

THE LAND REFORM PROCESS IN SOUTH AFRICA WITH THE EMPHASIS ON LAND RESTITUTION

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Abstract

Ownership or title to land in many countries of the world is a very contentious topic. Wars and battles have been fought over these rights and have caused the demise and instability of many countries, particularly in Africa. South African democratic elections in 1994 produced a Land Reform policy to redress the injustices of forced removals and the historical denial of access to land of black people. A target has been set, 30% of all white owned land is to change hands to blacks by the year 2014. The 3 key elements of the Land Reform programme are 1) Restitution (Land Claims), 2) Redistribution and 3) Land Tenure. This paper will briefly touch on the processes of Redistribution and Land Tenure but will highlight many of the challenges of Restitution or Land Claims in South Africa.

Keywords: land reform, restitution, land claims, reconciliation and food security.

Introduction

Throughout the history of mankind, many battles have been fought for the rights of use of land resulting in death and destruction to people and property. In the context of South Africa, democracy prevailed over the apartheid era with the 1994 elections. A brand new constitution of the Republic of South Africa 1996 (Act 108 of 1996) was enacted by the Parliament of the Republic of South Africa. One of the corner stones of the South African Constitution is Section 25, which deals with property rights, and the current Land Reform programme emanated from that principle of the constitution. Section 25(6) of the Constitution states that: “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”. Section 25(6) of the Constitution also provides that: “The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enables citizens to gain access to land on an equitable basis”.

The Objective of the Land Reform policy is to address the following issues:

- The injustices of racially based land dispossession of the past
- The need for a more equitable distribution of land ownership
- Security of tenure for all.
- The need for land reform to reduce poverty and contribute to economic growth

The Government also set a target of 30% for its land reform policy i.e. 30% of all white owned land to be transferred to the disadvantaged by the year 2014. In order to achieve this, a Land Reform programme was put in place. This programme has three legs:

- *Land Restitution:*
One of the very first pieces of legislation that the new government promulgated was the Restitution Act No. 22 of 1994 as amended. The main aim of the Act was to provide for the restitution of land rights to persons or communities dispossessed after 19 June 1913 as a result of past racial discriminatory laws or practices. (Since the *Natives Land Act, 1913*, rights to own, rent or even share-crop land in South Africa depended upon a person's racial classification).
- *Redistribution:*
This aims to provide the previously disadvantaged and the poor with access to land for residential and productive purposes by means of support and grants.
- *Land Tenure reform:*
This is to improve the tenure security of all South Africans and to accommodate diverse forms of land tenure, including types of communal tenure or ownership.

This paper focuses on the difficulties associated with Land Restitution in South Africa, and also discusses progress with land reform in the South African Sugar Industry.

Land Restitution And Challenges Faced In South Africa

Restitution Of Land Rights Act No. 22 Of 1994 As Amended Is:

- To provide for the restitution of rights in land to persons or communities dispossessed of such rights on or after 19 June 1913 as a result of past racially discriminatory laws or practices and, to establish the Commission on Restitution of Land Rights (the Commission) and the Land Claims Court (LCC), to provide for matters connected therewith.

A “Land Right” means “any right in land whether registered or unregistered, and may include interests of a labour tenant and sharecropper, a customary law interest, the interests of a beneficiary under a trust arrangement and beneficial occupation for a continuous period...” These rights are known as beneficiary occupation rights. They could be rights in the form of cropping use, residential, hunting or even firewood collection. Should a person’s rights be taken away by racial means then that person has a right to claim.

Land Claims are against the State and not, as perceived by many, the landowner.

There are various ways of settling valid claims i.e. land restoration, provide alternate land and financial compensation or /and any equitable redress. Urban claims have been much easier for the Commission to resolve than rural claims as most urban claimants opt for financial compensation. For rural claims though, restoration of claimed land or alternate land is the most preferred option by the claimants thus affecting existing landowners directly. Rural claim settlements are, and have been, relatively slow due to the complexities of validation, negotiation and land transfer. Presently the state is paying market related prices, which is in line with the SA Constitution.

In order to initiate the process of restitution, all Land Claims needed to be registered by the 31 December 1998. Claims were separated into urban and rural by definition, of a total of **79,696** registered claims in South Africa, **14,856** or 19% were rural and **64,840** or 81% urban. By 2006, **71,646** claims had been

settled of which only 7,881 or 11% were rural so the vast majority of settled or claims were urban (98% of all urban claims).

Due to the complexity of settlement of rural claims, government has had to extend their original target date of 2005 to the 31 March 2008. It looks like this deadline is to be extended again. Claims are registered against the state and each claim is investigated by the Commission to ensure it conforms to the rules of restitution. Once confirmed as valid, the claim is gazetted with the associated land identified. Stakeholders then have 60 days to respond to the gazette notice to accept or challenge the validity of the gazetted land claim.

Presently, the Commission is using the traditional willing seller/willing buyer approach to acquire claimed properties. The Restitution Act Section 42(E) empowers the Minister to expropriate land or right in land for land reform purpose. The purpose of the Act is to expedite the settlement of land claims when negotiations have failed. Obviously the expropriation route will also have its own challenges.

The following points discuss some of the direct challenges facing the settlement of rural land claims:

- Gazetted landowners, or farmers, generally not only derive their income from the land but also live on their farms, they have their homes there. Many families go back generations in building up their family farm unit so emotions play a massive role in the process of restitution, to move off land that has had so much personal and family input, capital injection, risk taking, effort and sense of achievement tends to harden farmers to this process.
- Gazetted claims have tended to be gazetted in bulk and most rural claims are “community” based claims. These claims tend to go from one river or feature to another and everything in between is deemed to be valid. Some farmers may have farms overlapping two or more claims complicating the situation. A community-based claim has its own complications, were the rights the same for one and all for each piece of land?
- Only the LCC can conclude correct validation of any claim, and that in itself takes money and time. There is a waiting list of up to two years for a LCC appearance should any one claim be challenged.
- Each affected landowner has his/her own needs and opinions so this process is and has split farming communities in groups. One common example is where some owners feel that the gazetted claim is not valid and they wish to pursue for a decision by the LCC, obviously costing money. This group wishes that all affected owners remain and fight as a unit. The other group, however, may feel that they have an opportunity to sell their land at market value due to personal reasons, such as financial status, and do not want to go down the route of challenging the validity of the claim. This situation is common and has resulted in nasty confrontations amongst farmers.
- The biggest complaint by gazetted landowners is the lack of communication or response by the Commission. Once the claim is gazetted and the farms identified, the Commission tends to move their resources onto the next claim. Land Claims is very sensitive for both claimants and landowners and should be treated as such. Correspondence from landowners asking questions and offering possible solutions frequently get no response from the Commission. The Commission is very wary of Lawyers
- There is high staff turnover in the Commission as the settlement deadline approaches. This poses a challenge in communication and interaction between the farmers and staff members. Landowners are accusing the Commission of dragging its heels to prolong employment but as there is a target date they need to perform.

- The Commission has not investigated all the registered claims. There are still many rural claims outstanding; landowners are therefore very reluctant to invest capital in their farms even though their farms are not presently gazetted. Growth has virtually stopped and it will only be when all claims are settled that this trend will reverse.
- Many of the rural claimants are illiterate and thus take time to produce the required documents. Construction of family trees, recording of minutes and important resolutions becomes a serious problem.
- Infrastructure and communication problems make it difficult to access claimants and to hold meetings. Distances to be travelled and the condition of rural roads pose a challenge.
- Determination of the monetary value of the claim and the development projects to be linked to the restitution award is problematical.
- High cost of farmland – productive farmland is expensive and the process of Governments purchase of the land for redistribution is expensive, which can lead to drawn out negotiations due to differing expectations between buyer (the State) and seller (the owner of the land under claim).
- In addition to the price, other issues around the transfer agreement that take time to resolve include agreement of the beneficiaries, validity of the claim, the rightful claimants, the extent of land (property description) land use, settlement etc.

The next real challenge comes after claims have been settled – the “Post Settlement” phase. The sugar cane industry in South Africa is reliant on the supply of cane in an area to a specific crushing mill. As an example the Umzimkulu Mill situated south of Durban relies on 30 000 hectares under cane for their cane supply of 1 200 000 tons of sugar cane. The mill has a breakeven point of approximately 1 000 000 tons so, should cane supply be reduced by 200 000 tons or 5 000 hectares then the uneconomic mill will close down affecting the existing food supply, 5 000 workers, their 30 000 dependants and many local small and medium businesses. Nobody can afford for this to happen.

“Post Settlement” is something the local commercial growers, in this case, are taking very seriously. The whole existence of the sugar industry in above rural areas is dependent upon the business of farming sugarcane. Claimants generally do not have any agricultural or business background so the challenge is for the business of farming to continue as before even though there are new owners of the land.

Presently, the mill and grower leadership are in talks with the Post Settlement division of the Commission to ensure continuity into the future of cane growing. This is a critical phase of restitution as whole cane farms can be destroyed within a few seasons without correct farming husbandry. Inexperienced farmers without the necessary agronomic, financial and labour management skills will jeopardise cane supply in the area. These skills need to be built up before taking on the responsibility of farming. Farming is not only for oneself but there is a responsibility for the community as a whole and also a social responsibility for labour and their dependents.

As the Commission would like to see potential black farmers get opportunities several models are presently being investigated. The one being looked at very carefully is a joint venture type model whereby the community, or trust, pools the land and the equipment, and management expertise is supplied by an experienced farmer to farm jointly with profit sharing.

Another model is for a lease back with a specific condition of empowerment. The outgoing farmer and claimants identify some individuals to understudy the manager of the farm. Once the lease expires the mentored individuals will take over the running of the farm.

Due to the nature of the Restitution Act, the State prohibits the claimants to sell, exchange or donate their restored land in perpetuity. The claimants may lease the property. This land is held by the legal entity on behalf of the beneficiaries. In a business sense this approach has challenges. One can understand that this prevents profiteering but it also poses a challenge to the farming unit should one want to raise capital due to unforeseen circumstances, development, change in use, or to grow the farm business. In the sugar industry, cane roots last for approximately 10 years before replanting and the farm gets into an annual planting cycle of 10%, however should a massive drought occur and the roots die off there needs be to a massive capital injection to replant the area. With no capital available due to the state's rules, the claimants will not be able to raise the necessary finance to get the farm back to where it was and the farm will resort to scrub land with cane supply lost. The phenomenon of roots dying actually happened during the prolonged drought between the years 1992 – 1994. During that drought farmers could mortgage their land to raise capital to replant their affected areas.

Landowners are fully aware of the land grab situation in Zimbabwe, South Africa's neighbour, resulting in the eviction of landowners from the land. Experienced farmers have left that country for good and now Zimbabwe is reliant on other countries to help feed its people. Land is a very emotional issue, the rights to land, whether by title or other, needs to be separated from the *business of farming*. On the one side, the new landowner, in the case of restitution, needs to ensure the continuity of the business of farming, on the other side the experienced and educated farmers need to assist in the upliftment of the previously disadvantaged. When a claimant has a farm handed over to him his outlook and responsibilities to himself and his community will change significantly and he must be able to understand this and apply himself to ensure the farm does not collapse. Existing landowners also have a responsibility by assisting or mentoring new farmers by setting up so called "joint ventures" or similar arrangements, and making their experience and expertise available to ensure the success of the new farmers and their farm business.

Land Reform Progress In The South African Sugar Industry

The South African Sugar Industry is committed to transformation in land ownership and supports Government's target to transfer 30% of freehold cane land to Previously Disadvantaged Individuals (PDIs) by 2014 through the use of the land market under the willing buyer/willing seller principle. The Inkezo Land Company, a land reform company developed by sugar grower and miller leadership was founded in 2004 to assist the industry in supporting this target. The company, while initially funded by the industry, is operating as an independent land reform initiative. Inkezo assists in identifying sellers and buyers, streamlining processes of land reform and promoting sustainability through outsourced support service providers and mentorship programmes with existing farmers. In addition to Inkezo, the milling companies have been undertaking land reform projects for several years, which have seen an increase in the number of PDI growers and a new PDI miller on freehold sugarcane land. This section of the paper summarises the trends in land ownership transformation in the South African Sugar Industry.

The Industry consists of 3 different classifications of growers, namely, Large Scale Growers (LSG), Miller Cum Planters (MCP) and Small Scale Growers (SSGs). The total Area Under Cane (AUC) for the 2005/06 season is estimated to be 423 960 hectares. The SSGs (who are almost all PDIs) farm on about 75000 hectares of "tribal" land (communal tenure) and are not considered to be commercial growers and hence are not included in the total transformation statistics. Table 1 below shows the comparative land ownership statistics of the different grower types between 1999 and 2005. In the table, some LSGs did not indicate a race.

Table 1: Land ownership of grower categories – a comparison of 1999 and 2005 AUC (measured in hectares)

	MCP	White LSG	PDI LSG	Unspecified LSG	Total LSG	Industry Total*
1999	57 035	263 313	13 244	5 213	281 770	338 806
2005	39 051	270 435	37 676	984	309 095	348 146

* - Excluding SSGs

The table highlights the increase in AUC farmed by PDI growers since 1999 from 13 244 ha to 37 676 ha in 2005 representing an increase of 24 432 ha or 184%. The average year on year increase has been 19%. The proportion of total LSG land owned by PDI growers has increased from 4.7% in 1999 to 12.2% in 2005 – an average increase of 1.25 percentage points per annum. If the rate of transformation continues at this average pace, the proportion of PDI growers will only reach 23.4% by 2014.

The previous rate of ownership changes includes transfers from MCPs to emerging growers – where the milling companies proactively began selling off their estate land to PDI growers – with transfers of land from white LSGs only starting to move more rapidly to PDI growers in recent years. In addition, although land restitution results in a transfer of land to PDI growers, the process has been slow due to the challenges outlined in the previous section and many potential land transfers from white to PDI growers have been thwarted by unresolved land claims over the property subject to transfer. This means that with less MCP land available to distribute, if the rate of land reform in the sugar industry is to be maintained or increased, more land will need to come from white LSG land that enters the property sale market, which will need to be transferred to PDI growers and Inkezo has a large part to play in this. Since Inkezo was only founded in 2004, it has not had much impact on the previous rate of transformation, and once its activities have gathered momentum and the land restitution process is completed, the average increase in PDI ownership could be accelerated and the target reached. In addition to improving the rate of transformation, the failure rate and subsequent exit of PDI growers from the industry needs to be minimised. The SA Sugar Industry will need to clearly identify the causes of failure and assess the options available to ensure the sustainability of new PDI growers that enter the industry.

Land reform is a slow and difficult process. The challenges need to be addressed and the time taken for restitution claims to reach resolution needs to be dramatically reduced. Despite these challenges the Sugar Industry has been moving steadily in the right direction towards meeting the State's land reform target. However, there is still a lot of work to be done to accomplish this and the challenges to the process will need to be continually addressed to ensure that the target is reached.

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