had a team of passionate people committed to the cause of community development. The sheer number and complexity of these cases were daunting at first, but we set simple, manageable goals and overcame the first hurdle of advising clients. We also learned that our clients, when given enough information, are the keepers of the Middle Way. They often preferred it to more extreme options.

Under these circumstances, our students were the most precious gifts. Their passion, commitment, and youth enabled us to meet even the most overwhelming challenge. We learned a hard lesson: that complete detachment is not always possible or even desired. At times, it helps both the clients and the lawyers to empathize compassionately.

E. Developing the Case Strategy

How were we to oppose a Presidential Lead Project? Is this what was required of us? Should we even be thinking about such an option? What strategy should we adopt? How were we to figure out what our role was? We took guidance from our clients.

The only people who remained after two Saturdays of interviewing some six hundred applicants were members of the Clinic team and one private practitioner. It was, I suppose, the single most important event in the last five years of the Clinic's history. What started out as something completely overwhelming ended up being one of the most important processes experienced by the Clinic. The law students involved in the project still talk about how meaningful the experience was for them. For once, they were doing something that actually had a direct impact on the lives of the claimants and on the political and historical development of land reform in the country.

The team that carried the process to completion was comprised of two advocates (one in private practice and the other, the director of the Clinic) and the students. We decided that we were compelled to

take on the case after reflecting on the interview process, with the voices of the claimants echoing in our hearts and minds. At first we were hesitant. How could we oppose an application that, as the papers described it, was about ensuring holistic development in Cato Manor? The founding papers were based on statements by leading town planners, historians, economists, and development workers who were also activists in the liberation movement. How could we be on opposing sides? We learned that even though we understood the need for development, we had fought too hard to allow convenience and expediency to control. We decided to protect and even expand our space.²⁶

We started by searching for a historian who would paint a clearer picture for us. We also searched for an urban planner who would help us understand the planning implications of the application. We realized that we, as lawyers, were not going to be able to do this on our own because a technical legal approach would not work. It was clear that a holistic approach that incorporates social processes,²⁷ client participation, and the assistance of members of other disciplines was needed to help us see the effect of restitution claims delaying inner city housing development. This approach was particularly true in our situation where international agencies and the government had planned to build massive low-income housing for the homeless. We also needed to be mindful of the possibility that complete disregard of the forcibly removed land claimants would

26. Azhor Cachalia suggests:

The principle theme our struggle presents is the need to defend legal space. Having understood clearly what the government strategy was we were able to use, where there were lawyers who were part of the movement or at least sympathetic to the movement, our skills in a meaningful way to support these communities. Where initially there would have been community opposition to a forced removal of leaders, now if there was opposition to forced removal, lawyers would be able to expand and extend the legal space and support the communities and leaders by making it more difficult for the government to arrest those leaders and put them in jail. This had the effect of empowering organizations and giving significant impetus to what we were doing.

Azhar Cachalia, *Lawyers and Social Change: The Role of Lawyers in Dismantling Apartheid*, Address Before the International Human Rights Law Group (Washington DC) and Legal Resources Centre (Johannesburg, South Africa) (May 10-13, 2000).

27. Pink Document, Policy Document of Cato Manor Dev. Ass'n (CMDA) (on file with author).

devalue the struggles and aspirations of human beings. History would simply repeat itself.²⁸ The Middle Way was necessary to balance the need for low cost housing and holistic development in Cato Manor and the needs of the land claimants.

IV.

A. The Middle Way

The Middle Way, so often regarded as the “sell-out” position during the liberation struggle, became the guiding principle for our role in this case and in cases to come. The interests of the whole community, including land claimants and the direct beneficiaries of the development program guided us in our search.

In this case, the Middle Way emerged as a simple social process.²⁹ It entailed a participatory process that informed the land claimants of all the issues and gave them the opportunity to decide what kind of remedy they wanted. Did they want to return to the exact piece of land from which they were removed, or were they willing to accept other options? Alternatives included return to other land in the area, or financial or some other type of compensation (for example, a road named after their family). The current residents of the area, the “shack dwellers,” were involved in the planning and social processes. Social processes marked the distinction between apartheid planning and the new form of urban planning. Whereas a “clean slate” approach was used in the past, people’s needs, desires, and aspirations were now factored into the planning process.³⁰

The new planners responsible for the development of Cato Manor, however, were falling into the same old traps. They needed a reminder that social processes are, despite the difficulty and hardship involved, the cornerstone of successful planning and development.

28. See generally PLATZKY & WALKER, *supra* note 16.

29. Ex Parte North Central and South Central Metro Substructure Councils of the Durban Metropolitan Area, and Another 1998(1) SA 78 at 87, available at <http://wwwserver.law.wits.ac.za/landclaim/LCC1996-1999.htm> (last visited Dec. 18, 2001).

30. For a more detailed appraisal of the planning and development context, see Nat’l Dev. and Planning Comm’n, Draft Green Paper on Development and Planning, available at <http://www.gov.za/greenpaper/index.html> (last visited Dec. 15, 2001).

After much discussion, a simple flow chart was developed to illustrate the Middle Way. It took into account the time needed for the development of a plan and the participatory processes for current residents and land claimants. The agreement effectively provided that the development would continue. Additionally, any applicant who wished to would be able to return to their parcel of land as long as restoration was feasible within the development area. If, however, restoration was not feasible, applicants still had the option to choose a different piece of land within the Cato Manor development area or to be a part of the housing allocation scheme. The agreement also created other mechanisms to ensure that those who chose the latter option benefited from the development. Those who did not wish to return to the area would still be able to file for financial compensation.

B. Reaching Agreement on the Middle Way

What seemed so clear to our team, simply evaded the Transitional Metropolitan Council's team (Council's team) at first. They were convinced of the need for the development and of their political high ground. Their submission that development was not only about bricks and mortar, but also about people, excluded the land claimants. Despite repeated suggestions that the interests of land claimants could be reconciled with the need for development, through this social process, they were adamant that the only solution was the court order exempting Cato Manor from restoration. It took some difficult and grueling cross-examination of their chief town planners to get them to realize that the solution offered was not only workable, but also one that resulted in equity and justice. While it placed some obligations on them to consult, it did not hold up the development process unduly.

After almost two months of discussions and planning and ten days in court, agreement in principle was reached between the Clinic's legal team and the Council's team.

C. Racial Tensions Emerge Again

We represented a group of claimants made up of former tenants (mainly African people) and former land owners (mainly people of

Indian origin and a few Africans). We tried to bridge the gap that had grown between the groups through talking about the issues in strategy sessions. This approach worked to some extent. Other teams, however, had emerged and assembled to represent small groups of Indian landowners. The gap that evolved during the days of apartheid wedged a deep schism between the groups. Their clients were suspicious of our clients. The other legal teams were antagonistic toward our own team. To complicate the issue, we had assembled a mixed legal team whereas the other teams were all of Indian origin.

We represented indigent Africans and Indians. Affluent Indian claimants were represented by around fifteen Indian private practitioners. They each had their own understanding of the historical context, and they each had a unique axe to grind with the Council. Many of them believed that the Clinic's team was pushing the "African cause." In return, we saw these lawyers and their clients as money-making opportunists. During the discussions, we often resorted to stereotyping and at times fell into sheer rage.

The challenges of our team extended to our clients, who comprised ex-landlord and ex-tenant, as well. They had grown up in the same geographical area, but came from diverse backgrounds. They had sometimes lived amidst serious acrimony. At first, some were uncomfortable having only one set of lawyers advocating what they saw as competing claims. With time—after counseling and many facilitated meetings—our clients developed a feeling of camaraderie among themselves. They attended the Land Claims Court hearings, and some observed the negotiations.

The Clinic's team was called upon to first balance the needs of individual clients and those of the community, and then to ensure that individual clients supported and were comfortable with the adopted strategy.³¹

Conversely, our challenges with the other legal teams were more significant. Our legal team demonstrated a level of impatience with the other teams and clients whom we did not regard as wise, compassionate or strategic because of our previous work in the liberation movement. If we had been more understanding and

31. In some instances, we would develop the strategy in conjunction with the client's community.

mindful of the collective suffering, the history of resistance, and the areas of commonality, then we probably would have reached a resolution sooner. That, however, was not to happen. Ironically, we reached an agreement with the City Council, but were unable to reach an agreement among ourselves until a month later. Despite the prejudices that our team harboured, it was clear that this agreement could only be concluded if *all* the parties (those who were before the Land Claims Court, and those who were not) were able to benefit from the terms and conditions.

In the end, the flow chart was reduced to language and the parties signed an agreement of settlement. The settlement offered substantially more to all the parties than any court victory. In that situation, a court's only action is to dismiss the application. This agreement, however, offered an opportunity for applicants to return to the land and to participate in its re-development. We all rejoiced at the signing ceremony organized by the Regional Land Claims Commission (Commission).

Then, we asked the court to incorporate the settlement agreement as a consent order in its judgment. To do this, the agreement had to independently meet the requirements of section 34(6) of the Restitution of Land Rights Act.³² Consequently, it was necessary for the court to investigate the concept of 'public interest' when considering restoration.

In carrying out this function, the court stated,

in determining where the public interest lay in the instant case it was almost axiomatic, given the history of dispossession in the area in question and the resultant devastation and hardship suffered by the removed community, that restoration would be in the public interest. Blanket restoration would, however, have required the refusal of the s 34 application and the resultant loss of the development. Against the advantages to the public interest of the restoration there had to be weighed and balanced the advantages to the public interest of the development which included the provision of affordable housing for disadvantaged communities near places of

32. Section 34(6) of Restitution of Land Rights Act 22 of 1994.

potential employment; opportunities of employment as a result of the development; upgrading of informal settlements; foreign investment; economic upliftment of the entire area; and eliminating the potential for violent strife between the informally settled communities and land claimants.³³

There was no doubt that both restoration and the proposed development were in the public interest and that any agreement which accommodated both with the consent of all the parties would be eminently in the public interest. The agreement signed by the parties, accommodating as it did the idea of restoration where this was feasible and development in which those respondents who did not get restoration were given a stake, was just such an arrangement.³⁴ The court accordingly made an order in terms of section 34(5) and incorporated the provisions of the settlement agreement into it.³⁵

D. What We Learned Through the Process

One of the most difficult lessons we learned was that, in the post-liberation period, comrades of yesterday would often become opponents of today. The one certainty in such instances is that each side will have compelling arguments. Lawyers alone cannot develop the type of strategy required in this kind of case, as so often occurs whenever issues of poverty, development, and social justice are involved. Often, the process requires the opinions and advice of people in other disciplines. They are regularly needed to do more than present expert evidence in judicial proceedings. They will frequently help develop strategy, help communicate the strategy to clients, help take instructions, and help implement the strategy both in and outside of court.

Judges and arbitrators are not the only ones who face the task of balancing interests and finding the Middle Way. A lawyer

33. *Ex parte North Central and South Central Metro Substructures Councils of the Durban Metropolitan Area and Another* 1998(1) SA 78 at 86H/I-87C/D, available at <http://wwwserver.law.wits.ac.za/landclaim.LCC1996-1999.htm> (last visited Dec. 18, 2001).

34. *Id.* at 87D-E.

35. *Id.* at 87G-98D.

representing a client must also find the Middle Way and achieve balance. Actions that may appear to be mutually exclusive at first can become more than a simple compromise. It can become the path of activism.

This period was a difficult time and we could see the effects of our history of division and tension. There was an opportunity, however, to rise above the tension and embrace each other. For some, it was an opportunity lost. For others, it was a time to heal deep wounds. For us, it was a chance to practice our values of non-racism, non-sectarianism, and tolerance.

It was difficult, and we did not always succeed. We first learned that apartheid created deep wedges within our individual and collective psyches. They emerged in the courtroom, around negotiation tables, and in client consultations. If they are ignored, they take on even more power. Acknowledging, identifying, and understanding these differences was crucial.

We learned that we had developed the art of being selectively compassionate. Compassion was conditional upon who suffered and why. If a person who supported the apartheid state was “necklaced”³⁶ in political violence, compassion did not simply emerge. In fact it did not easily emerge, as they “deserved” it for being collaborators. If an activist was arrested, assaulted, and tortured compassion arose spontaneously and without reserve.

At first, our compassion for the plight of the Indian landowner in the Cato Manor land claims case was non-existent. In fact, it was replaced with an extreme degree of impatience and intolerance. Their attitudes delayed the process. We had the same need for expedience as our opponents. Thankfully, wisdom prevailed and we were able to compromise.

We also learned to find the Middle Way. At first, we learned to look for it and to seek help to find it. Once we found it, we learned to walk the path slowly. We had to balance on the one hand, the path that monitors and watches government, and on the other, the path that helps government implement good policy.

36. The act of killing a person by dousing a tire with petrol and placing it around their neck and setting it alight: a method used to execute suspected police informants and collaborators during the apartheid days.

E. Post Script

The settlement agreement resulted in a social process. All claimants were required to participate in individual interviews and were advised of their options. They were also given an opportunity to tell their story and ultimately select an option that best met their needs. The students of the Clinic implemented this component. They were recruited and trained, and they conducted some forty-five hundred interviews. The experience was both meaningful and enriching for the Clinic, the students, and the claimants.

After the settlement, however, a claim for the restoration of land rights, including mineral rights, was instituted by a group of landowners.³⁷ This case came to be known as the “Ridgeview Quarry Case.”³⁸ We informed the Commission that some of our clients’ claims fell within the same stretch of land and that all the claims should be adjudicated together. Although the Commission disagreed, they were soon ordered by the Land Claims Court to ensure that all claimants, landowners, and tenants were before the court together. The Department of Land Affairs and the Durban Metropolitan Council combined their forces to oppose the application of all parties.

Disputes regarding the identity of claimants, the description of the property, and the completeness of the application form arose. Opponents raised technical issues to thwart any hope claimants may possess. The Council earned (and continues to earn) millions of rands in profit from the quarry in question. While the issues and our approach is different, we are still trying to find the Middle Way in this case.

V. CONCLUSION

These cases teach us that the most overwhelming circumstances can produce the deepest and most profound lessons. Reflections upon these times continue to bring forth further insights. These insights guide the development of the teaching component of the Clinic, and consequently, new material is brought into the class-room each

37. Ebrahim Essop Kara and Others LCC 44/98.

38. *Id.*

semester. Students take the new material and work with it in the community and in their own case strategy sessions. We have debates about the Middle Way. Some students still argued that the Middle Way is a “sell-out” position. Despite this criticism, the dialogue is both interesting and inspiring. Another insight was gleaned about the people and institutions involved in these processes. During the apartheid era, we were able to easily distinguish between the so-called “good guys” and “bad guys.” Conversely, during the post-apartheid era, we learned that there are no good guys and bad guys. Each has an element of the other and the challenge is to find the balance.

Our work in the Clinic continues to evolve, and the search for the Middle Way is a recurring theme that continues to pose a challenge. It is never easy to determine what strategy to adopt and whether that strategy is, in fact, in the public interest. The lessons of Cato Manor and the Amnesty hearings continue to guide the development of the programs, projects, and cases of the Clinic.