



THE FW DE KLERK FOUNDATION

Upholding South Africa's National Accord

Land reform: a contextual analysis

a Study on Land Reform for the FW de Klerk Foundation
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Purpose of the document

- Survey of existing policy with regard to land reform.
- Survey of proposed policy changes and pressure on the principle of “willing buyer, willing seller”.
- Contextualisation of the reform process and evaluation of the suitability of existing policy and proposed policy changes.
- Proposals for a sustainable approach to land reform.

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1. Background

Historic undermining of black land ownership

1.1 The need for land reform

The need for land reform in South Africa has its origin in the historic undermining of black land ownership through colonial dispossession and discriminatory legislation that had been implemented since the beginning of the 20th century.¹ The division of land between white and black South Africans was distorted i.a. by the policy of separate development, which forced black South Africans into over-populated homelands, the Native Land Act of 1913, the Native Trust and Land Act of 1936 and the Group Areas Act of 1950.

Native Land Act 1913

The Native Land Act of 1913 prohibited black land ownership outside the native reserves (which then constituted only 8.3% of South Africa's land area) and in so doing formalised for the first time limitations on black land ownership.² As a result, this Act is still regarded as an important turning point in the restriction of the land rights of black South Africans. In terms of the Native Trust and Land Act of 1936, black South Africans could not acquire land even within native reserves and land in the reserves was placed under the control of tribal chiefs.³ The Government granted far-reaching authority over the allocation of land and land matters to tribal chiefs, which often exceeded the authority that they enjoyed on these questions under customary law.

1950 - "Second wave"

Black persons who owned land outside the reserves before 1913, and who were exempted from the original legislation in 1913 and 1936, were deprived of their land in a so-called "second wave" of evictions after 1950 primarily in terms of the Group Areas Act which came into force in 1950.⁴ These farmers were forced back to the homelands or were compelled to accept work as labourers on white farms.

According to the White Paper on Land Reform, approximately 3.5 million people were removed from rural and urban areas between 1960 and 1980. The right of people to own land in urban areas was only recognised again with the institution of the 99-year lease system in 1978, and the abolition of influx control in 1986.

Impact on land ownership

At the inception of South Africa's democratic transition in 1994 the impact of these informal and institutional restrictions on black land ownership was very clear from the division of land between the various race groups. At that time, about 80% of agricultural land was in the hands of white South Africans.⁵

South Africa, like other countries in southern Africa, thus had :

- a minority group who owned a majority of the land (bearing in mind that less than 10% of the South African population is white);
- a "dispossessed" indigenous majority; and
- a dual system of tenure rights and land ownership - in which a modern property market based on the principle of private land ownership - and a traditional system in which land was communally owned by indigenous tribes, functioned parallel to one another.⁶

The urgency of the need for a successful land reform programme arises from both the moral obligation of a democratically elected government to rectify the injustices of the past, and the reality that in the long run the present unequal division of land is untenable.^a

^a It is interesting to note that in a set of scenarios for 2014 drafted by the South African Presidency in 2003, social instability, caused by growing dissatisfaction with poverty, unemployment and inequalities in the distribution of income, was cited as the biggest threat to constitutional democracy in South Africa.

Land question as an important point of contention

1.2 The land question and the Constitutional settlement

The land question was an important point of contention throughout the negotiations in the run-up to the acceptance of the interim constitution which came into effect in 1994, and the negotiations in the Constituent Assembly that were responsible for the development of the 1996 Constitution.

ANC policy pre-1994

The ANC's Freedom Charter called for a redistribution of land among "those who worked it" to end hunger and "hunger for land". Provision was also made in 1990 in the ANC's "Discussion Document on Economic Policy" and in the report of the ANC's Macro-Economic Research Group (MERG) in 1993 for strong state involvement in this redistribution process.⁷ It was against this background and with a strong mandate from its supporters to ensure decisive economic transformation in the democratic dispensation, that the ANC came to the Constitutional negotiating table.

Property rights in the SA economy

Activities in the South African agricultural and business sectors were, however, based on the principle of property rights. Representatives of the minority groups in the Constitutional negotiations thus had the responsibility of ensuring that the need for socio-economic transformation was brought into balance with the imperative of assuring continued economic growth and of establishing business confidence that would encourage essential investments in the economy.

The Constitutional compromise

A fine balance was achieved in the 1996 Constitution (which represented a compromise between the various interest groups) between "the right to land ownership" (as one of the inalienable rights in the Bill of Rights which is contained in the Constitution) and certain exceptional circumstances in which these rights could be suspended with a view to promoting land reform - and by implication broad socio-economic transformation.^b

Section 25

Section 25 of the Constitution stipulates that no-one can be deprived of their property, except in terms of a generally applicable law, and that no law may permit arbitrary deprivation of property. Historic inequalities in land distribution are also addressed in Section 25 (5,6,7), in which it is stated that:

- The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to obtain access to land on an equitable basis.
- A person or a community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- A person or a community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Provision for expropriation

In Section 25(2) provision is made for the expropriation of land if it is a) for a public purpose or in the public interest; and b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. In Section 25(3) it is stipulated that the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

- a) the current use of the property;
- b) the history of the acquisition and use of the property;
- c) the market value of the property;

^b This balance between rights and transformation priorities is also clear in constitutional provisions regarding affirmative action, in which the right to equality is inclusive of the Government's prerogative to discriminate in favour of previously disadvantaged individuals in order to promote overall equality (See Chapter 2, Section 9 of the Constitution).

- d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- e) the purpose of the expropriation.

Definition of "public interest"

It is important to note that "public interest" in Section 25(4) is defined as "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" and that it is specifically stated that "property is not limited to land."

It is against this constitutional background that the Government's policy with regard to land reform has been formulated.

Promotion of and support for reform

1.3 Present policy with regard to land reform

The South African Government follows a dual approach to the land reform with (i) specific policy measures that are aimed at promoting/making possible land reform, and (ii) direct financial support and other support services to land reform projects.⁸

The land reform programme of the South African Government has three focus areas, namely restitution (land restoration); redistribution and tenure reform.

Land restitution, 1913

Restitution

In the restitution or land restoration programmes land is returned to those whose land was taken from them during apartheid, or compensation is offered for this land. Land claims can be instituted against any land that was expropriated after 1913 (i.e. after the adoption of the Native Land Act), or in cases where forced removals took place. Land claims are dealt with by the Land Claims Court, and the Land Claims Commission which were established in terms of the Restitution of Land Rights Act (Act 22 of 1994).

Redistribution

Redistribution

Redistribution is aimed at providing land to previously disadvantaged and poor persons for residential and productive purposes and in so-doing to increase black ownership of land. Although the redistribution process also includes urban poor, the focus falls primarily on the redistribution of rural land to the benefit of rural poor, farm workers, labour tenants and new participants in agriculture.⁹

SLAG allowances

Redistribution was originally encouraged by means of Settlement Land Acquisition Grants (SLAG). SLAG was a R16 000 cash allowance for which poor and black South Africans could apply to purchase and develop agricultural land.¹⁰ The basic allowance was supported by allowances for planning, facilitation and the resolution of disputes.

LRAD allowances

In 2002, the SLAG programme was replaced by the Land Redistribution for Agricultural Development program (LRAD). The most notable difference between SLAG and LRAD was that the beneficiaries did not have to have a specific minimum income to qualify for allowances and that larger allowances were granted to applicants who could invest more of their capital or obtain loans from commercial institutions. The size of the allowance was also increased. At present, the minimum allowance is R20 000.

LRAD allowances can be used to purchase farms or land for agricultural purposes, for food security projects, for shares in new or existing agricultural businesses or for agricultural activities in communal areas. The program was designed to contribute to the realisation of the goal that 30% of agricultural land must belong to black South Africans by 2014.

Tenure reform

Tenure reform

Tenure reform is aimed at improving the security of tenure for all South Africans. It is addressed in a revision of land policy, the administration of land and legislation regarding private property, communal ownership and the rights of those who rent their land or homes.

Legislation since 1994

Important legislation that has been introduced to improve the security of tenure, includes:

- the Land Reform (Labour Tenants) Act (Act 3 of 1996) which protects the rights of labour tenants who had been rewarded for labour “primarily by the right to occupy and use land”¹¹;
- the Extension of Security of Tenure Act (Act 62 of 1997) which protects the tenure rights of farm workers and people who are associated with them;
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (Act 19 of 1998) which prohibits illegal evictions, and makes provision for procedures for the eviction of people who illegally occupy land; and
- The Communal Land Act which puts procedures in place to protect the tenure rights of people who live on communal or tribal land.

The current approach to expropriation

The current approach to expropriation

During the first 12 years since the political transition in 1994 the Government chose not to exercise its constitutional right to expropriate land. However, in February 2007 the Department of Land Affairs expropriated the first farm with a view to the restitution of land rights. The expropriation was carried out in terms of the Restitution of Land Rights Act which makes provision for the expropriation of land for the restitution of land within the provisions of the Expropriation Act of 1975. This expropriation followed an announcement by the Department of Land Affairs in 2006 that it would henceforth not negotiate with land owners for longer than six months.

Limitations of the Expropriation Act

It is important to note that no land had thus far been expropriated for the sake of land redistribution. Expropriations with a view to redistribution have thus far been prevented by the Expropriation Act (Act 63 of 1975) which makes provisions for expropriations for a public purpose (including servitudes, roads etc). In terms of the Land Reform Act (Act 3 of 1996) this “public purpose” includes land restitution. However, proposed amendments to the Expropriation Act call for an expansion of this concept to include the “public interest”, which in so doing will empower the State to expropriate for redistribution.¹²

1.4 Land Reform Targets

Official targets

Official targets

1998 cut-off date

The deadline for restitution claims was 1998. According to the Commission for the Restitution of Land Rights, 79 696 claims were received. The Department of Land Affairs originally set a goal of finalising all claims by 2005. This goal has in the meantime been extended and the Government now wants to finalise all claims by the end of the 2007/2008 financial year.

30% transfer by 2014

The present target for land reform is to place 30% of agricultural land in the hands of black South Africans. The original target date for this goal was 1999. In May 2001 this target date was extended to 2014.

Inconsistent definitions

However, inconsistent definitions of the goals of the land reform programme in policy documents and the rhetoric of government figures create uncertainty about the implications of the 30% target. In the official strategic framework for the LRAD programme it is stated that the “combined goal of the land reform programme is to transfer 30% of agricultural land to black South Africans over a 15 year period.” This implies that all three land reform projects could/would contribute to this goal.

The Centre for Development Enterprise (CDE) argues that it is not clear in this context what is meant by the term “agricultural land”. Initial formulations of the target (among others in the Reconstruction and Development Programme) referred simply to “agricultural land” which implies that all arable and grazing land was included in the term. However, government spokesmen and key policy documents (including the Department of Land Affairs comments to the Land Summit in 2005) now generally refer to the transfer of 30% of “commercial agricultural land”, which is defined as “white-owned agricultural farmland”.¹³ This formulation apparently excludes the transfer of state land to black owners. In contrast, according to the CDE, progress with the transfer of state land is usually included in reports on progress with land reform.

According to sources in organised agriculture, there are also indications that the State wants to transfer 30% of commercial agricultural land *in all regions* to black persons. It is important to keep in mind that restitution claims (that also contribute to the 30% target) are concentrated in specific regions. Region-specific targets will thus put strong pressure on farmers in regions where there are less restitution claims to transfer land to black South Africans through redistribution programmes. There is, however, a lack of clarity regarding these targets, further contributing to uncertainty in the agricultural sector.

Agri-BEE

Land reform and the AgriBEE process

Uncertainty regarding targets

In the AgriBEE framework farmers, co-operatives and agricultural businesses are encouraged to contribute to the achievement of the national goal of transferring 30% of farmland to black South Africans by 2014.¹⁴ The 30% goal is confirmed in the goals of the “ownership” element of the Agri-BEE scorecard.^c Here, the goal is also defined as “30% of commercial agricultural land”.¹⁵ Agricultural businesses can, however, earn bonus points in the ownership element of the scorecard if more than 30% of the land is voluntarily transferred/sold to black people. It is important to note that land that is transferred to black people as a result of expropriation by the State does not qualify for these bonus points on the scorecard. However, the agricultural sector also undertakes in the AgriBEE charter to lease land to black South Africans and to make land available to farm workers. This intention is given effect in two other elements of the BEE scorecard, namely “the enterprise development”, and the “residual” element that deals with corporate social investments.

The leasing of 20% of land to black people, or making land available to farmworkers will provide bonus points to agricultural businesses under the “enterprise development” and the “residual” elements of the scorecard. It would thus still be possible for agricultural businesses to earn full points under these elements of the scorecard without leasing land to black people or making land available to farmworkers.

According to the CDE these parts of the scorecard imply an effective land reform target of 60%.¹⁶ However, the fact that these so-called “additional targets” are included as activities that can earn bonus points in the scorecard is rather an indication of the commitment of both the Department of Agriculture and other stakeholders in the agricultural sector to the achievement of the 30% goal. The goals of leasing farmland to black people and of making land available to farmworkers are furthermore formulated as something that agricultural businesses “undertake” to do, rather than as something that is prescribed by the Department of Land Affairs – also creating the impression that these targets have been set in support of the 30% goal and do not represent “additional targets”. The fact that these goals are not mentioned elsewhere in policy frameworks or official documentation supports this interpretation.

As already mentioned, there is uncertainty about whether the transfer of state land to black South Africans will be taken into account when considering progress towards the 2014/30%

^c The scorecard referred to here, is the concept scorecard as released after the AgriBEE Indaba and subsequent consultations between key role-players in the agricultural sector.

target. It is also not clear whether the 2014 target will be the *final* target for land reform, or if further targets for the transfer of land to black South Africans will be set at this date.

Land reform as a development strategy

Land reform and development goals

It is important to bear in mind that the Government consistently cites the land reform project as a part of the national development strategy. In the RDP, the White Paper on Land Reform, the Government's contributions during the Land Summit in 2005 and the general rhetoric of government representatives, it is frequently mentioned that land reform can/must play an important role in poverty relief, job creation and the development of vulnerable rural groups.

The former Minister of Agriculture and Land Affairs, Thoko Didiza, argued at the Land Summit in 2005 that land reform must contribute to job creation, greater social and economic equality and the incorporation of black South Africans into the mainstream economy.¹⁷

At the ANC's lekgotla in January 2007, there were once again calls that "more land will have to be made available to address poverty and unemployment."¹⁸

Progress with regard to targets

1.5 Progress with Land Reform (1994-2006)

Outstanding claims mainly rural

As already mentioned, the restitution goal of the Department of Land Affairs is to process the 80 000 claims that have been received by 2008. In the 2006 annual report of the Commission for the Restitution of Land Rights, it was indicated that 71 465 claims (approximately 89% of the total) have already been dealt with. According to the report only 11% of the finalised claims were in rural areas. The outstanding claims at that time included 6 975 rural claims (more than 86% of the total).

Between 3% and 4% already transferred

Progress with regard to the 30% goal for the redistribution of land has been particularly slow. According to the report of the CDE, 3.5 million hectares, 4.3%^d of commercial agricultural land, had been transferred by the end of 2004. This figure includes the transfer of state-owned land. If the transfer of state land is not taken into account, only 3.4% of commercial farmland had been transferred by the end of 2004.¹⁹ According to Ruth Hall (a well-known researcher on land affairs at the University of the Western Cape) the latest information shows that approximately 4% of farmland has been transferred to black South Africans.²⁰

Unintended Consequences of ESTA

According to a submission by the Acting Director-General of Land Affairs and Land Reform, Glen Thomas, to the portfolio committee on Agriculture and Land Affairs occupation rights on 171 554 hectares of land had already been assured for black South Africans by December 2004.²¹ There are serious concerns regarding the effect of the Extension of Security of Tenure Act and the Land Reform (Labour Tenants) Act on the eviction of farm workers and labour practices on farms. According to senior officials of the Department of Land Affairs, this legislation resulted in an increase in evictions, because land owners were unwilling to grant occupation rights to workers.²² One of the unforeseen consequences of this legislation was that agricultural businesses increasingly choose to appoint workers on a contract basis and not to provide housing to workers.²³ The socio-economic empowerment of farmworkers (one of the key motivating factors behind the development of this legislation) is thus being undermined as a result of these laws. This issue will be discussed in more detail in section 3.2.

^d This figure is based on a presentation by the Acting Director-General of Land Affairs and Land Reform, Mr Glen Thomas, to the Portfolio Committee on Agriculture and Land Affairs in the National Parliament.

2014 target
looks
unattainable

The present rate of reform and the 2008 and 2014 targets

The restitution process in rural areas is considerably more complicated than that in the cities (i.a. as a result of the number of people who are involved in claims, overlapping claims, and the fact that rural claimants are less inclined to accept financial compensation). As has already been stated, the majority of cases that have thus far been finalised are of an urban nature. It can accordingly be expected that the tempo of land restitution will dramatically decrease. Moreover, many of the original claims were dealt with by means of compensation rather than actual land restitution – which naturally require fewer negotiations with current land owners and can thus be finalised more quickly. It was therefore not surprising that the Commission on the Restitution of Land rights has indicated, in the presentation of its strategic plan for 2007/2008 to the Portfolio Committee on Agriculture and Land Affairs on 14 March 2007, that approximately one third of the outstanding 5128 rural claims will not be processed before the 2008 deadline.²⁴

In terms of the redistribution of land, the CDE indicated in 2005 that the Government still has to transfer 20.6 million hectares of agricultural land. The pace of transfer up until that time was about 0.38 million hectares per annum. The pace of reform would thus have to increase fivefold in order to achieve the 2014 goal. If the pace of reform does *not* increase, the 30% goal will only be reached by 2058.²⁵

Various measures aimed at the acceleration of land reform are currently being suggested from the ranks of government. The most important of these, is the reconsideration of the “willing buyer, willing seller” (wbws) approach which has been followed thus far. This principle is discussed in Section 2 below.

2. The “willing buyer, willing seller” approach

Background of
the “willing
buyer, willing
seller

2.1 Background

The shifts in the ANC’s policy with regard to land reform (earlier as a liberation movement and later as the majority party in the democratic government) testify to both the influence of the World Bank on economic policy, and its commitment to the principles contained in the South African Constitution.

Shifts in ANC
policy

Earlier ANC policy documents, among which the “Ready to Govern” document of 1992, and even the Reconstruction and Development Programme (RDP) which was announced in 1994 as the basis of the ANC government’s socio-economic policy, included no reference to the “willing buyer, willing seller” principle. In the spirit of the ANC’s Freedom Charter, the “Ready to Govern” document refers to expropriation and other non-market related approaches to land reform. In the RDP, land reform is once again identified as a mechanism to fight poverty and formed part of the programme to provide for the “basic needs” of the South African population. Specific reference is made to the need to settle small farmers with a view to providing for the needs of the rural population, and substantial funds were put aside from the RDP Fund for pilot projects in land reform, restitution and the settlement of small farmers. However, no mention is made of the approach that would be followed to obtain suitable land for these projects.

It is widely known that in the early 1990’s the World Bank had an important influence on the ANC’s decisions with regard to economic policy. The organisation supported a market-supported (or market-orientated, or “negotiated”) approach to land reform.²⁶ This approach accorded with other policy suggestions for South Africa in which the effectiveness of the market in allocating economic resources and the unsustainability of extensive state intervention in the economy (or interference in the “operation of the market”) were continuously emphasised.

Right to expropriation not exercised

As already stated, property rights are protected by the Constitution, but specific circumstances are mentioned in which land may be expropriated. The fact that the ANC Government did not make use of its right to expropriation for the promotion of land reform during the first 12 years of its rule, is possibly an indication of the spirit in which the Constitutional protection of property rights was ultimately accepted. In the Department of Land Affairs discussion document on the revisions of the wbws principle, it is argued that there was no "political will" to expropriate land, since policy makers did not wish to "upset the applecart" and in so-doing "kill the goose that laid the golden eggs". It would thus appear as though the *status quo* was maintained to avoid the disruption of productive economic activity.

In the Land Policy of 1997, the wbws principle was thus established as the cornerstone of the Government's land reform policy.

What does "willing buyer, willing seller" mean?

Description of the "willing buyer, willing buyer seller" principle

As mentioned above the wbws principle forms the bases of a "market-supporting" or "negotiated" approach to land reform. The approach implies a completely voluntary transaction between a buyer and a seller of land.²⁷ The underlying supposition of the wbws principle is that there are willing buyers and willing sellers who participate in land transactions on the land market on an equal basis.²⁸ Land is purchased at a price on which the willing seller and the willing buyer agree.

In South Africa, this principle has thus far implied that the Government has not become directly involved in the purchase of land for land reform projects, but provides allowances and services that support needy people who want to obtain land.²⁹

There is at present pressure from various quarters to review this principle. The most important arguments in favour of the review of this approach are discussed below.

Pressure on the current approach to land reform

2.2 Pressure on the "willing buyer, willing seller" approach

At the Land Summit in July 2005, Deputy President Phumzile Mlambo-Ngcuka said that the "second phase" of South Africa's democracy had begun and that the acceleration of progress with regard to the 30% target for 2014 was now high on the Government's agenda. In his State of the Nation address in 2006, President Thabo Mbeki made a similar call for the reconsideration of the effectiveness of the wbws principle. These statements opened the way for a renewed debate on the wbws principle, and the effectiveness of this approach in the realisation of South Africa's land reform goals.

Why the reconsideration?

In the Department of Land Affairs' discussion document on this issue, it is indicated that the wbws principle is presently being reconsidered in the light of:

- the slow pace of land reform in the first 11 years of the programme;
- the rising price of land in redistribution and restitution projects;
- the inadequate success with the reform of high quality land near markets – eg. in peri-urban areas³⁰

In the abovementioned discussion document there are a number of references to an article on the wbws principle by Edward Lahiff of the *Programme for Land and Agrarian Studies* (PLAAS) at the University of the Western Cape.

Willing buyer, willing seller "invalid" in South Africa?

Lahiff argues that neither the principle of willing sellers, nor that of willing buyers, is really valid in the South African context.

With regard to sellers, Lahiff notes that private land owners have a monopoly on the sale of land. They are thus in a position to control the price of land to their own advantage without taking into account the ability of buyers to participate in land transactions. In the absence of

measures that give the State first option on all land that is sold (as was the practice in Zimbabwe in the 1980's) sellers have, as it were, a "veto" on the sale of land, which according to Lahiff implies that land owners can block land reform. The only reason that Lahiff provides for such blocking is "racist grounds".³¹

With regard to buyers, Lahiff notes that landless people cannot be regarded as "willing buyers" in the normal sense of the word. He points out that people who want to obtain land (thus supposed "willing buyers") are dependent on the co-operation of the land owners as well as the preparedness of the State to approve their application for funding.³² Lahiff argues further that although the State has the power and the resources to enter the property market on behalf of the beneficiaries, it initially declined to become involved in the market in this manner. Black South Africans with a need for land thus have to identify willing sellers (thus land that was on the market) and negotiate with sellers on a purchase price. However, such individuals only become effective buyers when they receive approval of funding from the State. Neither the State nor the prospective land buyers have thus really negotiated with the land owners on an equal basis.

The unequal protection of the interests of buyers and sellers is also reflected in the rights of sellers with regard to sale prices. According to the initial policy (as formulated in the white paper on land reform) the seller could ultimately decide if he or she wished to sell his or her land at a particular price for the purposes of land reform. This allowed sellers to sell land at the highest offer, or if there were a land claim on the land, to refer the matter to the Land Claims Court to determine fair compensation.³³ However, where the State did not make use of its right to expropriation, the seller was not obliged to dispose of his land even at the price established by the court.

Constitution regarded as an impediment to reform

According to Dr. Leon Wessels, a commissioner of the Human Rights Commission, leftist movements feel that the Constitution places limitations on land reform.³⁴ However, the only constitutional limitation that is placed on land reform is that land owners must receive "fair" and "equitable" compensation. There is thus reason for concern that the Constitution is regarded as an obstacle to land reform.

The demands of the "Landless People's Movement"

In this regard, it is also important to take cognisance of demands of more radical groups in the land reform debate. The "memorandum of demands" of the "Landless People's Movement" (LPM) at the Land Summit in 2005 asks for a complete overhaul of current policy with regard to land reform and questions the legal framework within which land reform is currently managed. They demand i.a. that the market based approach to land reform and the wbws principle be abandoned.³⁵ The LPM argues that land was "stolen" from their forefathers, and that is therefore not justifiable that present landowners should be rewarded for returning land to black South Africans.³⁶ They demand that "the state and the landless [must] organise to take back the land that was stolen from them" and that the money that is currently spent on compensation for land should rather be "used to help us meet our needs and build our livelihoods on the land".³⁷ The organisation also demands that the private property clause in the Constitution be scrapped because it "[legitimises] colonial and apartheid land theft" and that an immediate moratorium be placed on forced removals from state and private land in rural and urban areas.³⁸ They also ask for a "social obligation" clause in the Constitution that will allow landless people to occupy unused and unproductive land, or the land of "abusive landowners".

Women on Farms

The organisation "Women on Farms" (WOF) also demands a more radical approach to land reform. Like the LPM, they deny the rights of landowners to be rewarded for land which they "stole" from black South Africans.³⁹ WOF is particularly outspoken about the illegal eviction of farmworkers and demands that the implementation of current legislation must be monitored more effectively and that the socio-economic impact of evictions on vulnerable groups in rural areas must be investigated and addressed.

The organisation also demands a moratorium on the sale of agricultural land to foreigners until laws regulating foreign ownership of land is revised.⁴⁰

ALARM

At the 2005 Land Summit, the "Alliance of Land and Agrarian Reform Movements" (ALARM) also demanded that the market-based approach to land reform should be scrapped and that the State should play a stronger role in the land reform process. In the memorandum of demands, which they presented to the Summit, the LPM demanded i.a. that land reform policy should be adapted to accommodate smaller producers - and should by implication not focus on establishing black commercial farmers.

Questioning the legal framework

It is clear that these demands question the legal framework which currently regulates land reform, and could in certain cases even promote the random occupation of land. Thus far, the State has ignored the demands of most of these groups, and in their presentation to the Land Summit the LPM also demanded an end to the State's repression of the landless and the "political activities" of their organisations. The aspirations of these groups, however, have to be kept in mind when the future management of the land reform programme is considered.

Recent statements by the Department of Land Affairs do indicate a more aggressive approach to land reform that will give the State more power to expropriate land and thereby (according to spokesmen of the Department of Land Affairs) accelerating the land reform process. Current trends in the Government's land reform policy are discussed in section 2.3.

New approach to land reform

2.3 A new approach to land reform

The 1997 Land Policy of the Department of Agriculture and Land Affairs supports the wbws principle "where possible". Even within the existing policy provision is made for the Government to deviate from this principle if its application impedes land reform. As mentioned above, it was decided at the Land Summit in July 2005 to review the wbws principle. A number of important shifts in policy have since taken place.

Limit on negotiations

A six month limit on negotiations

The first of these was the announcement of a six month limit on negotiations between the Department of Land Affairs and the owners of land on which restitution claims have been instituted. According to government statements, extended negotiations on compensation are being used by land owners as a "delaying tactic" to hobble land reform policy.⁴¹ The six month limit is an attempt to solve this problem, and implies that after six months land owners will be forced to accept the Government offer for their land. Where land owners regard the compensation offered by the State as inadequate, they will still be entitled to refer the matter to the Land Claims Court. The Land Claims Court will then determine what a "fair and equitable" compensation for the property in question will be. This price, however, cannot be refused by the land owner and this change of policy thus represents a significant departure from the wbws principle.

Amendment of the Expropriation Act

Proposed amendments to the Expropriation Act

As previously mentioned, a farm has already been effectively expropriated for restitution purposes, but thus far no land has been expropriated for the redistribution programme of the Department of Land Affairs. However, both the South African Constitution and the Land Policy of the Department of Agriculture and Land Affairs make provision for the expropriation of land where it is in *the public interest*.^e Expropriation for redistribution has thus far been prevented by the narrow definition of "public purpose(s)" for which land may be expropriated in the Expropriation Act of 1975. Amendments to this Act are currently being considered that will allow expropriation "in the public interest", which will then also make expropriation for the purpose of the redistribution of land possible.

^e Keep in mind that the "nation's commitment to land reform" is specifically noted in the description of "the public interest" in Article 25 (4) of the Constitution.

Addressing rising prices *"Just and equitable" compensation*

Rising land prices are one of the reasons given for the slow pace of land reform. There is evidently a perception that the owners of land which has been identified for restitution or redistribution artificially raise the price of their property in an attempt to profit from the Government's reform programme (and particularly the fact that the Government is now under great pressure to achieve its land reform targets). Although the State has now placed itself in a position to expropriate land, thus to force a land-owner to sell his land at a set price, the Constitution provides that the State has to provide "just and equitable" compensation for land. It is important to bear in mind that the market price of land is only one of a number of principles that must be taken into consideration when "just and equitable" compensation for land is determined.^f

The underlying principle that is prescribed in the Constitutional provision with regard to compensation in situations of expropriation is that a "fair balance" must be found between the public interest and the interests of those who are directly affected (in other words the interests of the land owners). Where this "public interest" includes the country's objectives with regard to reform, it would thus be possible that land might have to be sold to the State below the accepted market price.

A proactive approach

A proactive approach to expropriation with regard to redistribution

Until now the Department of Land Affairs has become involved in negotiations for land where there was a claim on the land concerned or when a group of prospective farmers approached the Department for allowances for the purchase of a specific piece of land. However, the Government recently announced that a special body for land reform would be brought into being which would be able to obtain, hold, manage, develop and sell land for land reform.⁴² Land will be obtained on a proactive basis, and it will not be necessary to wait for applications from emerging farmers. In terms of the Department of Land Affairs' manual for the Implementation of the Proactive Land Acquisition Strategy, the right to acquire land on a proactive basis is also extended to Provincial Chief Directors of the Department of Land Affairs.⁴³ It is argued in this document that the Strategy for the Proactive Acquisition of Land empowers the Department of Land Affairs to obtain high quality land in centrally located agricultural nodes. This is consistent with the Department's drive to establish agricultural development corridors that could be incorporated in area-based planning and development projects related to Integrated Sustainable Rural Development Strategy. The Department of Land Affairs, in co-operation with the Department of Agriculture, is responsible for the development or preparation of the land for agricultural activities.

Provision is made for national, provincial and local government structures to reach service level agreements with role-players in the agricultural sector (including: financial institutions, estate agents, organised agriculture and agri-businesses) to assist the State in the identification of suitable land and potential beneficiaries and in the development of comprehensive business plans for new agricultural businesses.⁴⁴ The Departments of Agriculture and Land Affairs are, however, also responsible for the post-settlement support of the beneficiaries of land reform programmes. According to press reports in February 2007, the Department of Land Affairs indicated in its explanation of its strategy for accelerated land reform, that provision of post-settlement support would also be a function of the so-called "special purpose vehicle" responsible for the pro-active acquisition of land.

The concept of a special purpose vehicle for post-settlement support was also expounded by the Deputy Director-General of Land and Tenure Reform, Mr. Mduduzi Shabane, in a presentation to the Agricultural Business Chamber (ABC) Workshop on 8 November 2006.⁴⁵

^f Other aspects that have to be considered include: the current use of the property; the history of the acquisition and use of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.

Shabane emphasized the need for public-private partnerships in the promotion of land reform and argued that the State must create a “conducive environment for effective participation of agricultural businesses in land reform”. He therefore proposed a management model for land reform in which co-operation between the State (notably the Departments of Agriculture, Land Affairs, Trade and Industry and Water Affairs and Forestry), the land bank, commercial banks, the insurance industry and agricultural unions and agri-businesses is clearly defined and managed through a special purpose vehicle. This vehicle will provide a platform for agricultural unions and agri-businesses to become accredited agents for design, implementation and post-settlement support and to serve as a sounding board for government by providing advice, developing models for reform projects, providing market information and assisting with monitoring.⁴⁶

Government may take 1st option on land

First option on agricultural land

At a feedback session by the Department of Land Affairs to the Portfolio Committee on Agriculture and Land Affairs on 13 March 2007, Glen Thomas (Director-General of the Department of Land Affairs) said that his department is currently considering an amendment to the Provision of Certain Land for Settlement Act (no 127 of 1993) which would give the State right of first refusal on the sale of all agricultural land. According to Mr Thomas, the proposed amendment forms part of two policy documents (one on the wbws principle, and one on land tax) which will be released by the Department of Land Affairs in May or June 2007.⁴⁷ He mentioned that this measure will empower the State to participate in the land market on a proactive basis, thus utilising existing opportunities for acquiring land. Very little detail was given on the administration of the measure and no timeline for the amendment to the law was given.⁴⁸

Land tax

Land tax to discourage multiple land ownership

A further measure that is at present being considered by the State is the levying of further land taxation – specifically for owners of multiple properties.⁴⁹ It is hoped that this will encourage the sale of land that is not being actively used.

Limitations on foreign land ownership

Limitations on foreign land ownership

The possibility of limiting foreign land ownership, which is allegedly distorting local land prices, is also being considered as part of the new approach to land reform.

The key question to be answered here is whether this new approach to land reform is in step with the socio-economic realities of South Africa and whether it adequately addresses present challenges in the land reform process.

3. Contextualising the reform process

Reform must adapt to circumstances

3.1 General trends

It is imperative that the land reform process stays relevant to the socio-economic context in which reform programmes are being implemented and that programmes are adjusted when necessary. In their survey of land reform in South Africa the Centre for Development Enterprise (CDE) identifies three aspects of the socio-economic reality in the country that are not being properly recognised in the current approach to land reform.

CDE findings

In the first place the CDE argues that the demand for land by black South Africans is primarily an urban and a peri-urban phenomenon.⁵⁰ In the second place, mention is made of the fact that South Africa is an urban society, and that further urbanisation is expected, which will make the need for urban land reform more urgent/necessary than rural land reform or the reform of agricultural land.⁵¹ Thirdly, the CDE also emphasises the fact that the State is not the only distributor of land to previously disadvantaged communities. It argues that the role of the private sector in land reform is currently underestimated and that market-related channels for land reform merit further investigation.⁵²

Majority of black South Africans do not want to farm

With regard to the nature of the demand for land, the CDE argues that black South Africans' demands for land cannot be equated to a desire to farm (i.e. to accept farming as a career). The following results from a national survey that was commissioned by the CDE, CDE research and other surveys are quoted in support of this contention:

- Only 9% of black people who do not farm at present, have clear aspirations to farm;
- Only $\pm 15\%$ of farm workers have aspirations to own a farm of their own or to farm full-time;
- In response to a question regarding the three problems which must now be addressed in South Africa, only 2% of black South Africans⁸ identified rural land as a issue that should enjoy priority. However, urban land and housing issues were identified as priority areas by 35% of black respondents. About 60% of black respondents indicated that they need "services and infrastructure" that are normally centred in urban areas; and
- Research shows that tensions surrounding land questions and land occupations are centred in the metropolitan areas, especially Cape Town and Johannesburg.

Challenge of rural reform

The CDE report does indeed emphasise the fact that aspirations with regard to land or additional land reach "high levels" and are "very intense" among people who live in rural areas and have no alternative source of income, in water-rich areas and on the borders of the former homelands.^h It is argued that although this group is a minority, their absolute numbers are very high and their needs accordingly present a "significant local policy challenge." The CDE argues nevertheless that a land reform programme that focuses exclusively on rural land runs the risk of avoiding areas where the pressure for land (and thus for potential destabilisation) is the highest. Recent tensions in Hout Bay, where landless communities who demanded the right to occupy unused land in residential areas clashed with the local home-owners' association serve as a case in point.

South Africa no longer a rural society

With regard to the nature of the South African society, the CDE mentions that the country is already approximately 60% urbanised and that it is expected that this figure will rise to 70% by 2014.⁵³ It is thus to be expected that the present demand for urban land will increase. The under-supply of urban land (and the need for urban land reform) are clear from the many informal settlements, illegal transgression of boundaries and land occupations that often involve a threat to "the inhabitants themselves, law and order, and investors' perceptions of stability."

The role of the private sector is under-estimated

As mentioned above, the CDE argues that the role that the market and the private sector play in land reform is currently underestimated. According to their report the amount of land that was redistributed in the 1990's in certain provinces via the free market was up to five times higher than that which was transferred to black South Africans through state programmes. The value of land that is transferred and the speed of the transfer also tend to be higher when land is transferred via market mechanisms. The CDE mentions that the private sector is already playing an important role in involving black South Africans at different levels of the agricultural value chain by: providing free services to black emerging farmers; sector-specific organisations that encourage black entrants to the market by supplying support services and by assisting emerging farmers in the processing and marketing of their products; initiatives by private companies to train emerging farmers in the use of their products; share transfers to farm workers; outgrower arrangements by agri-businesses and new factories and processing plants that develop new areas for black participation.

⁸ Excluding coloureds and Indians.

^h The intensity of the rural demand for land was recently illustrated in the murder of a KwaZulu-Natal farmer during a meeting between the farmer and people who demanded tenure rights on his property. ("White farmers, black land hunger". *Mail & Guardian*. 20 January 2007. [Online]. Available: <http://www.mg.co.za>).

Possibly 50% closer to the 2014 target

These arguments are supported by those of Prof. Johann Kirsten, head of the Department of Agricultural Economy, Information and Rural Development at the University of Pretoria who expresses strong criticism of the Government's failure to take private transactions into account when progress with regard to land reform targets is evaluated. Kirsten has found in his research projects that "private transactions are usually much more than state supported transactions – primarily because of the snail's pace at which state machinery runs".⁵⁴ Kirsten also quotes from studies by Mike Lyne and Stuart Ferrer that show that transactions financed through the LRAD-programme were responsible for only 50% of the land that has been redistributed in KwaZulu-Natal. It is also interesting to note that individuals who obtained land on their own were prepared to pay substantially higher prices for land – the average price per hectare for land in KwaZulu-Natal that was bought with LRAD support was R734/ha, against an average of R3 651/ha that was paid in private transactions. Kirsten accordingly concludes in his research, that if private transactions are taken into account in progress with regard to the 2014 target, we are at least 50% closer to the target than the current estimates of the Department of Land Affairs.

Agriculture cannot be the core of development strategy

Another important area where the current land reform policy is not keeping up with general socio-economic trends relates to the relevance of land reform as a mechanism for poverty relief and job creation in a national and international economy in which agriculture has long since been replaced by other sectors as the driving force of economic growth. Consider, for example, the following statistic: agriculture's share in the South African economy (measured by the sector's contribution to Gross Domestic Product) has declined from 9.1% in 1965 to 2.6% in 2005.⁵⁵ It is unlikely that this trend will change in the future. Moreover, agriculture is increasingly becoming more knowledge-intensive, rather than labour intensive, and is thus not necessarily attractive as an instrument for job creation.

The CDE formulates this challenge as follows:

"The hard truth is that this sector offers few opportunities for addressing unemployment, poverty, or inequality on a significant scale, and provides an economic future for fewer and fewer people. There is – according to the country's largest bank in the agricultural sector – no longer any room for even the average commercial farmer. White South Africans are moving out of farming because it is hard to make a reasonable living. We must be very careful not to set up poorer black South Africans for failure".

Poverty a rural and an urban problem

The CDE points out in their report that government policy with regard to socio-economic development must be formulated taking into consideration that poverty in South Africa is both a rural and an urban phenomenon.⁵⁶ There is accordingly a call for a redefined socio-economic policy that addresses unemployment (the main cause of poverty) through job creation (i.a. by public work programmes), training and support for entrepreneurs in rural and urban areas.

> 5% of farmland is annually on the market

The rationale behind a land reform policy that departs from the wbws principle, and utilises expropriation as a mechanism to obtain land, is unclear in a property market in which significant amounts of land are available on the free market. South Africa has a "robust" agricultural land market.⁵⁷ The CDE estimates that about 5% of South Africa's agricultural land is annually offered for sale. In a study by Michael Aliber (of the HSRC) and Reuben Makoena (of the National Department of Agriculture) it was found that over a five year period an average of 6.3% of agricultural land was traded in the market.⁵⁸ It is thus clear that there is not a shortage of farmland that can be used for redistribution. The robust land market should moreover make it easier for the State to determine what an equitable market value for land is in various areas, which ought to facilitate negotiations on fair compensation.

Rising land prices are not impeding reform

Because the Government cites the rising price of land as one of the reasons for the slow pace of land reform it is necessary to give consideration to tendencies with regard to the price of land that have been earmarked for restitution (e.g. as a result of a land claim on the property concerned). There has indeed been strong growth in the price of farmland. Land prices in the Limpopo Province (where most of the land claims are centred) increased by about 40% in 2005/6.⁵⁹ Various reasons have however been adduced for the rising land prices:

- In the first place there was a considerable increase in the number of city dwellers who bought farmland. These so-called “life-style buyers” are prepared to pay high prices for land because agricultural activities are not their primary source of income.
- Buyers are also prepared to pay high prices for farmland that can be used for tourism purposes and thus hold potential for higher returns.
- According to Mr Nicholas Magada, spokesman of the Limpopo Department of Land Affairs, land prices in the province are primarily higher as a result of foreign interest in land and the development of infrastructure - which raise the value of land.⁶⁰
- The demand (and thus the price) for grazing land has also risen in the light of increasing meat prices. This market is driven by existing farmers who want to obtain additional land for grazing in periods when meat prices are high. Trends in land prices in other regions also indicate that prices often fluctuate with changes in the prices of commodities that are cultivated on the land.
- The South African property market as a whole has enjoyed strong growth during the past few years and it can thus be argued that the land market has simply kept up with this trend.

Land without claims more expensive

It is therefore clear that land prices do *not* rise because land owners are trying to take advantage of the Government’s need for land. On the contrary, there is considerable evidence that land without claims is more expensive than land on which claims have been instituted.⁶¹ Estate agents in areas where there are numerous claims on land in the vicinity are moreover convinced that land claims in a particular area increase the price of land on which there are no claims, because the claims place an effective limitation on the supply of land which is available as long term investments for ordinary buyers.⁶²

Restrictions on foreign land ownership are in conflict with general policy

One of the mechanisms that the State is considering to control rising land prices is a limitation on foreign land ownership. It would however be inconsistent if not ludicrous to limit foreign investment in the agricultural sector, while it is actively encouraged in other economic sectors. Foreign involvement in i.a. the financial, retail and tourism sectors is continuing undisturbed (recent transactions include: the sale of the V&A Waterfront, the Barclays-ABSA transaction, and the sale of the retail group Edcon to an international private equity company, Bain Capital.) Limitations on foreign involvement in the agricultural sector will thus be in conflict with the general policy with regard to international investments in the South African economy.

Challenges to determine “fair and equitable” compensation

If the initiative to depart from the *wbws* principle is continued and land owners are forced to sell their land at particular prices (that would be determined by the State or the Land Claims Court) we can also expect serious disputes regarding “fair and equitable” compensation. The challenges in this regard are numerous:

“Public interest” difficult to quantify

In the first place the Constitution provides that a balance must be found between the “public interest” and the interests of land owners. We can expect that it is in the interest of the land owner to receive market-oriented prices. It is, however, difficult to quantify the “public interest” and it is thus understandable that there is anxiety among land owners over expropriations that would occur in terms of this “balance”.

Retrospective calculation of subsidies virtually impossible

Section 25(3) of the Constitution also requires that “the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property” must be considered when determining a “just and equitable” sale price. Three types of subsidies were payable in the past, including (i) acquisition subsidies (where land owners bought land for less than the real market price, for example with the consolidation of the “homelands”), (ii) interest subsidies on loans for land purchases and (iii) subsidies for infrastructure, such as fencing and dams.⁶³ According to Dirk du Toit, Deputy Minister of Agriculture and Land Affairs, it is virtually impossible to determine the total value of these subsidies retrospectively.⁶⁴ The calculation of these values is further complicated by the fact that not all subsidies made a real contribution to agricultural businesses (e.g. in the case of boreholes that were sunk but did not produce water). There is uncertainty regarding the index that must be used to e.g. convert historic interest subsidies into current prices. The Consumer Price Index (CPI) is the index for which the most reliable historic information exists. However, if the CPI (which is often higher than the land price index) were used, there would, according to du Toit, be “absurd cases” where farmers would have to pay the State to buy their land.⁶⁵

According to Eugene Geysers and Monica Vessio (both with the law firm Rooth and Wessels) the court, after consideration of section 25(3) of the Constitution, would be able to depart from the market value of land, but good reasons would have to be given for the court to limit the interest of land owners in this manner.⁶⁶ Where expropriation drastically affects the rights of the land owner it would, in effect, constitute a Zimbabwe-style expropriation and would be in conflict with the Constitution.⁶⁷

Just and equitable compensation under pressure if state has first option on land

The issue of “just and equitable” compensation will also play a key role in circumstances where the State has the first option on the sale of agricultural land. Direct State involvement in the market for a particular asset (eg. agricultural land) could influence the price of that asset - as market forces are distorted. Therefore, if the State demands the right of first refusal on the sale of agricultural land, its mechanisms for valuing land, and its administrative processes have to be effective enough not to cause any but the most minimal distortions in the sale process. It is moreover currently unclear whether land will first be made available in the open market, following which the State would have to match or top the best offer, or if land will have to be offered to the State before market interest in the property has been tested. This distinction could have far-reaching implications for the market for agricultural land, and clarity on this issue should be attained as soon as possible.

Capacity of the Department of Agriculture

Accelerated land reform will require particularly effective management by the Department of Land Affairs (bear in mind that the present pace of reform must increase five-fold to achieve the 2014 goal). The present capacity problems of the Department consequently pose a serious threat to the success of the programme. Capacity problems are evident in:

Budgets not spent

- the inability of the Department of Land Affairs to spend its budget – at the end of the 2006 financial year R1.2 billion was returned to the Treasury;⁶⁸
- the inability of the Commission for Land Claims to spend its budget - in 2005/6 R900 million in the budget was not spent;⁶⁹

Great number of vacant posts

- the great number of vacant posts in the Department of Land Affairs – in October 2006 the *Financial Mail* reported that 1 out of 4 posts in the Department were vacant;⁷⁰
- vacant posts in the Commission for Land Claims – in October 2006, the *Financial Mail* reported that about 1 out of 3 posts in the Commission were vacant; and
- problems in filling vacant senior posts – during the past two years four provincial land claims commissioners resigned, of whom only two have thus far been replaced; to crown all this, the post of policy director is vacant.⁷¹

The capacity to manage an extended mandate

It would thus be dangerous to assume that the planned “special body for land reform” (which according to reports will be aimed at driving a more proactive approach to land reform) will necessarily be in a position to accelerate the pace of reform. In reaction to recent reports that the State may insist on the right of first refusal on all agricultural land,

analysts also questioned the capacity of the Department of Land Affairs to manage such a programme. The Director-General of the Department of Land Affairs, Mr Glen Thomas, who first announced the State's intention in this regard has acknowledged the fact that his department currently lacks the capacity to perform their mandate with regard to land reform.⁷² Thomas argues that a restructuring process within the department, which is expected to be completed by the end of the 2007/8 financial year, would solve this capacity problem.⁷³ It is however extremely dangerous to extend the mandate of a State department in an area which could have far-reaching consequences for the South African Economy, before sufficient capacity exists in this department to perform the new functions.

Legal disputes regarding expropriated land

Where the State has the right to expropriate land, it is essential that its integrity and motives should be above reproach. This is particularly so with regard to the manner in which it (i) opts for expropriation rather than other less intrusive approaches to land transfer; (ii) determines "just and equitable" compensation; and (iii) transfers the land to the intended beneficiaries. It is therefore worrying that an E-TV programme recently raised questions on the manner in which the State dealt with the first property that was expropriated for land restitution purposes.⁷⁴ The expropriation related to the transfer of the Pniel Estate in the Northern Cape to a Community Property Association (CPA) which represented the intended beneficiaries. Allegations were made that the State had unnecessarily made use of expropriation, simply as a smokescreen to gain control of the property, in view of the fact that the CPA had reached agreement with the previous owners on a willing buyer/willing seller basis. The transfer was delayed after the State alleged that the CPA was mismanaging its affairs and was divided by internal conflict⁷⁵. The State had the land placed under its curatorship, pending the outcome of its court application to take over the CPA's responsibilities. According to the CPA, government officials were trying to "overrule the community's plans for the land" because they wanted to "bring investors of their own choice on board".⁷⁶ A referee has been appointed to mediate the dispute. Cases such as this should be closely monitored, as misconduct on the part of either the State or institutions like the CPA would necessitate tighter control over the management of expropriated land.

Redistribution of land in former homelands not addressed

Another critical issue with regard to land reform in South Africa, namely challenges with respect to the redistribution of communal land in the former homelands, also does not appear to enjoy attention in the so-called new approach to land reform. Approximately 35% of the rural population live in the former homelands. Despite the relatively high potential of farmland in these areas, land is often under-utilised and these areas are characterised by extreme poverty, inequality and dependency.⁷⁷ It is unclear how this important challenge will be addressed in the future. The Communal Land Rights (Act 11 of 2004) gives extensive power to the traditional leaders in the allocation of land in communal areas. According to Lungisile Ntsebeza, Professor in Sociology at the University of Cape Town, such allocation of power to unelected leaders is unusual in a democratic system and amounts to the denial of the democratic rights of South Africans in rural areas.⁷⁸ Ntsebeza formulates this challenge as follows:

"The 2004 Communal Land Rights Act makes traditional councils supreme structures when it comes to land allocation. This means that they will be decentralised and indeed despotic in so far as they will be unaccountable. To the extent to which traditional authorities could claim legitimacy, this has been based on their control of the land administration and allocation process at the local administrative and Tribal Authorities level. The powers they will enjoy under the Communal Land Rights Act perpetuate this apartheid legacy.

The amended draft of the Communal Land Rights Bill drew criticism from a range of civil society organisations, gender and land rights activists. Despite the protest, the controversial Bill was bulldozed through and passed unanimously by parliament on 27 January 2004. For the first time in more than ten years traditional authorities have given their overwhelming support for the Communal Land Rights Act. But the question of what democracy and citizenship mean for rural residents, still stands."

*Suggestion:
convert
collective land
rights*

Cheryl Walker (of the HSRC) suggests that decisive efforts should be made to establish the boundaries between the property of various groups and households and to convert collective land rights into other forms of land ownership – either in the form of tenure rights, a leasehold or a freehold system.⁷⁹

*De-racialisation
does not imply
empowerment*

A last point with regard to the general context within which land reform programmes are implemented involves the necessity that land reform must contribute to real socio-economic transformation. It can be argued that the current approach to land reform is aimed at overthrowing the monopoly of white ownership in the farming sector – it is thus in the first place a de-racialisation programme. However, close inspection of the statistics of active white commercial farmers, the number of “landless people” in South Africa, and the extent of land ownership in particular areas indicates the dangers of a programme that brings race to the fore to this extent.

There are at present between 50 000 and 60 000 commercial farmers in South Africa. Estimates of “landless” households in former homelands point to 675 000 black households with a need for land. It is thus theoretically possible to replace all white commercial farmers with black commercial farmers and still provide land to only 10% of landless households in the former homelands – with the result that the land reform project will make virtually no contribution to socio-economic upliftment in South Africa.⁸⁰ Alternatively, large numbers of black households could be established on existing economic units. It is however unlikely that yields from these units could support a larger number of households, and households that are already vulnerable would thus be further impoverished.

The over-emphasis on the *quantity* of land transferred to black South Africans through reform projects also leads to a failure to appreciate other important determinants of the success of agricultural undertakings, such as the quality of the land, the proximity to markets and the enormous differences in the economic potential of land in different regions. The capacity of the land reform programme to contribute to socio-economic development is thus further undermined.

***Challenges to
land reform***

3.2 Challenges with regard to rural land reform

There are also a number of trends in the agricultural sector that influence rural land reform and should thus be taken into account in the reconsideration of the reform policy.

*Strong
competition
places pressure
on profitability*

Firstly, the South African agricultural sector forms part of an increasingly competitive global market for agricultural products. Not only are South African farmers no longer protected by tariffs or supported by agricultural marketing boards in the marketing and distribution of their products, but they must also compete with farmers in countries with which South Africa conducts trade (most notably the European Union) who are supported by comprehensive state subsidies.

*Larger economic
units*

One of the consequences of this increasing competitiveness is that economic units in the sector have increased in size. The advantages of scale derived from these larger units ultimately make it possible for agricultural undertakings to remain competitive. Initiatives by the Departments of Agriculture and Land Affairs to establish small black farmers are contrary to this trend and often condemn those involved to subsistence farming and socio-economic decline. This problem is aggravated in circumstances where several households are established on a single piece of land which is far too small to accommodate all the beneficiaries as full-time farmers.⁸¹ Agri SA also argues that the internal cohesion of communal restitution projects is not sufficiently tested. This ultimately leads to conflict in Communal Property Associations and trusts, with the result that no-one accepts responsibility for projects, and their financing is consequently extremely risky.⁸²

The necessity of establishing a class of black commercial farmers was increasingly recognised under the leadership of the former Minister of Agriculture, Thoko Didiza, and gave rise to the increases in allowances for the purchase of farmland (the move from the SLAG to the LRAD programme) and attempts to cooperate with financial institutions to support emerging farmers. The challenges in the industry are, however, numerous and emerging farmers thus require support on several levels.

Large capital inputs and high risks

Large capital inputs during the establishment phase of agricultural projects present an important challenge to rural land reform. Beneficiaries need access to considerable credit - especially in the initial stages of projects. In some product groups there are very long waiting periods before returns are produced - with serious implications for interest on loans. The high risks associated with agricultural activities (i.a. as a result of variable weather conditions) place further financial pressures on new entrants who do not possess the necessary capital reserves to support businesses in periods of low profitability. According to predictions in a report by the United Nations' Intergovernmental Panel on Climate Change, the unpredictability, and by implication also the risks, related to weather patterns can be expected to increase as the effect of global warming becomes more visible worldwide.⁸³

Risks associated with global warming

According to Carl Opperman, chief executive of Agri Western-Cape, not enough attention is paid to potential changes in weather patterns due to global warming when land reform projects are initiated in specific regions. The establishment of agricultural businesses with large numbers of dependents in areas which may, in the long term, not be suitable for agricultural activities exposes beneficiaries to serious socio-economic risks. References to the geographical spread of reform projects in current land reform policies is however limited to the expression of the desire to establish black farmers on high quality land in nodes with convenient access to markets - and does not appear to take these future risks into account.

Farming increasingly knowledge driven

Commercial farming is also extremely competitive, and successful farming requires not only knowledge of the cultivation of commodities, but also familiarity with sophisticated management techniques with regard to processing, distribution, marketing, the management of human resources, financial planning etc. The knowledge intensity in the sector is consequently particularly high. Inexperienced participants should accordingly enjoy comprehensive support from the State or via mentorships from existing farmers. However, it is not clear whether the Department of Land Affairs is in a position to provide such support effectively.

Inadequate support to beneficiaries

According to AgriSA, 71 land reform projects in the Limpopo province have already failed.⁸⁴ This organisation sees these numerous failures as the result of inadequate support for emerging farmers. It was also found in a survey of reform projects in the Western Cape that projects were often unsuccessful because the skills of the beneficiaries had not been timeously upgraded to adapt to the changing circumstances in the industry.⁸⁵ In 2005, the University of Pretoria conducted an analysis of the progress with agricultural activities on farms which had been transferred to black emerging farmers through the land reform programme. According to a summary of this analysis in the *Rapport*⁸⁶, they found that:

- production on 44% of the farms had decreased "drastically";
- 42% of these farms only produced a "small marketable surplus";
- 36% of the new owners could not afford the first instalments on their bonds;
- 27% of the farms did not produce anything at that stage; and
- on 24% of the farms there had been no production since the transfer of the farm to the new owners.

A number of reasons were given by the new owners for this apparent inability to manage farms effectively, including: a lack of contracts to supply products, a lack of experience in commercial farming, the absence of mentorships and business plans, multiple managers, a

lack of capital and machinery and conflict between new owners.⁸⁷ Almost half of the new owners (49%) indicated that "a lack of support from the Department of Agriculture" contributed to the failure of their farming activities.⁸⁸

It is thus clear that the current programmes aimed at supporting emerging farmers (including: the "Comprehensive Agricultural Support Programme"/CASP, and financial support from the Landbank and the MAFISA programme which is administered by the Landbank) are not successful in enabling these farmers to establish sustainable agricultural businesses.

Lack of co-operation with established farmers and agricultural organisations

As already mentioned, there is limited capacity in the Department of Land Affairs. Indeed, in a press release in November 2006, the Department admitted that capacity problems, particularly at the provincial level, prevented the effective implementation of land reform programmes.⁸⁹ In the absence of state capacity to support emerging farmers one must look to alternative channels through which such support could be offered. One of these would be to work with existing farmers. Agri SA and the "National African Farmers Union" (NAFU) recently established a trust that is aimed at:

- providing information, advice and support to government programmes that have as their goal the achievement of transformation in agriculture;
- to develop an information system in support of the coordination and promotion of the best practices to support emerging farmers;
- to offer support and a communication channel to transformation projects; and to
- actively promote transformation initiatives through financing.

In AgriSA's annual report about this trust, the organisation commits itself to "co-operation between organised agriculture, agricultural businesses, local authorities and state departments that play a role in establishing farmers and development and financial institutions." AgriSA suggests that these stakeholders should be represented "on one structure, that can be devolved down to local level" that "[can] evaluate, support and monitor land reform projects".⁹⁰

AgriSA supports the concept of local forums. This corresponds with the State's idea of area-based land reform. The organisation also suggests that existing farmers should remain involved in the management of land until land is allocated to black beneficiaries and emphasises the advantages of co-operation between established farmers and new entrants during interim periods – i.a. with regard to limiting disruptions in production pending the eventual transfer of land.

Organised agriculture is also concerned about the politicisation of local bodies responsible for the implementation of land reform initiatives. According to Carl Opperman, co-operation between stakeholders in the agricultural sector is inhibited by the appointment of political loyalists, rather than professional people, on local government level. These people often disregard the importance of practical issues and economic realities in the sustainability of reform projects.

Denial of the agricultural sector's commitment to transformation

Existing commercial farmers are frequently criticised by the State as obstacles to the Government's efforts to transform the agricultural sector, and yet suggestions for co-operation agreements – such as those of AgriSA and NAFU – are ignored. This denial of the commitment of existing farmers and their representative organisations to the transformation of the sector is experienced very negatively, prevents these organisations from working with the Government in good faith, and impedes effective transformation projects such as land reform. Repeated negative statements about white farmers by the new Minister of Agriculture, Lulu Xingwana, have soured the relationship between organised agriculture and the Government.

However, the unique challenges of rural land reform necessitate effective co-operation between *all* stakeholders, and efforts will accordingly have to be made to repair the relationship between the Government and the white commercial farming sector.

Bonuses for help to black farmers

One mechanism through which such co-operation can be promoted, which could have a positive effect on the success of new farming initiatives, is an incentive to white farmers who assist black emerging farmers - as proposed by Dr. Mohammad Karaan.⁹¹ In the current political climate it seems unlikely that such an initiative will enjoy positive consideration.

Report with suggestions from prominent Afrikaners receives no clear reaction from government

The commitment of white South Africans to the achievement of the country's transformation objectives, and specifically the Government's objectives with regard to land reform, was recently illustrated in a land reform project initiated by prominent South African businessmen and academics.ⁱ This group launched a land reform programme in the Northern Freestate (at their own cost) in which they are attempting to avoid the problems generally experienced in land reform projects and to develop a successful "model" for land reform. Experience gained through the project has been compared to the Government's current approach to land reform by Stephan Hobson and Dr Mohammed Karaan. Hobson and Karaan have compiled a report in which the problems in the current approach to land reform are highlighted, and an alternative model for land reform is proposed. One of the most important suggestions arising from the report, is that there should be a stronger focus on creating sustainable businesses - as opposed to the mere transfer of land to black South Africans.⁹² According to this report, many projects are currently failing due to i.a. the low levels of profitability in the agricultural sector, the insufficient scale of projects, the lack of experience from new entrants and the lack of appropriate financing.⁹³ The authors ultimately suggest that the Government should acquire land pro-actively, lease this land to appropriate candidates, and only transfer land once the groups/ individuals involved have demonstrated their commitment to the project, and specific milestones have been reached.⁹⁴ The report was handed to President Thabo Mbeki and the Minister of Agriculture, Lulu Xingwana.

There was no official response from government on this report. In a discussion about the report on the *Cape Talk* radio station the Land Claims Commissioner, Tozi Gwanya, has said that the issue of "justice" is not recognised by Afrikaners, and that a land reform project aimed at the promotion of "justice" and "transformation" cannot follow a business-oriented approach.⁹⁵ Gwanya also rejected the proposal that land should initially be leased to the beneficiaries of reform projects. The only reason given for this rejection, was that "this was not the case for the Afrikaners" who are in their current position of advantage because of "historical support from the State". The logic behind this argument is not clear. The Government's limited reaction to the report, however, once again indicates their unwillingness to accept white South Africans and farmers as partners in the land reform process.

SA's food security currently under pressure

Failed land reform projects also threaten food security in South Africa. Food security in the country is already under pressure. According to Professor Nick Vink, from the Department of Agricultural Economics at the University of Stellenbosch, South Africa may soon be a net importer of food - ten years ago the country exported agricultural products to the value of R2.40 for every R1 imported; compared to current levels of R1.40 of exports for every R1 imported.⁹⁶ The country can therefore not afford the non- or under-utilisation of arable land. A land reform policy in which land is pro-actively acquired by the State and only transferred to black South Africans once potential beneficiaries have been identified could place even more arable land outside the sphere of the commercial agricultural sector.

ⁱ This group includes: Ton Vosloo (chairman of Naspers), Thys du Toit (chief executive officer of Coronation fund managers), GT Ferreira (chairman of Rand Merchant Bank), Hendrik du Toit (Investec), Guiseppa Cucci (Stonehage Group) and the academics, Willie Esterhuyse, Russel Botman and Theuns Eloff.

Lease land to commercial farmers

Where land is viewed primarily as a potential source of income, and black South Africans are not interested in managing the land commercially, Mr Hans van der Merwe, executive director of AgriSA, suggests that land be leased to commercial farmers - who can pay rent or dividends to black owners.⁹⁷ Van der Merwe therefore suggests that the concepts of "ownership" and the cultivation of soil be viewed separately, and that experienced farmers should be allowed to continue managing agricultural businesses. The pressures on food security caused by land reform projects could thus be relieved.

ESTA not effective as mechanism to ensure tenure rights.

Tenure rights, and specifically the implementation of the Extension of Security of Tenure Act (ESTA), is a highly contentious and emotional issue in rural land reform - and one of the key points of contention between the Departments of Agriculture and Land Affairs and organised agriculture. Here it should also be considered whether current policy is suitable for the context in which it is implemented, and if the goals that were set for this legislation are accordingly being realised.

As already mentioned (section 1.5) there are concerns that ESTA and the policy which supports it are not effective in ensuring tenure rights to vulnerable groups, and especially farmworkers. In an analysis of the eviction of farmworkers between 1984 and 2004 it was found that evictions reached a peak i.a. in 1997 - the year in which ESTA was promulgated.⁹⁸ There has also not been any clear reduction in the number of evictions per year since 1997.⁹⁹

There have been diverse reactions to this apparent ineffectiveness of current legislation in ensuring the tenure rights of farmworkers.

Policy not effectively communicated

On the one hand there is a perception that the Department of Land Affairs, the legal system and the police do not have sufficient capacity to ensure that the legislation is effectively implemented.¹⁰⁰ In this instance, specific reference is made to the inability to effectively communicate the legislation to farmworkers - in other words, to inform those affected by the legislation of its existence and of the legal implications of the legislation. In a report presented by the Human Rights Commission to the select committee for agriculture and land affairs in the National Council of Provinces, it was suggested that the majority of persons facing evictions do not know where to get help, and are thus marginalised in legal processes.¹⁰¹ According to this report, 2 out of 3 families that were evicted had a need for assistance, but 75% of these families did not know where to find help. In a case study in Worcester, it was found that in the majority of cases in which eviction applications were granted farmworkers were not present in court and did not have legal representation.¹⁰² In 2001, the Legal Resource Centre won a case in the Land Claims Court in which the right to legal representation for farm workers facing eviction was affirmed. It was found that it is the responsibility of the State to supply such support. There is, however, still no mechanism in place to ensure that such assistance is provided to farmworkers.

Lack of legal support to farmworkers

Other causes of evictions

Agricultural organisations have insisted that the broader socio-economic causes of evictions should be considered in the debate regarding evictions: for example, the years in which evictions have peaked were also years of serious droughts¹⁰³; the number of farmers and farms in South Africa are continuing to decrease - the report on evictions between 1984 and 2004 referred to above has shown that the main reason for evictions during this period has been that farms were sold or got a new owner¹⁰⁴; agricultural activities are increasingly mechanised, which has an impact on the demand for labour on farms; and in the past two decades there has been a general de-population of rural areas as more people move to urban areas in search for better opportunities.

These arguments point to an implicit acceptance of the legislation, but dissatisfaction with regard to the manner in which it has been implemented and (in some cases) disagreement with regard to the limited interpretation of eviction-trends.

Amending ESTA

There are however also community-based organisations that insist that ESTA should be amended because it does not sufficiently protect the interests of farmworkers and their dependents. This grouping demands a moratorium on evictions until the legislation has been amended. It is especially the connection between tenure rights and employment which these organisations find unacceptable, because it places farmworkers in a particularly vulnerable position when their employment contracts are terminated. At the Land Summit in 2005, such a disconnection between employment agreements and tenure rights was one of the proposed amendments to ESTA.¹⁰⁵ AgriSA however indicated at the summit that they will not support legislation pertaining to tenure rights which does not take employment agreements into account.¹⁰⁶

Resistance from AgriSA

In its policy document on land reform AgriSA confirms its opposition to illegal evictions. The organisation however argues that a ban on legal evictions will amount to expropriation without compensation¹⁰⁷ - which would violate section 25(2b) and (3) of the Constitution which requires that "just and equitable" compensation be paid in all instances of expropriation. In the said policy document it is also argued that permanent housing and the long-term security of poor rural communities remain the responsibility of the State, and that it cannot be expected of the agricultural sector to take over these responsibilities.¹⁰⁸ Where the agricultural sector does take over these responsibilities, they suggest that the State should assist them in providing housing of "acceptable quality".¹⁰⁹

It does thus seem as if the key objectives of the laws with regard to tenure are not currently being achieved. A reconsideration of the relevant laws, and possibly a more extensive investigation into the reasons for the ineffectiveness of current legislation in promoting security of tenure is thus justified. Future policy and legislation should also clearly articulate the State's responsibilities with regard to housing of vulnerable rural groups.

Land tax not justified

The Government's reconsideration of a further land tax on farmland must also be considered within the context of the total South African tax regime and contemporary challenges in the agricultural sector. Land taxation was also considered during the transition years in the early 1990's as a mechanism to encourage land reform. The idea was then dropped in the light of limited success with such taxation in other countries, uncertainties regarding the supposition that it would really bring more land to the market, and the fact that such a tax would be virtually unaffordable for an agricultural sector that was already delivering relatively low returns on investments.¹¹⁰ Moreover, a municipal land tax is already being levied by local authorities. A further tax on land would thus be excessive, without any guarantee that it would ultimately promote land reform.

4. A sustainable approach to land reform

In this study, we have tried to provide an overview of the key issues in the complex land reform question in South Africa. Land reform is a central element of the broader socio-economic transformation project and will certainly remain one of the most pressing issues in the South African socio-economic and political landscape in the foreseeable future. It is essential that it should be dealt with in a manner which will promote equity in keeping with the principles of the Constitution. The process must, however, also be fair to all those involved and ensure the continued effective utilisation of scarce farmland.

With this in mind, it is suggested that the following factors be borne in mind when considering the future of land reform in South Africa.

- The Government has to acknowledge the limited capacity of the agricultural sector to serve as a catalyst for socio-economic development.
- There should be a greater focus on urban land reform – where the demand for land and housing is greatest.

- The challenges around collective land tenure in the former homelands have to be addressed, eg. by converting collective land rights into other forms of land ownership.
- A balance between local challenges (eg. support for existing projects) and the pressure to achieve national goals has to be established.
- Given the contemporary challenges in the agricultural sector, the idea of a further tax on farmland should be scrapped.
- The planned limitations on foreign land ownership should be reconsidered in the context of the general policy with regard to foreign participation in the South African economy.
- Sufficient capacity has to be created in the Department of Land Affairs before initiating proactive expropriation of land or giving the State the right of first refusal on agricultural land.
- More decisive efforts should be made to obtain available land on the free market.
- If the right to expropriation is going to be exercised, greater clarity will have to be provided on the manner in which “fair and equitable” compensation will be determined.
- If the State claims the right of first refusal on the sale of all agricultural land, it has to clarify whether it will meet the best offer in the market, or if compensation will be determined in another manner.
- Land reform targets that simply require the transfer of a particular quantity of land to black South Africans – without taking into account other factors that can influence the sustainability of the projects – have to be reconsidered.
- Existing farmers and agricultural organisations have to be accepted as credible partners in the reform process and their proposals for co-operation should be considered in good faith.
- The contributions of the private sector to the distribution of land have to be recognised - a national audit of land ownership may be necessary.
- There has to be clarity regarding the targets of the land reform programme, and questions surrounding (i) the inclusion of the transfer of state land in determining progress towards targets, (ii) the intention to make targets regionally-specific, and (iii) the issue of the finality of the 2014 target have to be answered in a conclusive manner.
- The State has to accept its responsibilities in providing housing to vulnerable communities, and amendments to ESTA must not infringe unfairly on the property rights of landowners in the agricultural sector.

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