



Land Reform in SA: What Is Happening? Should We Care?

1. Introduction

The question of whether land restitution should take place or not is no longer one for discussion or argument. The matter has been settled and most people accept the need to do something about the 'land question'. But what is still a burning issue is how to go about land reform and land restitution; and beyond that is the major question of rural development and food security going into the future. Should government continue paying billions of Rand of tax-payers' money to white land owners to buy back land at market value? Should expropriation be used to take land forcibly? What about just and fair compensation and the constitutional right to property? Which pieces of land should be returned to whom, and at what cost? What about those who are landless but cannot prove dispossession – how do they get access to land? What about the land that has been restored or redistributed but which is lying fallow and unproductive? Finally, what about those who are ignoring all policy and laws and instead are promoting the forcible invasion and occupation of land?

2. Restitution

Land reform policy has been described as being about restitution, tenure reform, and redistribution. Restitution deals with historical claims to land, tenure reform deals with different forms of land holding, and redistribution is about making more land available to previously disadvantaged people. In recent years, government has also started to include development as a major component of its land policy.

- In 1994, approximately 86.2 million hectares of commercial farm land was owned by less than 60 000 white owners.
- By 2005, about 3.5% of this had been transferred to black people through the various official land reform programmes.
- Around 57% of South Africans were living below the income poverty line in 2001, a figure unchanged since 1994.
- Poverty is heavily concentrated in the rural areas – the poorest provinces are Limpopo and Eastern Cape, with 77% and 72% of their populations living below the income poverty line.
- Approximately 16 million people live in the communal areas of the old 'homelands', and between 3 and 5 million live as tenants on commercial farms.¹

According to Rural Development and Land Reform Minister Gugile Nkwinti, from 1994 to the beginning of 2014, the Commission on Restitution of Land Rights settled 77 610 claims. A total of 3.07 million hectares of land, acquired at a cost of R17 billion, as well as R8 billion in financial compensation, was awarded to 1.8 million beneficiaries, coming from 371 140 families (of which 138 456 were female headed families). A further R4.1 billion was given as development assistance to beneficiaries who had been awarded land. Thus, "the total cost of the restitution programme to date is R29, 3 billion".²

Because of complaints that the 31 December 1998 claims cut-off date had left many people unable to lodge claims, The Restitution of Land Rights Amendment Act was introduced to reopen land claims for another five years in order to accommodate those who had failed to submit land

claims in time. This was signed into law by President Jacob Zuma in 30 June 2014. However, in March 2015 the process came under constitutional challenge from LAMOSASA (Land Access Movement of South Africa), the Nkuzi Development Association, and the Association for Rural Development, as well as three communal property associations representing the affected communities of Makuleke, Modderfontein and Popela. In their court papers the applicants argue that “due to the lack of public involvement in the legislative process, and due to the vagueness in the Act regarding the resolution of existing claims, the applicants have asked the Court to declare the Amendment Act unconstitutional and invalid”.³ Two of the major complaints of the applicants are that new claims cannot be opened up before old claims have been finalised; and that the new Act does not deal with the question of new claims that contest claims previously lodged for restitution.

Another question raised by the restitution process has revolved around what right communities have to particular pieces of land. In the *Alexkor (Ltd) and Another v Richtersveld Community and Others* case, the Constitutional Court laid down fundamental principles about who has right to restitution, especially concerning land that was considered *terra nullius* – land which, because it was not immediately occupied or was occupied by a people not considered civilised enough to be owners of land, was considered ‘empty land’ and thus could be taken by the colonial state and others without duty of restitution or compensation. This is important especially in land claims involving Khoi and San communities seeking to establish historical ownership of contested lands, since pre-1913 Land Act disposessions have not been recognised by restitution laws up to now. Indeed, many would argue that this time-limit unfairly discriminates against Khoi and San land claims, and that it needs to be adjusted.

3. Redistribution

In the past months, the EFF (Economic Freedom Fighters) has been embarking on what it terms ‘land occupation programmes’, where communities are encouraged to invade and occupy vacant land, from Gauteng⁴ and KZN⁵ to Cape Town⁶. This has led to various land invasions, court battles, evictions, and often violent confrontations with the police.⁷

These invasions raise serious questions about the resolution of land problems in the country. There seems to be an attitude developing in some quarters that it is acceptable to walk onto any property one wants and take it simply because one is poor and landless. However, either we are a society based on the rule of law or we are not. If people feel that the laws around land are wrong or unjust, then they must advocate for a change in the law, not simply disregard it. If obedience to the law becomes optional, then we are on the path to rule by violence. Copying colonial methods of illegally acquiring land is not a virtue!

Land invasions also give the illusion that solving land problems in South Africa is a simple matter of sticking poor people on vacant land, and that there is no need for making tough choices and really changing land ownership patterns, including the need for planned and integrated land use and spatial planning.

4. Tenure

4.1. Ownership

At the end of 2013, the State Land audit was concluded; it found that the state owned 14% of SA land, while 79% was in private hands, leaving 7% unaccounted for. There is a huge argument about the racial composition of privately owned land, with the various stakeholders arguing about which statistics reflect the truth. Some have argued that about 40 000 white families own 80% of South African land⁸, but such bold assertions are difficult to prove, and Africa Fact Check has found that such assertions are in fact “incorrect and not supported by available data”⁹.

The problem with throwing around unsupported numbers such as these is that people begin to dismiss them as fiction and the impression is created that there is no real problem with ownership issues and that the politicians are exaggerating the problem for the sake of populist votes.

South Africa has a vibrant property market, and over the past 21 years large tracts of land have changed hands in private transactions irrespective of race. Over the years the ANC has been accused of leaving it to the market to address property ownership patterns in general, since the reality is that when it comes to the private residential market, the greatest shift in terms of residential real estate ownership has been

through private transactions. The argument, then, is that the government believes that a similar dynamic will change general land ownership patterns.

A study by LEAP (the Legal Entity Assessment Project) called *Perspectives on Land Tenure Security in Rural and Urban SA*¹⁰ looked at the various types of tenure in South Africa and noted how tenure, especially within the black community and the poor in general, is often complex, multifaceted, and sometimes layered. Because of the complexities of the apartheid and homeland land tenure systems, trying to deal with tenure requires creative solutions. Often the argument is made that the solution to land tenure is to give everyone a title deed, and thus empower the person to use the land as an asset for economic activity. What this argument overlooks are the social and historical consequences of such titling. When a property that has been occupied for generations as a family holding, where everyone has rights of use and occupation, is suddenly given to an individual as legally titled owner, he (or, less likely, she) can then simply lease out or dispose of the property, leaving a whole extended family homeless or destitute. This is even more crucial in rural areas where women depend on the male relatives in whom these rights are often vested. Thus, indiscriminate titling is likely to lead to even further disempowering of women and other vulnerable members of these communities.

Tenure protection for the poor and those who have informal land rights is becoming an issue, especially with the eviction of farm workers increasing. Because many poor people do not have formal tenure, the state often has to resort to extra legislation to deal with those that fall outside of normal tenure protection. In December 2014 Minister Nkwinti extended the Interim Protection of Informal Land Rights Act 31 of 1996, which was to expire on 31 December 2014, for another year.¹¹

This piece of legislation deals, *inter alia*, with 'beneficial occupation', which is defined as "the occupation of land by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner"¹².

Other pieces of legislation that are supposed to look after vulnerable occupiers of land and their ability to acquire land are the Extension of Security of Tenure Act 62 of 1997, (ESTA); the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE); and the *BP 384: Land Reform in SA: What is Happening? Should we Care?*

Land Reform (Labour Tenants) Act 3 of 1996 . These give security of tenure and protection for those who live on other people's property and to various categories of land occupiers who have no other clear legal rights.

These laws, and many others, show that South Africa has a complex set of tenure conditions and challenges, but also that there has been some attempt to deal with these complexities. However, they also show that the policy response has not been systematic, but almost *ad hoc*, and this adds to the complexity and the confusion. And if all this were not enough, there is now a new proposal to give 50% of agricultural land to farmworkers.

4.2. 50/50 ownership

One of the more controversial policy proposals that government has come up with is entitled 'Strengthening the Relative Rights of People Working the Land'. The idea is that farmers should cede ownership of 50% of their land to certain categories of farmworkers who live on the farm. There have been accusations that farmers are evicting farm workers in large numbers in an attempt to minimise the impact of this proposal. In 2014 the policy was released as a proposal for discussion, and then in 2015, in his State of the Nation Address, President Zuma announced that government would conduct pilot projects on 50 farms by 2019. Thus, it seems that the matter of whether this is a good idea or not is no longer up for discussion, but rather how the policy will be implemented. Whether the policy is open to challenge in the courts, only time will tell.

4.3. Foreign ownership

Also during this year's State of the Nation address, President announced that foreign acquisition of land will be limited to leasehold, and that the Regulation of Land Holdings Bill will regulate foreign ownership of mainly agricultural land. This comes out of a concern that the country might lose control over food security. It is also, it seems, a reaction to a political sentiment that accuses foreigners of buying up large tracts of land and housing, pushing up prices, and making property unaffordable to locals.

The phenomenon of foreign land ownership in Africa is becoming a point of serious conflict and contention, with political concerns about foreign ownership of land in general and about the acquisition of African agricultural land by foreign companies and governments trying to protect

their own food security. Expressions such as 'land grab' and 'a new scramble for Africa'¹³ express the kinds of worries that lie behind such policies around foreign ownership. However, as seen in other countries, just because ownership by foreigners is limited does not mean that long-term leaseholds of millions of hectares of land is not possible. For instance, the South Korean company Daewoo sought a 99 year lease of a million hectares of land in Madagascar to produce food for South Korea. Madagascar is an interesting case because, up until 2004, the law forbade the sale of land to foreigners; then President Ravalomanana changed it and foreigners could buy or lease land¹⁴. When in 2009 he signed the Daewoo land deal, it produced such a backlash that it contributed to his ousting as president soon after.¹⁵

Thus, even if South Africa stopped foreign ownership but provided for foreign leasehold, it would still not fully address foreign control of land. Even less would it ensure South African food security. Domestic food security depends on domestic food production across all agricultural land, irrespective who owns it at any point in time, whether for export or for domestic consumption. What government should be asking is not so much who owns land, but who controls it and who controls what that land is used for and how it contributes to the wellbeing and development of the country.

However, the question of ownership cannot be ignored simply because of the need for food security. The question of the politics of foreign land ownership has electoral implications as the experience of President Ravalomanana shows. Politicians' failure to heed domestic voters' sentiments can have negative electoral or political consequences. Be that as it may, the problem of land in South Africa cannot be blamed simply on foreigners owning land but on the racially skewed ownership patterns within the country itself. In any event, since there has not been an audit of private land ownership, it is not possible to determine how much land is actually in foreign hands.

It is also worth noting that the Minister has proposed restrictions even on domestic ownership of land. For both natural and juristic persons, these are:

- a) for a viable commercial small-scale farm, 1 000ha;

- b) for a medium-scale viable commercial farm, 2 500ha; and,
- c) for a large-scale viable commercial farm, 5 000ha.¹⁶

Any land in excess of these limits would be expropriated. This means those with 'excess' land would lose it, while the rest of society would face a ballooning bill to pay compensation for all this land. It is doubtful whether the country could afford it, and even if it could, there is another, more serious problem with these proposals: many of South Africa's key agricultural sectors, especially maize, wheat and cattle, are not commercially viable on farms as small as 5 000ha. To impose a blanket restriction of this kind would pose a far greater risk to domestic food security than foreign land ownership currently does. On the face of it, it might seem like a good idea that foreign land ownership be scrutinised for its effects on food security for the country, but simply banning foreign land ownership does not in itself ensure food security, nor does it ensure just land access to the previously dispossessed.

8. Conclusion

It is clear that the challenges of resolving land issues in South Africa are enormous. It is also clear that the solutions themselves are often creative, but also introduce their own complexities. What is still unclear is whether all these proposals will resolve the issues or simply precipitate other crises which will have to be sorted out by the Land Claims Court and the Constitutional Court. Irrespective of whether one agrees with the various policies and proposals or not, one thing is clear: South Africa's people need to know what is going on with land reform; what policies are in place; what is being done to improve implementation of these policies; and what the new proposals really entail for food security, ownership rights, and just access to land for the dispossessed.

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¹ Human Sciences Research Council, 2004, and R. Hall, 2004

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CC0QFjAC&url=http%3A%2F%2Fcommunitylawcentre.org.za%2Fprojects%2Fsocio-economic-rights%2FResearch%2520and%2520Publications%2FResource%2520Book%2FChapter%25206%2520-%2520Land%2520Rights.pdf%2Fdownload&ei=zyBwVcq1N66t7Aa1xIPwAw&usg=AFQjCNHMoJpW6cQeBJHpRFYS-HOdLaGkIg&sig2=bOh0kyBSRDvb7W3avD4Ykw&bvm=bv.94911696,d.ZGU>

² Commission on Restitution Land Rights, 2013/2014 Annual Report.

<http://www.ruraldevelopment.gov.za/publications/annual-report/category/249-commission-on-restitution-of-land-rights>

³ <http://www.lrc.org.za/press-releases/3425-press-release-challenge-to-the-restitution-act-going-to-the-constitutional-court>

⁴ <http://www.timeslive.co.za/politics/2015/01/21/eff-land-invasions-disrupt-housing-plans-undermine-the-poor-tshwane>

⁵ <http://northcoastcourier.co.za/35945/eff-land-invasion-at-ballito/>

⁶ <http://ewn.co.za/2015/04/21/Khayelitsha-illegal-land-grabs-case-to-be-heard-in-court>

⁷ <http://mg.co.za/article/2015-01-18-eff-forges-on-with-the-invasion-of-unoccupied-land/>

⁸ <http://www.politicsweb.co.za/documents/taking-back-our-stolen-land--eff>

⁹ <http://africacheck.org/reports/do-40000-whites-own-80-of-sa-the-claim-is-incorrect/>

¹⁰ Perspectives on Land Tenure Security in Rural and Urban SA. An analysis of the tenure context and a problem statement for Leap. <http://www.mdukatshani.com/leap-home.php>

¹¹ Interim Protection of Informal Land Rights Act 31 of 1996

http://www.gov.za/sites/www.gov.za/files/38290_gon1007.pdf

¹² Interim Protection of Informal Land Rights Act 31 of 1996

<http://www.ruraldevelopment.gov.za/phocadownload/Acts/interim%20protection%20of%20informal%20land%20Rights%20act%2031%20of%201996.pdf>

¹³ <http://www.theguardian.com/environment/2008/nov/22/food-biofuels-land-grab> accessed 20 May 2015

¹⁴ <http://www.globalpropertyguide.com/Africa/Madagascar>

¹⁵ It is important to note that President Ravalomanana was overthrown in a coup and thus it is difficult to ascertain if this land deal would have led to an electoral loss. It did however lead to serious political disaffection that fed the justification for the subsequent coup.

¹⁶ Minister Nkwinti, Budget Vote 08 May 2015.

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