

**Land and Agrarian Reform in South
Africa:**

Naefa Kahn

Policy: issues & actors

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Land and Agrarian Reform in South Africa:

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List of Acronyms

AIAS	African Institute for Agrarian Studies
CTDT	Community Technology Development Trust
DALRI	Development of Appropriate Agrarian and Land Reform Initiative for the SADC Region
SADC	Southern African Development Community
GDP	Gross Domestic Product
TAU	Transvaal Agricultural Union
SLAG	Settlement Land Acquisition Grant
LRAD	Land Redistribution for Agricultural Development
ANC	African National Congress

1. INTRODUCTION

1.1 Background to the Project

This report forms part of a broader research agenda seeking to address the problems of land and agrarian reform in the Southern African Development Community (SADC) region. The Support to Land and Agrarian Reform Project seeks to achieve the following objectives:

- Address the colonial imbalances currently existing in land ownership;
- Review the customary laws governing land ownership and distribution and improve access by the landless;
- Advocate pro-poor land policies with a thrust towards poverty reduction;
- Facilitate the establishment of institutional frameworks that are supportive of people centred land and agrarian reforms;
- Scaling up and replication throughout the region of best practices and approaches employed by different countries implementing agrarian and land reforms.

In order to achieve these objectives, the first step is a report on the current state of land and agrarian reform in the respective countries taking part in the study. In the case of South Africa, as with many of the other countries, the task is a substantial one. In South Africa, as shall be demonstrated, land reform is essentially taking place in three spheres, namely redistribution, restitution and land tenure, and each has its own set of concerns and dynamics. The Herculean task of dealing with all aspects of land and agrarian reform means that the report touches on some issues and where there are repetitive concerns elaborates on those.

The Southern African region is obviously not a homogenous one and, consequently, it is ill advised to fall into the trap of finding a one-size-fits-all solution to the land and agrarian problem of the area; but every attempt should be made, as the objectives of the Support to Land and Agrarian Reform Project stipulate, to learn from the successes of land and agrarian reform in the region to ensure that land reform fulfils another objective of this study, the alleviation of poverty.

1.2 Methodology

This study is essentially a review and analysis of existing literature on the subject of land and agrarian reform. Since land is a political and emotive issue in the South African context, much has been written on the subject. As a result of the various perspectives on the state of land reform in South Africa, governmental as well as non governmental and civil society reports on the land issue have been examined. Information has been extrapolated from these

and some academic sources in an attempt to provide a balanced appraisal of the situation. Interviews have also been conducted to gain further insight into the land reform process.

1.3 The South African Landscape

South Africa is one of the largest countries in Africa, with a surface area of 1.22 million sq km. The population is approximately 46.9 million. South Africa has the largest economy in Africa, with a gross domestic product (GDP) per capita of US\$ 3 530. The difference between this and many other African countries is marked. Moreover, the GDP per capita figure is “more than four times the African average.”

Agriculture is not a significant contributor to GDP. In fact, it accounts for less than 4 percent of the total. It is, nonetheless, a major employer, accounting for nearly 10 percent of employment.¹ In the past South Africa’s economy was dominated by mining and agriculture. However currently manufacturing and financial services are contributing a larger share to GDP.²

2. THE LAND AND AGRARIAN CONTEXT

2.1 Historical Evolution

Awaking on Friday morning, June 20, 1913, the South African Native found himself, not actually a slave, but a pariah in the land of his birth. (Plaatjie, 1916: 21)³

The history of land dispossession in South Africa is a harrowing one. Although legislation had been implemented earlier diminishing the ownership rights of black people, the most significant denial of rights came with the enactment of the Native’s Land Act of 1913. The Act sought to provide 7 percent of the land to black people as reserves, from which labour for mines and urban work could be drawn. It also prevented black people from renting land independently or owning land on farms or anywhere outside the reserves. Black people were only allowed to stay on farms as wage labourers or labour tenants. As a result of the tenancy

¹ Organisation for Economic Cooperation and Development. *Review of Agricultural Policies - South Africa*. 19 April 2006. [Online]. Available: http://www.oecd.org/document/31/0,2340,en_2649_201185_36482847_1_1_1_1,00.html

² Economist Intelligence Unit. *Economic Structure: South Africa*. 14 April 2004. [Online]. Available: www.economist.com/countries/SouthAfrica/profile.cfm?folder=Profile-Economic%

³ SA History. *A Land Dispossession History*. [Online]. Available: <http://www.sahistory.org>

provision, many more black people were forced onto the already overcrowded reserves. Consequently, the sections dealing with tenancy were suspended until more reserve land could be found. In later years, additional acts were implemented, further eroding the rights to land of black people. After WWII, it is estimated that a further 3.5 million black people were dispossessed of land and resettled on the reserves. (Thwala, 2003) This eventually led to 80 percent of South Africa's population living on 13 percent of the land. (Mbeki, 2003).

It is estimated that, by 1918, black people in the reserves were only able to produce 45 percent of what they required to survive. Forty years earlier they had been able to produce enough for subsistence living and to sell at markets. As the years progressed, productivity in the reserves fell by another 20 percent as further restrictive legislation was implemented (Bradstock, 2004: 8). A thriving agricultural way of living had been systematically destroyed.

2.2 Impact on the Country's Overall Development

In the years that followed land dispossession, black people were reduced to working on the mines and as domestic workers in the cities. This led to the establishment of informal settlements to house the influx of people seeking any form of livelihood in the cities. South Africa's land dispossession, therefore, not only produced a rural land problem, but also an urban one. Although not the focus of this report, it is important to remember that South Africa's urban land problem is a direct result of racist land policies, which sought to create a labour market for the mines and to take women away from their families to work as domestic workers in the cities. On the farms, black people were often left to the mercy of the farmers. Most farm workers were not paid and the infamous 'dop' system further broke down established community social structures.

As a result of a history of dispossession, 82 million hectares of land was owned by 60 000 white farm divisions (Levin and Weiner, 2003: 39). As the end of apartheid dawned, the poverty in the homelands was at its zenith. It is estimated that 13 million people lived in these homelands in poor living conditions. Infant mortality was high and illiteracy was the norm (Wilson and Ramphele, 2003: 39). The apartheid government had successfully crippled a people. With the end of apartheid, it was clear that the injustices of the past needed to be rectified. The importance of land is illustrated by the fact that provision for such rectification was included in the interim constitution (Roux, 2004: 518). Redress in terms of land was, therefore, a given; the concern was how to balance redress with reconciliation and economic sustainability.

2.3 Democracy and the Constitution

The inclusion of a clause protecting property rights in the Constitution was something of a feat. Most Commonwealth countries do not have a property clause in their constitutions and, in India, an existing property provision was removed (University of Southern California Law Department: 15). As a result of the socially destructive and economically devastating effects of a racist land policy, there was significant resistance to the inclusion of a property clause. Academics from the University of the Western Cape stated that:

We think that there should be no property clause in a South African Bill of Rights...[E]nshrining property rights in the Constitution will finally render legitimate the unjust distribution of land which is the result of the process of dispossession commenced by colonization and continued under apartheid (University of Southern California Law Department: 15).

Despite considerable protest, a property clause was included in the South African Constitution Act 108 of 1996. However, the provision was formulated to ensure that both the propertied, and the landless and vulnerable and those dispossessed of their property were able to benefit from its inclusion. The final product evidences an attempt to ensure redress as well as allaying the fears of private property owners. The section reads as follows.

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application-
 - (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.
- (3) The amount of 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;
 - (d) the extent of direct state investment and subsidy of the acquisition and beneficial capital improvement of the property; and

- (e) the purpose of the expropriation.
- (4) For purposes of this section-
- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions, which enable citizens to gain access to land on an equitable basis.
- (6) A person or 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.
- (7) A person or 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.
- (8) No provision of this section may impeded the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from provisions of this section is in accordance with the provisions of section 36(1).
- (9) Parliament must enact the legislation referred to in subsection (6).⁴

Clearly the constitution was a compromise and the South African government has adopted a cautious approach to land reform by including a constitutional protection of private property and then limiting that right.

2.4 The Three Pillars of Land Reform

There are three pillars of land reform stipulated in the Constitution:

- 1 Land Redistribution seeks to provide the landless with productive land and residential land. The government is providing grants to enable the poor to purchase land. According to the Chief Land Claims Commissioner, land redistribution seeks to

⁴ Section 25 of the South African Constitution Act 108 of 1996.

provide land for “urban and rural very poor, labour tenants, farm workers as well as new entrants to agriculture.”⁵

- 2 Land Restitution seeks to return what has wrongfully been taken. This is being achieved through restitution of the land or financial compensation. Restitution covers forced removals, which took place after 1913.⁶
- 3 Land Tenure recognises communal land and also seeks to protect the rights of tenants on predominately white owned farms (Thwala, 2003).

The challenge in the South African context is to ensure that that these three pillars are successfully achieved. Success can be construed in many ways but, in terms of land and the alleviation of poverty which land redistribution forms an aspect of, successful land reform should mean better livelihoods for those who receive land.

2.5 The Institutional Framework

The emotive, political, economic and social aspects of land have meant that there are numerous stakeholders vying for attention. As land reform is an attempt to redress the wrongs of the past and to provide “equitable and sustainable land dispensation that promotes social and economic development”⁷ those who have the largest livelihood stake in the process should be viewed as the most important stakeholders. Yet, it is because of poor resources that the majority of people who have the most at stake in the process remain voiceless. Certain civil society organisations, such as the National Land Committee and the Landless People’s Movement have sought to provide a forum and voice for the landless and vulnerable. Although there are often concerns about whose voice is eventually represented - as with all organisations, it is nonetheless imperative to incorporate these civil society organisations’ views into any strategic planning around land since their members are often the people most directly affected by policy decisions.

The following are the more visible stakeholders in the land reform process.

2.5.1 The Legal Resources Centre

The Legal Resources Centre has been a significant player in the land reform process, often representing indigent communities in their restitution claims. The Richtersveld community claim had been fought by the Centre at no cost to the community for over nine years. The

5 Commission on Restitution of Land Rights. Achievements and Challenges.

6 Section 2 of the Restitution of Land Rights Act, No.22 of 1994 as amended.

7 Department of Land Affairs. Mission.

Centre has also been at the forefront of the fight to stop forced removals (Camay and Gordon, 2000: 5-6).

2.5.2 The National Land Committee

The National Land Committee has defended land rights for over two decades. The organisation is the reincarnation of the National Committee Against Removals, formed in 1984, which fought racist land legislation (Sibanda, 2001: 7). In 1991, the organisation renamed itself the National Land Committee and focused on three objectives,

...investigating and influencing the formulation of a just land reform policy in SA; establishing and extending land rights and related development resources to communities excluded and dispossessed as a result of apartheid policies; and assisting in building community organisations within and across communities so that land rights can be enforced and defended (Camay and Gordon, 2000: 6).

The National Land Committee and its affiliates continue to strive for these objectives.

2.5.3 The Transvaal Agricultural Union

The Transvaal Agricultural Union (TAU) was generously subsidised by the South African government under apartheid. During the 1980s and 1990s the union was a hotbed for the recruitment of right wing activists. In Mphumalanga, a new union was established known as the Mphumalanga Agricultural Union. However, members of the TAU have refused to join the new organisation because it admits black members. The TAU has further tried to block land restitution and has not cooperated with the land reform process (Schönteich and Steinberg, 2000).

2.5.4 The Land Bank

The Land Bank was formed in 1912 to aid white agricultural production. Over the past decade this has obviously changed. Today, the Bank provides various services for farm development to predominately black farmers. A significant percentage of the Bank's clientele would not normally receive funding from ordinary commercial banks. The Bank has not forsaken its white clientele and, although this has drawn criticism, the Bank argues that its needs to maintain these relationships in order to remain commercially viable (Sibanda, 2001: 8).

2.5.5 Agri-SA

Agri-SA is the new name of the South African Agricultural Union. The union was initially resistant to land reform, but recently it has been working, in a limited capacity, with the process. It has illustrated a willingness to cooperate in those aspects of reform, such as the Land Redistribution for Agricultural Development programme which falls into the commercially friendly category, as shall be demonstrated below. The organisation is, however, still strongly opposed to secure tenure on commercial farms. In essence Agri-SA is the organisation most determinately working in the interest of the private sector (Hall and Moyo, unpublished: 4).

2.5.5 The Landless People's Movement

The Landless People's Movement was established in 2001. The organisation incorporates and deals with farm workers, labour tenants, and the unemployed in urban and peri-urban areas. The members seek faster land reform, an end to the willing buyer-willing seller formula and, most importantly, land reform that solves the problem of joblessness and food scarcity (Hall, unpublished document: 14; Hall and Moyo, unpublished document: 13).

Clearly there are competing interests at play and the government is placed in a precarious position of trying to balance these competing forces. The forces are not only domestic, but also international and this creates added political pressures. However, as shall be demonstrated later, the government and the Landless People's Movement appear, on the face of it, to be in agreement with a land and agrarian policy which, if implemented correctly, could help with the dual dilemmas of poverty alleviation and food scarcity.

3. KEY LAND AND POLICY ISSUES

The leading issues in land policy are redistribution of land, the imperatives of restitution, and land tenure, administration and planning. These are discussed in detail below.

3.1 Land Redistribution

3.1.1 Land Redistribution for Agricultural Development

The approach to land redistribution has metamorphosed over the years. The first method adopted was the provision of a specified amount to purchase land. This was known as the Settlement Land Acquisition Grant (SLAG). Each household would receive R 16 000 with which to buy land. The idea behind the scheme was that households would combine their grants and buy land. This did, in fact, happen. However, the actual result was 500 families living on a small piece of land with insufficient individual household land to enable even basic subsistence farming (Lyne and Darroch , 2003: 8). Furthermore, as will be discussed in more depth later in this report, post settlement support was often insufficient and not sustained (Aliber, 2003). As a result of the poor performance of the previous programme, a new programme was developed. The new programme is known as the Land Redistribution for Agricultural Development (LRAD) programme and came into being in 2000/01. The most significant departure from the previous programme is that there is no longer an indigent requirement to receive the grant. Anyone can qualify for the minimum amount of R 20 000 and the more money one are able to raise on their own, the larger the grant. Someone who is able to raise R 400 000 will receive a grant of R 100 000 (maximum grant claim) (Lyne and Darroch , 2003: 4). A further significant difference between SLAG and LRAD is that the former provided grants per household, while the latter provides grants per individual. The new initiative was World Bank driven (Aliber, 2003). As Lyne and Darroch note, this means a “distinct shift in the South African government’s land redistribution policy away from poverty alleviation and group settlement, in favour of settling prospective farmers on their own farms” (Lyne and Darroch , 2003: 4-5). Similarly, Tilly maintains that the government has decided to invest in the smaller and wealthier emerging black farmers who are economically more viable and present a picture, although distorted, of transformation in the agricultural sector. Subsistence farming, the backbone of most black rural people is, Bond avers “...not seen as having any potential for economic growth, particularly in what are, for government, the key areas of export earnings, taxable revenue and formal job creation” (Bond et al, 2003: 40).

3.1.2 Willing Buyer-Willing Seller

Besides the policy shift favouring a black emerging farming class, the most often voiced hurdle to land redistribution is that of the willing buyer-willing seller model. The reason often given for adopting the market-based approach is to ensure efficiency is maintained and increased in the agricultural sector, and to ensure ‘investor confidence’ (Thwala, 2003). However, Edward Lahiff maintains that:

In line with its neo-liberal macroeconomic policy, the approach of the ANC-led government to land reform has been based on the use of free market mechanisms, tightly controlled public spending and minimal intervention in the economy - the so-called market-based, demand-led approach. To date, this has made little impact on the racially skewed distribution of land in South Africa (Lahiff, 2003: 36).

Although, recently, there has been talk of forsaking the willing buyer-willing seller formula, this has only been done in the context of restitution. Many social movements have argued that the willing buyer-willing seller formula has been the cause of the snail's pace of redistribution.⁸ The aim is to have 30 percent of agricultural land redistributed by 2014. Initially it was 30 percent over five years (Bond, 2005) but, currently, only 3.1 million hectares of land has been redistributed. This is only 3 percent of agricultural land.⁹

3.2 Land Restitution

3.2.1 Problems Raised by the Commission

Land restitution claims are governed by the Restitution of Land Rights Act 22 of 1994 as amended (Restitution Act). The Restitution Act established the Land Claims Court and the Commission to deal with restitution claims.¹⁰ Over the past few years, restitution claims have moved faster than they have in the past. It is estimated that over 62 000 out of 79 000 claims have been settled. The deadline for finalisation of all claims has been extended to 2008.¹¹

A report prepared by the Chief Land Claims Commissioner, Tozi Gwanya sets out the difficulties the Commission has encountered in dealing with restitution claims. Of specific concern are rural claims. As a result of apartheid engineered Bantu education, most of the claimants have difficulty understanding the restitution procedure. This further hinders the process of determining the accuracy of the claim in terms of family trees. Furthermore, most land in the former homelands was not registered or surveyed, which means that title to the land is difficult to establish and the size and place of the claimant's land nearly impossible to discern. Then there are the inevitable infrastructural concerns in these areas. For instance, a whole day may be spent driving in order to find the claimants since there are few tarred roads in many of these rural areas, especially the former homelands. Establishing contact with the claimants in order to arrange community meetings is an arduous process since, in many cases, the claimants have no access to telephones.

⁸ Organisations such as the Landless People's Movement and National Land Committee.

⁹ ANC Today. *Striving to Ensure the Land is Shared Among Those Who Work it.*

¹⁰ Commission on Restitution of Land Rights. *Achievements and Challenges.*

¹¹ ANC Today. op cit.

With regard to land prices, the report contends that the willing buyer-willing seller formula has resulted in numerous stalemates and problems. Farmers are asking unreasonably high prices per hectare. The average price per hectare is between R 1 000 and R 4 000 but some farmers are asking as much as R 23 000 per hectare. Moreover, the presence of the Transvaal Agricultural Union, whose main aim is to resist restitution claims, does not engender a cooperative environment. (Mbeki, 2001)

Another concern is that pecuniary compensation is more tempting since money will alleviate financial worries immediately. Therefore, especially in the urban areas, financial compensation is often chosen. The Commission has stressed that they would prefer the claimants to select the land for the following reasons:

- Land appreciates in value;
- Land is a factor of production, which is critical for any economic development;
- Land can be passed on from generation to generation (heritage); and
- Land marks the dignity of a nation.¹²

In terms of development, the Commission is also concerned that there is no follow up support for those who have been awarded restitution claims of agricultural land. Post settlement support would include developing skills in beneficiaries such as “technical skills, business skills, organisational skills, development planning skills and financial skills.”¹³

The problems as described by the Commission illustrate the difficulties inherent in restitution claims. Although there has been a dramatic increase in the number of claims settled over the past three to four years, many problems are still evident.

3.2.2 Government Intervention

Recent events, however, have indicated that some problems may soon be remedied. There is a move afoot to do away with the willing buyer-willing seller formula in respect of restitution. In his State of the Nation address for 2006, President Thabo Mbeki stated that the willing buyer-willing seller aspect of restitution would have to be reassessed if restitution claims are to be dealt with swiftly. This is a view supported by Tozi Gwanya who maintains that the willing buyer-willing seller formula has slowed down the restitution process.¹⁴ Andrew Maphiri Mphela, Commissioner for the North-West and Gauteng regions agrees. He

¹² Commission on Restitution of Land Rights. op cit.

¹³ Ibid.

¹⁴ Tozi Gwanya, Chief Land Claims Commissioner on After Eight Debate. SAFM. 13 February, 2006.

further asserts that, where a farmer is willing to sell, the land is often not productive land and this does not assist the beneficiaries.¹⁵ However, for Professor Ben Cousins, the willing buyer-willing seller formula is not the most significant problem. He maintains that post settlement support is the real concern. Furthermore, the process of delivering on the claim often slows down drastically when the claim reaches national level. This may be as a result of bureaucratic inefficiency.¹⁶ Although Mphela does not believe the department lacks capacity, Cousins and people within the department, argue differently. The fact that the Commission's mandate terminates at the end of 2008, by which time all claims are supposed to be settled, effectively means that people working within the department on restitution will be unemployed. Under these circumstances it is easy to understand the high staff turnover rate. This further exacerbates the problem of post settlement support since the Commission will not be there to ensure that restitution claimants are successful after handover.¹⁷

3.2.3 Post-Settlement Support

Simply restoring ownership of the land without additional support, financial and technical is meaningless. An example of a potentially successful claim in the Northern Cape is that of the Riemvasmaak community. In 1994 the government proclaimed that the Riemvasmaak community could have its land back. In 1995 the 2 340 community members received 74 000 hectares of land which had previously been utilised by the then South African Defence Force. The local municipality has been instrumental in providing basic services for the community, including sinking three boreholes which to ensure sufficient water supply. Unfortunately, members of the community have used the water for their livestock and, as a result, there is not enough water to service all household needs. Despite the water problems, further progress has been made. The municipality has ensured that the community receives electricity and has elicited the aid of the Department of Transport and Public Works to develop roads. There is also a drive to develop community projects such as wine farming and tourism (Samaai, 2005; 3-6). Moreover, the Department of Environmental Affairs and Tourism has provided the community with R 3.5 million to develop its tourism industry and to ensure successful nature conservation. The Department has contracted a consultant to help with these matters. It should be emphasised that unemployment in the community is high, at 95. The initiatives mentioned above will provide some members of the community with employment, but fulltime employment will be limited to a few (Samaai, 2005; 17-18).

Unfortunately, post settlement support such as that of the Riemvasmaak community is not the norm and, even in this case, proposed development initiatives may only help a small

¹⁵ Andrew Maphiri Mphela Commissioner for the North -West and Gauteng on After Eight Debate. SAFM. 13 February, 2006.

¹⁶ Ben Cousins, Programme for Land and Agrarian Studies on After Eight Debate. SAFM. 13 February, 2006.

¹⁷ Ibid

percentage of the community. A four-year research programme undertaken by FARM-Africa indicated that most communities who have received land in the Northern Cape are still living in poverty. Agricultural production is insufficient to sustain families and most rely on pensions or other types of grants to survive. The researcher on the project, Alastair Bradstock, maintained that "...the majority of households had been unable to integrate the land to any significant degree into their livelihoods and its [land reform] impact on poverty reduction had therefore been minimal" (Bradstock, 2004: 15).

3.2.4 Financial and Emotional Costs

The South African government is funding the land reform programme from its own state funds. By the beginning of 2003, the Land Commission had spent R 1.8 billion on "land acquisition, financial compensation and development grants". For the years 2003/04 the Commission was provided with a budget of R 800 million of which R 701 million was set aside for settlement claims only. The Commission deemed this amount insufficient.¹⁸ For the 2004/05 year the budget was R 1.6 billion. In 2005 Trevor Manuel, in his budget speech, allocated R 6 billion to restitution claims for the next three years (Mzwandile, 2005). This amount is still considered insufficient and the fact that the budget allocation for land reform is only 1 percent of the national budget indicates that, financially, land reform is not being prioritised (Cousins, 2005: 4).

Restitution also has an added dimension that cannot be quantified or dismissed - it is extremely emotive. In many cases, the state is purchasing land simply taken and for exorbitant amounts. The restitution claim of the Mdluli land is indicative of the problem. The land belonged to the Mdluli people and the Hall family asked if they could work some of the land to provide food for the mine and railway workers. As legislation began to restrict ownership of land by black people, so ownership rights were divested from the Mdluli people and transferred into the hands of the Hall family. The Mdluli people stayed on the farm but their status changed from owners to workers on the farm. In 2004 the state bought 6 000 ha of land from HL Hall and Sons at a cost of R 71 million. Two thousand members of the Mdluli family will benefit from the acquisition (Tau, 2004). Seventy one million rand was the cost of the land only and does not cover any post settlement investment to ensure that the beneficiaries are able to live productively off the land.

Cases such as the Mdluli family's are numerous. Another case which is important, not only as an illustration of the emotive justice dimension, but also for post settlement issues, is the Richtersveld case. The Richtersveld Community was dispossessed of its land officially when diamonds were found in the area. A vast region of about 85 000 ha, where the Community's descendants had farmed pastorally was simply taken away from them. The tales of tribulations were heard in the Constitutional Court. Oom Gert Domnoch, in an

¹⁸ Commission on Restitution of Land Rights. *Achievements and Challenges*.

emotional account and speaking through a translator, spoke of a heart sore as a result of the callous act.

The Community was excluded. You could not enter that land. The old people saw the erection of the fence as the end of the existence of the Community....This dispossession, this denudation meant our human dignity was taken away - we were stripped of everything... (Maclennan²⁰⁰⁵).

From then on, the community was forced to work on the mines and the women as kitchen staff and domestic workers in Port Nolloth and Alexandria Bay. The hardship caused and denigration of human rights of people in this community is palpable in the words and eyes of senior members of this community, such as Gert Domroch and Marien Farmer. As with all communities forced to relocate to the outskirts of nothingness, with no real prospect of advancing themselves or the lives of their children, alcoholism and drugs are rife. The cycle is destined to perpetuate itself if nothing is done to uplift the community.

The community leaders have, time and time again, stressed that the money they will receive as compensation will be used for development of the community. Development would be as basic as building a tar road into Kuboes, a remote town of a few hundred residents, which forms part of the Richtersveld.¹⁹

Unless support is provided for development of the land, unemployment, drug and alcohol abuse will always remain the most significant characteristic of this community. It is clear that simple restitution is insufficient; more resources should be invested in post settlement grants. Land reform cannot transform lives productively without proper post settlement support. Andile Mngxitama of the Landless People's Movement maintains that nothing less than half the value of the amount required to purchase the land should be provided for post settlement support.²⁰

3.2.5 Legal Principles

Finally, restitution has not only tried the skills, patience, commitment to change and budgetary skills of stakeholders, the process has also seen the development of legal principles which will have a significant impact on the legal field and the status of indigenous laws in South Africa.

In 2003, the Constitutional Court handed down a judgement, which was heralded as a groundbreaking decision for the poor and dispossessed. It had taken nearly seven years for a court to pronounce unequivocally that the Richtersveld Community was entitled to restitution for its land, including its minerals and precious stones. Importantly, the court

¹⁹ Interview with Kuboes resident, 15 October 2005.

²⁰ Interview with Andile Mngxitama of the Landless People's Movement, 25 February, 2006.

stated that indigenous land ownership had equal status in law to that of common law land ownership. The significance of this ruling cannot be overemphasised. A colonial and apartheid history had led to the almost intrinsic supposition that western law is superior to indigenous law. Colonialism denigrated indigenous legal systems and this is clearly seen in representations of the law and the inferior status accorded indigenous law. If an indigenous law was considered “repugnant” it was simply excluded from formal law and, even where ‘native’ courts were allowed, the law was European-ised in attempts to civilise the indigenous legal system (Roberts and Mann, 1991).

The Constitutional Court in the Richtersveld case articulated a view that needs to infiltrate our application and study of the law. The court held that:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution...the Constitution acknowledges the originality and distinctiveness of the indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in light of its values...In the result, indigenous law feeds into, nourishes, fuses with and becomes part of an amalgam of South African law.²¹

Although our highest court may have accorded indigenous law equal status to that of common law, legal discourse is still tied into a staid notion of western law and there still exists a conceptual barrier to using indigenous systems in order to strengthen and support the existing legal system. It will probably take more than a Constitutional Court ruling to eliminate years of indoctrinated slanted views of indigenous law. A legal culture needs to develop which supports, encourages and evidences the richness of placing indigenous law on equal footing with common law.

3.3 Land Tenure

3.3.1 Communal Land

In terms of land tenure, one of the greatest concerns is communally held land. Approximately a third of South Africa’s population of 43 million lives in the former homelands, which comprise 13 percent of the land (Kariuki, 2004: 5). Most of this land is communally held.

The history of apartheid and its affect on communities plays a pivotal role in trying to understand the protracted negotiation process that has seen the fraught and possibly,

²¹ Alexxkor Ltd and Another v The Richtersveld Community and Others, Constitutional Court case 19/03, 14 October 2003.

unconstitutional formation of the Communal Land Rights Act 11 of 2004 (Communal Land Act). An integral part of this contentious issue is whether communal ownership should, in fact, exist.

Communal ownership is considered the dominant form of ownership in an African context. In African societies, all members of the community have rights in the land, but with these rights come obligations. The rights that families or individuals have vary depending on the social structure of the particular society. Rights and obligations, therefore, differ depending on the position held within the social arrangement. Essentially what exists is a symbiotic relationship which, when devoid of power machinations, benefits society as a whole (Cousins, 2002: 2-3).

This form of ownership is contrary to the western titling model. Titling works on the notion of private ownership, absolute rights and defined boundaries. Information on titling is easily accessible and regularly updated by a department dealing exclusively with ensuring that there is certainty regarding land ownership. When a dispute arises regarding titling, the problem will generally be resolved through the courts (Cousins, 2002: 3). These are two contesting notions of land rights and the South African government has sought to ensure a convergence of the two in order to placate both the proponents of the western legal system and those of the customary, indigenous legal system. This is proving a difficult task.

The ANC government, in its initial attempt to deal with the former homelands, sought to take control away from the traditional leaders and to focus on individual ownership. However, opposition to this move and the threat of widespread violence resulted in a reformulation of the way in which communal land would be addressed (Kariuki, 2004: 11). This reformulation to accommodate traditional leaders was viewed by many as problematic.

Ntsebeza elaborates on the problems presented when traditional leaders maintained power. The Bantustans were controlled by traditional leaders, most of whom were authoritarian and 'undemocratic'. They controlled land allocation and would often abuse their power in this capacity. As democracy dawned in South Africa, traditional leaders, aware that in a democratic dispensation their powers would be eroded, established the Congress of Traditional Leaders of South Africa to function as an organised representative grouping which focused on maintaining the strength of traditional leaders (Ntsebeza, 2005: 2-3).

Significantly, traditional leaders have not responded well to civil society organisations as they view these organisations as disruptive and negatively influencing and affecting societal relationships. They are also aware that their power remains tenuous since most of the leaders were co-opted by the apartheid government and used violence against their own people with the weapons it provided (Camay and Gordon, 2000: 8). Therefore, not only are traditional authorities plagued by civil society organisations fighting for the democratic rights of people under traditional rule, but the African National Congress government itself is having difficulty reconciling the principles it stands for with loss of support that will result if

it maintains them. South Africa has an impressive constitution and the government has constantly reiterated its commitment to equality of the sexes, which is difficult to achieve in a patriarchal traditional society. Moreover, the right to be represented by those voted into power is a hallmark of democracy. Traditional leaders are un-elected leaders and, therefore, opposed to local government authorities, which need to be established to better the lives of people living in the former homelands through service delivery (Ntsebeza, 2005: 4.5).

Despite all these visible contradictions between traditional leadership and democratic values, the 2003 Framework Act was passed to placate traditional leaders. The salient aspect of the act is that it establishes traditional councils. Initially only 25 percent of the members would be elected, but outrage from various civil society organisations ensured that this figure was increased to 40 percent (Ntsebeza, 2005: 4.5). These councils are institutionally involved in the land process as demonstrated below.

The Communal Land Act seeks to provide secure tenure of communal land to communities or individuals. Before any form of registration or land transfer can be achieved, the Act contemplates that a land inquiry will be held to establish the validity of a claim and the extent of the land, which can be allocated. The minister then determines what land will be transferred and who will be entitled to such land. Once this has been done, the person or community has what is known as a 'new order right'. These rights are then registered and can be converted to freehold rights. In order to ensure this process is achieved, land administration committees and land rights boards have been established. The Land Rights Board works in an advisory capacity dealing with both the minister and the communities. The Land Administration Committee will consider the establishment of a new order right. A third of the committee members must be women. If a traditional council exists within the specific jurisdiction, the traditional council can fulfil the role of the committee (Kariuki, 2004: 11-14). This is one of the contentious issues since, although 40 percent of the members of the council are elected, the majority are not. Therefore, once again, an undemocratic body can determine land ownership.

The Communal Land Act has received its fair share of criticism. Kariuki believes the first concern is the definition of a community. A community is defined as "... a group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group." Kariuki argues that many communities in South Africa are in fact 'invented'. As a result of apartheid policy, groups of people were simply thrown together and traditional leaders appointed to rule over them (Kariuki, 2004: 15-16). Consequently, it is difficult to ascertain a real community.

The other aspect which many civil society organisations took umbrage with was the disadvantageous position women would be placed in as a result of the Act. The Women's Legal Centre argues that, even in the form the bill was passed, there is no guarantee that women's rights will be protected. Under the old system, male heads of household were granted what was known as 'permission to occupy certificates'. These were only provided to men. In one of its first formulations the Communal Land Rights Bill stipulated that these

certificates would be converted to 'new order rights'. The bill was strongly objected to since it would simply mean that men would be the only ones entitled to these new rights. The Act, as currently passed, stipulates in section 4(3) that,

A woman is entitled to same legally secure tenure, rights in or land and benefits from land as is a man, and no law, community rule, practise or usage may discriminate against any person on the ground of gender of such person.

The effect of this section is that both men and women may now apply for new order rights. It also means that men and women of the same household could apply for the same land and with a permission to occupy certificate and often better resources and support, the male household head is more likely to prove that the land belongs to him (Women's Legal Centre).

With all these concerns and, in the opinion of many, the unconstitutionality of the Communal Land Act, the success or failure of the hybrid attempt of applying both indigenous and common law in solving the issue of communal ownership is yet to be seen.

3.3.2 Land Tenants and Farm Workers

The previous discussion dealt with tenure security of communal land; the present discussion deals with tenure security of farm workers and labour tenants. The relevant act in the case of farm workers is the Extension of Security of Tenure Act 62 of 1997 (Extension of Security Act). The Extension of Security Act deals with the occupier and landlord relationship and tries to prevent arbitrary evictions. It also seeks to ensure that those living on farmland as labourers are protected from arbitrary harmful acts of the landlord (Kariuki, 2004: 9).

Unfortunately, most farm workers are unaware of their rights and often farmers simply disregard the law. Human Rights Watch has documented the violations that have occurred even with the newly enacted legislation. Prior to the Act, evictions were forceful; now they appear simply to be regulated. During the transition period, farmers feared that permanent land rights would be granted to their workers and consequently dismissed many farm labourers (Human Rights Watch, 1998).

In terms of Section 4 of the Extension of Security Act, when farm workers who have not acted contrary to the terms of their stay are evicted, the state is responsible for finding alternative accommodation. This rarely happens. Williams maintains that even the Land Claims Court has not been forthcoming in stipulating that alternative accommodation should be found when making eviction orders (Williams, 2005: 10). This places farm workers in a very vulnerable position.

A discussion with Mac Nodliwa, District Manager for the Stellenbosch District Office provided some clarity around support for farm workers. He explained that SLAG is still being

utilised but now for farm workers. A subsidy of R 15 000 is provided per household to enable farm workers to buy land.²² Securing tenure can be achieved by farmers subdividing plots and allocating land to their farm workers. Obviously this does not happen often and farmers are more prepared to donate or sell 'off-site housing' (Williams, 2005: 10-11).

The Land Reform (Labour Tenants) Act 3 of 1996 (Land Reform Act) seeks to provide labour tenants with land security and also regulates their evictions. Labour tenants are similarly provided with a grant of R 15 000 to help buy land. Unlike farm workers, labour tenants do not receive a wage. They work for the farmer and, in exchange, their cattle may graze on the land, they may cultivate a part of the land and they are entitled to housing. (Helen Suzman Foundation) The trials and tribulations of labour tenants and farm workers are succinctly captured by Hall and Moyo when they write that,

The reengineering of labour processes aiming to reduce the status of labour tenants to the even less protected category of "farm workers", and the extent to which farmers as employers and landowners can punish farm workers by expulsion as an ultimate sanction or charge them with trespass notices, demolish their homes and close their access to water taps and natural resources (e.g. rivers), and bar tenants from rearing livestock; emphasises their insecure and/or inadequate land rights of farm workers (Hall and Moyo, unpublished: 12). Even with legislation enacted to protect labour tenants and farm workers these groups remain exposed to ill treatment.

3.4 Land Administration

Land administration is defined as "...the process of determining, recording and disseminating information about the tenure, value and use of land, usually by a public agency". This is a more limited definition of land administration than Okoth-Ogendo's definition, which incorporates five components of land administration -juridical, regulatory, fiscal, cadastral and, in a sub Saharan African context, conflict resolution (Adams, 2006). Precisely because of its scope and definitional complexities, land administration is a study in its own right. For the purposes of this paper a conceptual understanding of land administration similar to the more limited definition given above will be used.

As illustrated above, three methods exist to ensure land reform and each method, in theory, is adequately catered for. The Department of Land Affairs has a very comprehensive website and if this is to be believed, the government has made every attempt to ensure that land reform happens with all the necessary support structures.

For example, there is a directorate of shared service in most provinces. In the Western Cape, the mission of the department is to "...endeavour to deliver excellent administrative

²² Interview with Mac Nodliwa, District Manager for the Stellenbosch District Office, Department of Land Affairs, 24 February 2006.

support services to the line functionaries of the Department of Land Affairs within the Western Cape Province to enable them in promoting effective land delivery.”²³ In order to achieve this mission, the directorate performs the following functions for the Western Cape Provincial office of the Department of Land Affairs, “information technology, human resource management, financial support and finally logistical support.”²⁴ A discussion with Peter Majola, a staff member in the Directorate in the Western Cape confirms that a strong support base exists for the administration of various departments in the Department of Land Affairs.²⁵

South Africa also has a developed and sophisticated surveying and mapping system. The Chief Directorate of Surveys and Mapping of the Department of Land Affairs is based in Cape Town. The Directorate has grown significantly over the past ten years from a meagre six member staff to over 300. According to Du Plessis et al, “South Africa is one of the few countries in Africa that is completely covered by 1: 50 000 scale topographic maps” (Du Plessis et al, 2000: 6). This feat was achieved through the Chief Directorate of Surveying and Mapping. The importance of the Directorate in terms of land is further reinforced by Wonnacott when he states that:

80% of all decisions which are made regarding the governance of people and the best utilisation of sustainable and unsustainable resources are related to the spatial relationship between resources and people, without accurate and up to date knowledge of “what is on the ground” decision makers cannot make any meaningful decisions or implement their decision and plans (Wonnacott, 2000: 11).

This is the reason that the Department of Land Affairs is so reliant upon the work of the Chief Directorate of Surveys and Mapping as the Directorate is able to ensure that land is properly allocated, that the land is productive and so forth.

Closely aligned with the Chief Directorate of Surveys and Mapping is a Directorate of Cadastral and Spatial Information and Professional Support which serves the following functions:

- Examining and approving diagrams and general plans prior to their being registered in a Deeds Registry
- Preserving and keeping up to date all documents and records pertaining to caesural surveys

²³ Department of Land Affairs website. *Chief Directorate Corporate Services*.

²⁴ Ibid.

²⁵ Interview with Peter Majola, finance section of the Directorate of the Shared Service Centre in the Western Cape, Department of Land Affairs, 23 February 2006.

- Preparing and keeping up to date cadastral maps and plans, both in paper and digital form
- Supplying copies of documents kept in the office in hard copy or digital form. The office also provides, to all who ask, advice and information pertaining to the cadastre.²⁶

Finally, for any land reform process to be successful, a proper functioning deeds registration process needs to be in place. According to the Department of Land Affairs website, the Deeds Registration,

...played a very important role in support of the Department's land reform initiatives. Land registration information supplied from the Deeds Registration System database plays a vital role during the preliminary investigative stages of any land delivery initiative while the final step in the process, the registration of the relevant title deeds, is handled by the Department's nine Deeds Registries. Despite an increase in their workload over the past year, the Deeds Registries have been able to maintain the turn-around time of their vital registration function to 10 working days from lodgement.²⁷

There is also an initiative to ensure that each province has a deeds registry and a drive to computerise the entire system to enable quicker access to information.²⁸ The directorates, which deal with administration are numerous and, if functioning effectively, should be able to ensure efficient performance of land administration. When attempts were made to arrange interviews during the research for this paper, unanswered phones and full voicemail boxes were the order of the day. Moreover, trying to work one's way through the labyrinth that is the Department of Land Affairs is problematic. Nonetheless, the technical resources and expertise in the various directorates are present and, therefore, theoretically speaking, an efficient land support and administration system exists. An examination of the planning and development procedures indicates that these areas are the department's greatest downfalls.

3.5 Land Planning and Development

Land development is the greatest problem of land reform, as indicted throughout this paper. It is clear that, once the beneficiaries have received their land, the real problems start. Land planning as required by the Department of Land Affairs is often done after the claim has been settled and it is during this period that crops are lost as beneficiaries wait for planning initiatives to be passed and settlement grants to be provided. Phume Booysen of Southern

²⁶ Department of Land Affairs. Land Planning & Information - Cadastral Surveys.

²⁷ Department of Land Affairs. Deeds Registration.

²⁸ Ibid.

Cape Land Committee stated that accessing post settlement grants is one of their most significant problems. The time it takes before a grant is provided is too long and during this period the farmland simply withers and dies.²⁹ Successful land and agrarian reform cannot work without proper sustained post settlement support. The government had made allowances for Settlement Planning Grants, but these grants are difficult to access, as Booyesen has indicated. Moreover, it is clear from the latest reports that, in terms of restitution, most commissions pronounce land settlement grants and post settlement support as their greatest challenges (Commission on Restitution of Land Rights, 2005).

A further concern raised by the commissions in Gauteng and the North-West and also discussed by Cousins, is the inability of local government and municipalities to implement land reform. As one of their challenges, the commissions had the following to say about this problem,

The capacity of Local Government and Municipalities to handle land reform is suspect. Apart from their lack of capacity to handle key mandates, most municipalities have the will, but lack conceptualisation, planning and technical ability that goes with the implementation of land reform. This problem explains why in the majority of cases claimants have not moved onto the land such as the example of Putfontein. Planning processes initiated by Municipalities are seldom, if ever, consummated, there is general planning paralysis or interminable planning processes at a huge cost to government without product. Most municipalities are plagued by process without product syndrome, especially in the areas of planning, budgeting and implementation. This problem poses a serious problem and obstacle in the attainment of land reform objectives (Commission on Restitution of Land Rights, 2005: 25).

The issues of land planning and development are intricately tied into post settlement grants and functioning, capable, municipalities and local government. Until serious attention is focused on these areas in order to improve what is currently a debilitating aspect of reform, development will be hampered.

4. KEY AGRARIAN ISSUES

4.1 Priority Given to Commercial Farming

Agrarian reform needs to work hand in hand with land reform. But, as noted above and stressed more in the context of poverty reduction (discussed hereunder), commercial farming has been prioritised. This is evidenced by a move away from SLAG to LRAD with regard to

²⁹ Interview with Phumi Booyesen, Southern Cape Land Committee, 17 February, 2006.

restitution. The ultimate result has worked to the advantage of an emerging black elite farming community and to the detriment of the poor.

4.2 Poor Post Settlement Support

In cases where restitution has resulted in restoration of agricultural farmland, post settlement support has not been sufficient or sustained. This has meant that commercially viable agricultural farms obtained as a result of restitution have, in certain cases, not been successful.

Although these issues are addressed throughout, the importance of the agricultural component cannot be overemphasised. Land reform coupled with effective agrarian reform has the ability to reduce food scarcity and poverty levels. As shall be demonstrated below, both Government and civil society organisations concur that small-scale farming is the way forward but, unfortunately, this ideal has not been realised as yet.

5. THE IMPACT OF LAND AND AGRARIAN REFORM

5.1 Poverty and Food Security

In terms of social redress, the government has failed to focus adequately on the plight of the poor in South Africa. Policies which benefit an already established élite have really only helped accentuate the divide between the rich and the poor. A study undertaken by the Human Sciences Research Council confirms the growing divide.

New estimates of poverty show that the proportion of people living in poverty in South Africa has not changed significantly between 1996 and 2001. However, those households living in poverty have sunk deeper into poverty and the gap between rich and poor has widened... The poverty gap has grown faster than the economy indicating that poor households have not shared in the benefits of economic growth (Human Sciences Resource Council, 2004).

In the context of land reform, Moyo and Hall have the following to say,

South Africa's attempts at land reform in the first ten years of democracy have proved to be slow and have made little headway towards the goals of rural restructuring and poverty alleviation. Politicians and policymakers in South Africa have yet to draw relevant lessons about the limits of market-based land redistribution from other countries in the region. Instead, South Africa appears to be repeating the tendencies towards elite capture, moderate deracialisation

of the land-owning class and the growth of a small black commercial farming class in place of wider agrarian reform (Moyo and Hall, unpublished: 1).

The same sentiments are expressed by Lahiff, who argues that failure to address the land issue, and continued insistence on working within the private market formula, has resulted in the poor remaining poor. Where the needs of the poor are not being addressed, social movements develop to pressurise governments to respond to these needs (Lahiff, 2003: 39).

The ultimate pronouncements are the same, land reform has failed to alleviate poverty and, generally, in a South African context, the poor are becoming poorer. Why has this happened?

A report, which has caused quite a furore, has suggested that land reform is not where the emphasis should be. The report, compiled by the Centre for Development and Enterprise, maintains that those involved in land reform have an “idealised” notion of rural South Africa, one in which those whose land was stolen are provided with land to farm happily ever after. The report does not dismiss the importance of agrarian land reform, but suggests that other issues also need to be considered. For land reform to be effective, the report argues, urban land needs to be considered, the private sector needs to be more actively involved and the budget increased, amongst other things.³⁰

Most importantly, Bernstein argues that “[f]arming can provide a good living for a relatively small number of increasingly skilled people, but in a mainly arid country it cannot be a route out of poverty for millions” (Bernstein, 2005).

Masiphula Mbongwa (Director-General Agriculture) and Glen Thomas (Director-General Land Affairs), in response to the report, have argued that the romantic version of a countryside where there are thriving rural communities and “small scale producers” is completely plausible. They contend that, in both developing and developed societies, rural, small-scale communities exist and prosper. They further maintain that the situation in South Africa is not the norm. Large scale farming only in the hands of the few was apartheid engineered and cannot continue. Therefore, they assert that,

...it is quite valid to want a different agrarian structure, not just one in which some of the existing white faces are replaced by some black faces, while leaving the farm size distribution essentially unchanged. We therefore disagree with one of the author’s main opinions that land reform will, and should, primarily benefit a small number of relatively better off land owners and potential farmers. The Government would like to see a more inclusive targeting of potential beneficiaries (Mbongwa and Thomas, 2005).

³⁰ The Centre for Development and Enterprise. Land Reform in South Africa. A 21st Century Perspective.

This restructured agrarian environment is what should be striven for but, unfortunately, this is not happening. The case of Elandskloof is a case in point. Elandskloof was the first piece of land reclaimed in South Africa. The community was provided with 3 000 ha of citrus farmlands just outside Citrusdal in the Western Cape. The farm has now been placed under government administration. Conflict within the community, poor post settlement financial assistance and lack of skills have led to the farm, which formerly produced an income of approximately R 2 million a year, wasting away and in need of quick government intervention (Ensor, 2006).

This will be the inevitable consequence if post settlement assistance is insufficient, and expectations are unrealistic. Franz Zottl has correctly pointed out that most successful farms have had generations of family members farming. The father may have spent decades working on the farm in an attempt to make a profit. A successive generation may have had more capital to invest and, therefore, achieved greater success. Another generation may have ruined the efforts of the past, only to be helped out by the huge subsidies the farm obtained from the government. The point is that success does not come overnight. There is an expectation that those provided with agrarian land must make a success of it. Thoko Didiza recently said that people who fail to use land allocated properly would forfeit such land.³¹

These are unrealistic burdens to place on beneficiaries of land reform and this is in a context of poor post settlement support. Often, once the beneficiaries have received the land, they are unable to farm it because post settlement support does not happen immediately. In the interim, crops perish. Previously, many beneficiaries have merely on-sold at a substantial profit. Now, however, a moratorium, usually lasting five years, has been placed on the ability to resell. This prevents beneficiaries from capitalising on their land. The inability to sell adds further pressure to succeed in an environment, which offers little and late post settlement support. The farming environment is also very competitive. Even with substantial post settlement support, farming is difficult and not only are farmers competing with each other, but also with external competitors as a result of trade liberalisation.³²

The fate of New Beginnings is indicative of unrealistic expectations of beneficiaries in a competitive environment. A farmer in the Western Cape promised his workers that, if the farm produced an award winning wine, he would provide land to his workers for all the hard work they had done. Nine years later, the Nelson's Creek Chardonnay was named the best wine in South Africa. Eleven hectares of farmland was then donated to sixteen families that had worked the farm. The families pooled resources and set out to produce their own wine, known as New Beginnings. Initially the experiment was a success and the families received considerable publicity. But, as the families later realised, running a farm, marketing and

³¹ Interview with Franz Zottl, Communications Officer of the Regional Land Claims Commission: Western Cape, 22 February 2006.

³² Ibid.

successfully producing on a relatively small area, once the land was divided between the sixteen families, were difficult tasks. Therefore, although initially successful, they began to falter and eventually asked the farmer to reincorporate the land (Selva, 2005: 19-20).

The story of New Beginnings demonstrates the difficulties with commercial farming. For land reform to succeed the agrarian environment needs to be restructured. Andile Mngxitama of the Landless People's Movement maintains that reinforcing and expecting beneficiaries to work within the commercial farming environment is not feasible and does little to remedy the situation of the landless. Subsistence farming with additional produce for the market could ensure food security. Furthermore, providing individuals with land to farm and a market in which to sell their produce will help solve the huge unemployment rate.³³ Mbongwa and Thomas have stated that small scale farming is happening in developed and developing countries and maintain that these countries "... also achieve higher living standards and higher growth rates than those which are dominated by large farming sectors only" (Mbongwa and Thomas, 2005). Small-scale farming could then be the way out of the poverty trap for many indigent people in South Africa.

5.2 Access and Equity

In terms of redistribution, the move from SLAG to LRAD was seen as a move away from a pro-poor to an emerging middle class farmer focus. The argument has been made that this limits the ability of the poor to benefit from redistribution. Furthermore, Lahiff argues that the poor are asked to negotiate for land in the market economy that the government advocates. The unequal bargaining power between the landless and the established farmer makes this process difficult and, therefore, Lahiff suggests that the government plays a more direct role in purchasing land, especially in areas where there is severe land hunger. In this way, there would be stronger bargaining power and this may lead to better access to land (Lahiff, 2003: 3).

Abuse of tenants at the hands of farmers continues unabated as the Human Rights Watch report and other research illustrates. Interestingly though, the Land Claims Court has been a significant player in implementing legislation to ensure pro-poor results. The following is a general discussion on the role of the court in the land reform process.

³³ Interview with Andile Mngxitama of the Landless People's Movement, 25 February, 2006.

5.2.1 The Land Claims Court

The Land Claims Court was established in 1996 in terms of Section 22 of the Restitution Act. On 16 April 1996 the Court handed down its first judgment. Over the past decade the court has handed an estimated further 300 judgements.

Besides jurisdiction over the Restitution Act, the Court also has jurisdiction over cases involving the Land Reform Act and the Extension of Security Act. The Court has exclusive jurisdiction in terms of both the Restitution Act and Land Reform Act, but concurrent jurisdiction with both the Magistrate's courts and high courts with regard to the Extension of Security Act. Interestingly though, most cases dealt with by the Court concern the Extension of Security Act, while restitution and labour tenancy only form a very small percentage of the Court's cases (Roux, 2004: 516).

Section 33 of the Restitution Act deals with the relevant factors the court should have regard to when making any decision. These are,

- the desirability of providing for restitution of rights in land to any person or Community dispossessed as a result of past racially discriminatory laws or practises;
- the desirability of remedying past violations of human rights;
- the requirements of equity and justice;
- if restoration of a right in land is claimed, the feasibility of such restoration;
- the desirability of avoiding major social disruption;
- any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories or persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;
- the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
- the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
- in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;

- any other factor which the court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution.³⁴

The factors to be considered in terms of restitution are wide ranging and indicative of an act seeking social transformation. Theunis Roux in discussing the judges' understanding of their role had the following to say:

In the early judgments the LCC stated that it saw itself as interpreting and applying 'social legislation', by which it meant legislation whose primary objective was to transform social power structures in favour of landless groups (Roux, 2004: 518).

This was clearly illustrated in practise in terms of cost orders. The Court maintained that, if the litigant litigated in good faith but was unsuccessful, the costs would not be borne by the litigant (Roux, 2004: 518). The overarching notion of a court furthering social justice is reaffirmed with the appointment of the four judges, all of whom are trained in human rights law and none of whom served as apartheid judges (Roux, 2004: 512).

The importance of land as a vehicle for social redress, the calibre of the judges and the use of "discretion-conferring legislation in social transformation", a phrase used by Roux, succinctly captures the idea of the Court as working in favour of justice for the poor. Although it should be explained that Roux's central thesis is that a culture of legal formalism has prevented the Court from making pro-poor decisions in certain important cases, thereby restricting social transformation, this does not detract from the fact that most of the Court's decisions have been pro-poor. Roux simply tries to understand why, in certain cases where a pro-poor ruling could have been made, it was not (Roux, 2004: 534). His theory that judges are caught up in legal formulism does help to explain some of the more uncharacteristic rulings of the Court.

Nonetheless, the fact that the Court has stated that it views itself as furthering social transformation, its principle on cost orders and the human rights background of all its judges, tends to present an environment where justice can be achieved and has been in the majority of cases.

5.3 Environmental Management

In 1998 the National Environmental Management Act 107 of 1998 was promulgated. The Act stipulated that certain departments were required to implement environmental plans. As land reform affects the environment and reform needs to be managed to ensure sustainable development and the effective management of the environment, the Department of Land Affairs was required to produce an "Environmental Implementation and Management Plan".

³⁴ Section 33 of the Restitution of Land Rights Act, No. 22 of 1994 as Amended.

The plan was adopted in July 2000. Part of the plan related to recommendations with regard to Integrated Environmental Management (Beukman, 2000: 34). To this end, guidelines were adopted by the Department, and the most important aspect of the guidelines is the attempt to integrate environmental planning into “routine project planning procedures”. The guidelines speak of a three-phase approach to incorporating environmental concerns into land reform. Before moving to the second phase, the feasibility of the project in terms of its environmental impact is assessed and, if environmentally unsound, the project ceases at this point. This ensures intervention at the earlier stages to prevent additional expenses being incurred (Eschweiler, 2002: 32-33).

There are no specific reports on environmental impact assessments on the Department of Land Affairs website. The researcher was, however, informed that the Department of Agriculture always performs an environmental impact assessment before land can be transferred.³⁵

The importance of environmental impact assessments is clearly illustrated in the Richtersveld case. The cost of rehabilitation of the land is estimated at over R 1 billion. This is a necessary expense to ensure that the land can be productively used. Before the implementation of guidelines, environmental issues were not taken on board. The Department of Land Affairs stated in its 2000 September/October LANDinfo that,

Land Allocations through the Land Reform Programme have not been guided by environmental considerations. This has led to environmental sensitive areas allocated for either settlement or other human activities that in turn have resulted in the intensification of land degradation.³⁶

Hopefully the guidelines and the fact that environmental assessments now appear mandatory will ensure that a lack of consideration for environmental aspects of the programme is now a thing of the past.

6. ISSUES, INITIATIVES AND RECOMMENDATIONS

The above was an attempt at an exposition of the some of the issues dominating the discourse of land and agrarian reform. For ease of reference the salient issues and the initiatives adopted to deal with these issues are extrapolated below and recommendations are provided.

³⁵ E-mail from Franz Zottl on 23 February 2006 stating that Ms Lethabo Mashile at the Department of Land Affairs confirmed that an environmental impact assessment is done by the Department of Agriculture.

³⁶ LANDinfo. *Background to the DLA/DANCED Environmental Blyderiver Canyon Impact Assessment*. p. 15.

6.1 Willing Buyer-Willing Seller

6.1.1 Issue

The willing buyer-willing seller is considered by Government and most non-governmental organisations, which focus on access to land as a stumbling block to effective land reform.

6.1.2 Initiatives

In relation to land restitution, the government has illustrated a willingness, both verbally and recently in practice, to do away with this formula. However, no concession has been made in terms of land redistribution and this is the area, which requires focus since restitution has nearly reached fruition.

6.1.3 Recommendation

If the government is intent on maintaining this formula with regard to land redistribution, then the suggestion provided by Lahiff should be pursued actively. The government should not be a complacent bystander in the redistribution process. Where land demand is great and poverty high, the government should be actively involved in attempts to purchase land to resolve the land hunger. This will also level the playing field slightly, given that current power relations between farmers and the landless work to the detriment of the landless.

6.2 Post Settlement Support

6.2.1 Issue

Timely, well-funded, sustained post settlement support was a factor raised by nearly all stakeholders.

6.2.2 Initiatives

Although the importance of post-settlement support has been noted by all interested stakeholders, support remains delayed and financial assistance insufficient. Land reform cannot succeed if beneficiaries are not provided with proper financial support. Although

there is constant acknowledgement by the government that insufficient post settlement support is a problem, no sustained and systematic policy is in place to remedy the current inefficiencies. However, comments made by Ben Cousins in August this year indicate that, in terms of post settlement support, help may be on the way. According to Cousins, “A major donor-funded investigation of models for effective support is now under way, and may be extended to cover all land-reform projects.”³⁷

6.2.3 Recommendation

The issue of post settlement support is imperative if land reform is to succeed. Investigations are of no consequence if there is no follow through. There should be constant oversight to ensure that the model, which is adopted is also implemented.

6.3 Restructuring of the Land and Agrarian Environment

6.3.1 Issue

Mngxitama makes the crucial point that land reform cannot be structured around large-scale commercial farming. Expecting beneficiaries to survive in a competitive, local and international agrarian market is not feasible. Small-scale farming can be more productive.

6.3.2 Initiatives

As mentioned earlier, Mbongwa and Thomas assert that small-scale farming has proved successful in developing and developed countries and can be successful here. The top echelons of the government departments are also maintaining that this is the way forward.

6.3.4 Recommendation

The current trend towards favouring a black emerging élite needs to be reigned in, and land as a form of poverty reduction and as a method of alleviating food scarcity should take centre stage once again. There should be a coherent policy at national level which filters down and informs decisions at all levels in the land reform process. Civil society and government are speaking the same language in terms of small-scale farming, yet antagonism

³⁷ Cousins, B. ‘Land and Agricultural Policy: Back to the Roots’, *Mail and Guardian*, 15 August 2006.

remains. A policy illustrating this nexus and a government drive encouraging small scale farming may transform an antagonistic relationship into a more conciliatory one where both parties work together using their combined expertise and knowledge.

6.4 Local Government and Municipalities

6.4.1 Issue

The inability of local government and municipalities to function properly and to produce results is a serious concern. Regardless of whether the inability to perform is as a result of lack of expertise, capacity and/or will to perform, the problem must be tackled head on. Failure to acknowledge and to deal swiftly with non-performing municipalities will debilitate any programme adopted by the department.

6.4.2 Recommendation

Solving the problem of ineffectual local government and municipalities is a project on its own. However, a good start is the acknowledgement by top government officials that the problem does exist. Although some commissioners have openly acknowledged the problem, others have simply denied it. Functioning, effective local governments are crucial for effective delivery of services and, therefore, the problems must be acknowledged and addressed.

6.5 Education

6.5.1 Issue

As mentioned earlier, labour tenants and farm workers are some of the most vulnerable groups.

6.5.2 Initiatives

Although legislation has been enacted to protect labour tenants and farm workers, the power relations are still completely skewed and decades of an unprotected working environment in

which the workers had no rights cannot be overhauled simply with legislation which has moreover proved, in certain respects, ineffectual.

6.5.3 Recommendation

Besides secure tenure, education of labour tenants and farm workers about their rights must continue throughout South Africa and regular spot checks should be undertaken to ensure that these vulnerable groups are being fairly treated.

6.6 Budget

6.6.1 Issue

The budget for land reform is insufficient.

6.6.2 Initiatives

From 1994 to 2004 the financial resources allocated to land reform were 0.5 percent of the national budget. In 2005 this percentage was increased to 1 percent. (Cousins, 2005: 4)

6.6.3 Recommendation

Proper land reform has the potential to alleviate the problems of unemployment and food scarcity if implemented correctly. It is, therefore, essential that the process is adequately funded by the government.

6.7 Expectations

6.7.1 Issue

There are unnecessarily high expectations being placed on beneficiaries in environments, which are not conducive to success. Those who do not wish reform to proceed are using these failures to present a picture of inadequacy.

6.7.2 Initiatives

The South African government has played into the hands of negative publicity by threatening to take away farms that are not productive. The victims of land dispossession become the victims once again.³⁸

The government is, however, currently trying to adopt new methods to manage the failures of the past reform process, which hopefully not will victimise the landless again. In areas such as Limpopo, where land claims are high and the economy “dependent on agriculture”, the government has developed a new strategy of “strategic partners”. These partners will be members of the private sector who will manage the farms on behalf of the beneficiaries. This will only be the case with huge commercial farms and the idea behind the initiative is that the farms will be properly managed and the beneficiaries will receive a percentage of the profits. As Cousins points out, there are important concerns, which this initiative needs to address. These include ensuring that, after management fees are paid, that there are sufficient profits left for the beneficiaries and that the beneficiaries are empowered by the process (Cousins, 2005).

6.7.3 Recommendation

The continued existence of a skewed large scale commercial farming environment, as demonstrated above, has done little to alleviate poverty or provide food security for the majority of poor South Africans. If the government is intent on ensuring that certain commercial areas which are economically important are maintained, then the above ‘strategic partners’ plan could be very helpful. However, this new plan should be an exception, rather than the rule, and should only be used sparingly. Small scale productive farming should be the primary focus since, as stated repeatedly throughout this paper, it is the land and agrarian environment which may best solve both poverty and food scarcity if implemented correctly. A programme, which is supportive and encourages small scale production could ultimately lead to more successes and a more sustainable land reform.

³⁸ Interview with Andile Mngxitama of the Landless People’s Movement, 25 February, 2006.

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