

**Taking land reform seriously:
From willing seller-willing buyer to expropriation**

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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Signed by candidate

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Dedicated to the memory of my father
Mr. Shiyumhlaba Sanie Nicholas Dlamini (Attorney At Law)
15 November 1949 – 30 June 2006

**TAKING LAND REFORM SERIOUSLY:
FROM WILLING SELLER-WILLING BUYER TO EXPROPRIATION**

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I. INTRODUCTION

1.1 *Scope and aims of the paper*

This dissertation is concerned with the appropriateness and effectiveness of the South African government's policy and approach to land redistribution. It reviews the willing seller-willing buyer approach to land redistribution and assesses its effectiveness and highlights its strengths and weaknesses. This will include an examination of its implementation by two other countries (namely Namibia and Zimbabwe) in the region that have faced similar land issues. In order to determine whether it is an appropriate approach for South Africa. Zimbabwe and Namibia are ideal comparisons as they are neighbouring countries (with similar agricultural sectors) that are also implementing land redistribution at the same time that South Africa is. Namibia, which once formed a part of South Africa (South West Africa), is going through land reform at the same time as South Africa, while the Zimbabwean process began earlier. The fact that both countries also relied on the market-based willing seller-willing buyer principle provides a unique opportunity for the South African government to learn from the experiences of these two countries, while they still manoeuvre through the issues related to the approach. This will enable a determination of whether the willing seller-willing buyer policy is an appropriate basis for South Africa's redistribution programme or whether an expropriation-based approach would prove to be a more effective option.

1.2 *Land as a source of inequality*

It has been stated that land is the primary source of inequality in contemporary society and in this regard South Africa is no different. There is a long history of social manipulation in South Africa which has resulted in distribution of land ownership and access to natural resources based on the promotion of racial interests rather than the promotion of public interests in an open and democratic

society based on human dignity, equality and freedom.¹ Apart from statutes which have directly affected land ownership and access to other natural resources, many other legislative provisions have indirectly affected the relationship between the majority of its people and land.² When the democratically elected government came into power in 1994 it adopted a land reform programme to address the problems that had been inherited from a past characterised by a highly unequal pattern of land ownership and wide-spread rural poverty.

1.2.1 Historical background to land issues in South Africa

The land question has always been critical in South Africa. Tensions over land began in the colonial era, particularly as Boer Voortrekkers moved inland, displacing indigenous Africans as they went along.³ Land became an even more central issue during the apartheid regime which used land as a means of economic and social oppression of the African majority.⁴ Historically, white settlers in South Africa appropriated more than 90 per cent of land under the 1913 Natives Land Act, while confining the indigenous people to reserves in the remaining marginal portions of land.⁵ This process forced a large number of rural residents to leave the rural areas for urban areas and farms in search of work, resulting in a significant number of rural people becoming fully proletarianised, while others became migrant workers with a tenuous link to land.⁶

The discovery of minerals, particularly gold in the 1880s led to a demand for cheap labour. The obvious target was African labour and the colonial strategy

¹ MD Southwood *The Compulsory Acquisition of Rights: By expropriation, way of necessity, prescription, labour tenancy and restitution* (2000) 21.

² Ibid.

³ M Barry 'Now another thing must happen: Richtersveld and the dilemmas of land reform in post-apartheid South Africa (2004) 20 *SAJHR* 355, 356.

⁴ Ibid.

⁵ R Hall and L Ntsebeza (Eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 3.

⁶ Ibid.

shifted from promoting a class of African farmers to compelling Africans to becoming wage labourers.⁷ Thus, while colonialism and apartheid systematically undermined African agriculture, white farmers, through substantial state subsidies and the availability of cheap African labour, were able to develop a model of large-scale commercial farming in South Africa.⁸

1.3 The need for post-apartheid land reform

In a country like South Africa, where an estimated 84 per cent of the land is still held by the white minority, it is important to adopt land policies that are aimed at redressing historical and racially-based inequities. While arguments for land reform programmes typically revolve around issues of equity, poverty reduction, economic development and political stability; land reforms are also seen by some as important in contributing to human freedoms, civil liberties and sustainable democracies.

It has been suggested that land reform is an appropriate means of compensating black South Africans for the harm they suffered under Apartheid and expanding black economic self-sufficiency and political empowerment.⁹ It is argued that this group should be compensated with land because their dispossession was the source of their oppression, and land redistribution redresses the historical inequities caused by such dispossession.¹⁰ Thus, this argument for land redistribution is based on the idea that the return of land is a tangible expression of not only the government's but also society's willingness to address past abuse.¹¹

South Africa's land reform programme is conventionally described as having three legs: restitution, tenure reform and redistribution. Redistribution, which is

⁷ Ibid.

⁸ Ibid.

⁹ LG Robinson 'Rationales for rural land redistribution in South Africa' (1997) 23 *Brooklyn J of Int'l Law* 465, 484.

¹⁰ Ibid at 485.

¹¹ OL Zirker 'This land is my land: The evolution of property rights and land reform in South Africa' (2003) 18 *CONN J of Int'l L* 621, 640.

the focus of this paper, is specifically aimed at transforming the racial pattern of land ownership and is widely seen as having the potential to significantly improve the livelihood of the rural poor and to contribute towards economic development. In this regard, the government's stated target for land reform is the delivery of 30 per cent of white owned commercial farmland to African ownership by 2014.¹²

Since 1994 the South African government has implemented a multi-faceted land reform programme that has largely consisted of the provision of grants and other assistance to would-be landowners to acquire land through the market. In line with its neo-liberal macro-economic policy, the government has based its land reform programme on free market principles. Reliance on an assisted land market has been said to clearly arise from government's determination to follow a reconciliatory path towards greater social equity. The willing seller-willing buyer approach generally denotes a completely voluntary transaction between a seller and a buyer and, in the South African context; this transaction takes the form of negotiations between landowners who wish to sell their land and government officials who act on behalf of the intended beneficiaries of the land. ✓

While redistribution is specifically aimed at redressing past inequality, the so called market-based, demand-led approach envisaged by the willing seller-willing buyer policy has arguably had little impact on the racially skewed distribution of land in South Africa. Of the 120 million hectares that make up South Africa's total landmass, 84 million hectares constitute prime, white-owned agricultural land. In terms of it's 30 per cent target, government aimed to deliver 22 million hectares of this land by 2014. However, by the end of the 2005 to 2006 financial year, only 3.7 million hectares had been delivered.¹³

¹² Department of Land Affairs, A partnership to fast track land reform: A new trajectory towards 2014. 2006-2009. Strategic plan, March 2006 at 5.

¹³ Ibid at 21.

This paper will discuss the reasons behind this result and attempt to ascertain whether the slow pace of land redistribution can fully be attributed to the policy itself or to the manner in which it has been implemented by the government thus far. This will lead to the determination of whether a different policy (namely expropriation) would be a better option.

1.4 Chapter outline

This paper is structured as follows. Chapter two looks at the South African land policy in a historical and constitutional context, and is followed by a discussion of models of land reform in chapter three. Chapter four considers land redistribution in Zimbabwe and Namibia. Chapter four examines the willing seller-willing buyer policy in South Africa while chapter six discusses expropriation as a solution to the slow pace of land reform. The last chapter provides the conclusion and makes recommendations for the future.

II. SOUTH AFRICAN LAND POLICY IN A HISTORICAL AND CONSTITUTIONAL CONTEXT

2.1 Introduction and historical background

This chapter discusses the importance of land reform policy in South Africa. It briefly discusses the historical background and significance of land issues in South Africa and places it within a regional context before examining the question of whether there is a recognised right to land and land reform in international law. This is followed by a discussion of the Constitutional framework for redistribution in South Africa and a brief analysis of the Constitutional property clause.

As stated in the previous chapter, the apartheid government used land as a means of suppressing Africans.¹⁴ Land is a primary source of income and subsistence, and without land, a person is dependent on others for economic survival.¹⁵ It has been argued that in addition to economic reasons, there was also a political reason for taking the land away from the indigenous people. Land rights are intricately connected to political rights. It is difficult to refuse land owners the right to vote. Thus taking land rights away from indigenous people meant that they were effectively deprived of the means of obtaining political rights.¹⁶

It has also been suggested that in South Africa, the issue of land cannot be separated from apartheid's policies of "homelands", Group Areas, housing and urbanisation; and that land issues remain the core of South African race politics because land is a resource around which racial competition, animosity, and

¹⁴ Barry (note 3 above) 356

¹⁵ Zirker (note 11 above) 621

¹⁶ JS Dreyer 'Land reform: A key human rights issue and a challenge for religion in post-apartheid South Africa' (2005) 20 *Practical Theology in South Africa* 5

black anger have often crystallised.¹⁷ In the name of apartheid, approximately 3.5 million Africans were forcibly removed from their communities to the homelands between 1960 and 1983.¹⁸ It is not surprising then that issues relating to land would take a central and significant place at the negotiations leading to a democratic South Africa.

2.2 A regional perspective on the importance of land

It has been found that many African nations have experienced a resurgence of land reform over the last century following the retreat of colonial rule. Land lies at the heart of social, economic and political life in most of Africa, but across much of the continent there is a lack of clarity regarding property rights and land tenure is contested.¹⁹ In many African countries, the struggle for independence, although aimed at achieving universal suffrage, human dignity, and equal opportunities, was mostly to address the land issue.²⁰ Issues of justice based on reclaiming lost lands were the central aspect of nationalists' demands for independence.²¹

Land rights, like all property rights, are socially-mediated entitlements. It has even been suggested that the way land use is governed is not simply an economic question, but also a critical aspect of the management of political affairs.²² The administration of land use is the most important political issue in most African countries. One of the defining features of the land rights situation in most parts of Africa is the dichotomy between customary land tenure arrangements which dominate the African landscape and the statutory systems

¹⁷ Z Skweyiya 'Towards a solution to the land question in post-apartheid South Africa: Problems and models' (1989) 21 *Colum HR LR* 211, 212

¹⁸ Robinson (note 9 above) 466.

¹⁹ C Huggins and J Clover (eds) *From the ground up: Land rights, conflict and peace in Sub-Saharan Africa* (2005) 2

²⁰ M Munyuki-Hungwe 'Introduction to Land and Tenure Reforms in Southern Africa' in M Munyuki-Hungwe (ed) *Land reform and tenure in Southern Africa: Current Practices, Alternatives and Prospects* (2004)

²¹ *Ibid.*

²² Skweyiya (note 17 above)

based largely on western models, which dominate in urban and particularly high-value areas.²³

Land reform is, even in the most stable of countries, a volatile and politically challenging process.²⁴ What land reform is for, who should benefit and how it should be pursued are often treated as technical economic questions, but it is important to note that at its heart the land question is political- it is about identity and citizenship as well as production and livelihoods- and can be resolved only through political processes.²⁵ Needless to say, the land question has remained unresolved in the post independence period in most countries.

Although the liberation struggle in South Africa was not overtly fought around the land question, as was the case in Zimbabwe for example, there was always the expectation that unravelling centuries of land dispossession and oppression would be among the priorities of a democratic South Africa.²⁶

2.3 Constitutional entrenchment of a right to access property

2.3.1 An international law perspective

The significance of land redistribution is evident when one considers that while there is no specific or direct right of access to land in any of the international human rights instruments, there are other fundamental rights from which a right of access to land can be implied. For instance, article 17 of the Universal Declaration of Human Rights²⁷ provides that everyone has the right to own property, and that no one shall be arbitrarily deprived of said property.²⁸ Other rights from which the right of access to land can be inferred include the right to food and the right to housing.

²³ Ibid at 9.

²⁴ C Huggins and B Ochieng 'Paradigms, processes and practicalities of land reform in post-conflict sub-Saharan Africa' in C Huggins and J Clover (eds) *From the ground up: Land rights, conflict and peace in Sub-Saharan Africa* (2005) 27.

²⁵ Hall and Ntsebeza (note 5 above) 13.

²⁶ L Ntsebeza 'Land redistribution in South Africa: the property clause revisited' in R Hall and L Ntsebeza (eds) *The land question in South Africa: the challenge of transformation and redistribution* (2007) 107, 109

²⁷ GA Res 217A (III) of 1948 available at <http://www.unhchr.ch/udhr>

²⁸ Art 17 (1) and (2)

Without land, the majority of citizens of South Africa who live in rural areas would not be able to feed themselves and their families or provide shelter for themselves. Thus

[l]and has value not only for food and market crops, but also for the non-commoditised resources it offers poor people; among these, grazing, firewood, building and craft materials as well as providing medicinal herbs.²⁹

It has been argued that it may even be said that without land the right to life itself and to human dignity would be meaningless. This argument is in line with what is referred to as the social function of property, which is characterised by issues such as those of fairness, equity and justice in access to land.³⁰ In this line of thinking, there are legitimate grounds for interference with existing property rights in order to serve social functions.³¹

Equally supportive of a right of access to land is the right to development, which is understood to be an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human and fundamental freedoms can be fully realised.³² Article 6 of the United Nations Declaration on Social Progress and Development³³ provides that social progress and development require participation of all members of society in productive and socially useful labour and the establishment in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of land, of forms of ownership of land and the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people.³⁴ Thus, the Declaration recognises the social functions of property including land and calls

²⁹ C Walker 'Piety in the Sky? Gender Policy and Land Reform in South Africa' in Razavi (ed) *Agrarian Change, Gender and Land Rights* (2003)117.

³⁰ Land Rights, An Overview, at 278.

³¹ Ibid.

³² Article 1 Declaration on the Right to Development GA Res 41/128 of 1986

³³ GA Res 2542 (XXIV) of 1969 available at <http://www.ohchr.org/english/law/progress.htm>

³⁴ Article 6.

for land ownership that ensures equal rights to property for all.³⁵ The Convention on the Elimination of All Forms of Discrimination against Women³⁶ has also been interpreted as protecting the rights of women to have access to property as well as to agrarian development initiatives.³⁷

It can thus be concluded that international law requires states to carry out land reforms that lead to access to land for their people and that ensure a decent existence. At a minimum, all people have a moral right to have enough property to enable them to survive or to lead a dignified existence. If they do not have it, the state has the obligation to provide it.

2.3.2 Constitutional framework for redistribution

In 1994, the first democratically elected government committed itself to the Reconstruction and Development (RDP) as a policy framework to achieve a broad transformation of South African society. This programme was seen as a statement of intent for government as well as the private sector, NGOs, and local communities.³⁸ The overall goal of the RDP is to promote a fundamental transformation of the social, economic and moral foundations of South African society. Land reform is the third largest element of South Africa's RDP policies.³⁹ The RDP identifies national land reform the central and driving force of rural development, and envisages that such a programme would effectively address the injustices of forced removals and the historical denial of access to land.⁴⁰ It further required the government to build the economy by generating large-scale employment, increasing rural incomes and eliminating overcrowding as part of the land reform programme.⁴¹

³⁵ Article 17 (d) and 18 (b)

³⁶ GA Res 34/180 of 1979 available at <http://www.unhchr.Ch/html/menu3/b/e1cedaw.htm>

³⁷ Article 14 (2) (h).

³⁸ K Deininger and J May 'Is there scope for growth with equity? The case for land reform in South Africa' (2000) CSDS Working Paper 29, School of Developmental Studies. University of Natal, Durban at 7.

³⁹ Ibid.

⁴⁰ The Reconstruction and Development Programme (RDP): A Policy Framework at 2.4.1 available at <http://www.anc.org.za/rdp/rdpall.html>

⁴¹ Ibid.

In general, land reform is defined as “the redistribution of property or rights in land for the benefit of the landless, tenants and farm labourers”.⁴² There are three main types of land reform, namely, land redistribution, land tenure and land restitution, and all are enshrined in section 25 of the Constitution. The three elements are complementary parts of a comprehensive approach to deal with the legacy of apartheid and establish the basis for a productive development of a diverse rural sector in South Africa.⁴³

Land redistribution, which is the focus of this paper, is dealt with in section 25 (5) of the Constitution. As stated above, land redistribution refers to the acquisition of land by the state for purposes of distribution to those who have no land or who have inadequate access to land.⁴⁴ This section of the property clause imposes a positive obligation on the state to enhance accessibility to land. It also creates a socio-economic right for those in need of land to call on the state to act and make land accessible.⁴⁵ This was confirmed by the Constitutional Court in *Government of the Republic of South Africa v Grootboom and Others* where, with regard to the right to housing, it stated that ‘[t]he rights need to be considered in the context of the cluster of socioeconomic rights enshrined in the Constitution. They entrench the right of access to land, to adequate housing and healthcare, food, water and social security’.⁴⁶ The Constitutional Court further stated that ‘[t]he state must also foster conditions that enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done’ Thus, it is argued that although the Constitution does not expressly define access to land as a right, the Constitutional Court has interpreted it as such.⁴⁷

⁴² Zirker (note 11 above) 634.

⁴³ Deininger and May (note 38above) 9.

⁴⁴ S Rugege ‘Land Reform in South Africa: An Overview’ (2004) 32 *Int’l J. Legal Info* 283 available at <http://www.ukzn.ac.za/ccs/files/LandreforminSouthAfrica.pdf> at 7.

⁴⁵ *Ibid.*

⁴⁶ *Grootboom* 2000 (11) BCLR 1169 (CC)

⁴⁷ Rugege (note 44 above) 8.

2.4 The South African property clause

There was considerable controversy over the inclusion of a property clause in the South African Interim Constitution. This was marked by fears that the clause would either entrench existing property rights too strongly or that it would undermine existing property rights for the sake of land reform.⁴⁸ However, in the end, parties at the multiparty negotiations agreed to a property clause protecting existing rights while allowing the state to expropriate private property subject to the payment of compensation. This provision was retained and expanded in section 25 in the final Constitution.⁴⁹

Section 25 comprises two parts. The first part, subsections 1 to 3, aims to protect existing property rights and delimits the scope of that protection.⁵⁰ The second part, subsections 4 to 9, deals largely with land reform.⁵¹ The

⁴⁸ E Lahiff and S Rugege 'A critical assessment of land redistribution policy in the light of the Grootboom judgment' (2002) 6 *Law, Democracy and Development* 279, 280

⁴⁹ *Ibid.*

⁵⁰ Section 25 (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 in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

⁵¹ Section 25 (4) For the 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.

Constitutional Court in *First National Bank of SA t/a WESBANK v Minister of Finance*,⁵² stated that section 25 “has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions”.⁵³ Thus, section 25 strikes a balance between the interests of property holders and the general public interest. It also empowers the state to redress the injustices of the past through redistribution of land and other natural resources to the advantage of the previously deprived.⁵⁴

The South African Constitution has been described as a transformative constitution because it was designed to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens and free the potential of each person.⁵⁵ Land reform is a major means of attaining the goals of social justice and economic progress in South Africa.⁵⁶ It is critical not only in terms of providing historical redress for centuries of settler dispossession, but also for resolving the national democratic revolution in South Africa.⁵⁷

(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 impede 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 the 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).

⁵² *First National Bank* 2002 (4) SA 798 (CC)

⁵³ *First National Bank* at 794C.

⁵⁴ Ntsebeza (note 26 above) 281.

⁵⁵ Preamble to the Constitution of the Republic of South Africa Act 108 of 1996.

⁵⁶ Zirker (note 11 above) 634.

⁵⁷ WD Thwala ‘land and Agrarian Reform in South Africa’ (2003) available at <http://www.nlc.co.za/index.htm> at 1.

2.4.1 Constitutional endorsement of redistribution

The Constitution expressly manifests the moral, social and economic bases for rural land redistribution by empowering the government to redistribute land.⁵⁸ Furthermore, it specifies the mechanisms by which to implement land redistribution (namely through government expropriation and by legislative action). By acknowledging the adverse social conditions caused by land dispossession, the Constitution not only authorises legislative action, but also manifests the expectation of the South African people that parliament will actually take legislative action. This intent is reflected in the wording of section 25(5) of the Constitution which provides that “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”. Furthermore, section 25(8) of Constitution states that “no provision of this section may impede 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”. Consequently, it can be argued that these provisions unambiguously contemplate proactive steps by the legislature and other governmental bodies to implement land reform and address the harms that emanated from land dispossession.⁵⁹ Land redistribution is necessary to create the just and united South Africa that is envisioned by the Constitution. It has been suggested that although other forms of restitution may ease poverty, compared to land redistribution, they would probably do little to change inequality between the races and the structure of power relations.

2.5 A brief analysis of the South African property clause

Section 25 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

⁵⁸ Zirker (note 11 above) 640.

⁵⁹ Robinson (note 9 above) 487.

- (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 in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.
- (4) For the 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 impede 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 the 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).

Section 25 (1) is negatively phrased and does not guarantee a right to acquire land or other property. A question may arise as to how to interpret Section 25(1) of the Constitution. What meaning should be attached to the notion that 'no law may permit arbitrary deprivation of property'? What amounts to 'arbitrary deprivation of property'?⁶⁰ Judge Didcott has cautioned that what a Bill of Rights "cannot afford to do... (is) to protect private property with such zeal that it entrenches privilege and makes it, difficult for the country's wealth to be shared more equitably".⁶¹ Ntsebeza has also questioned whether this clause can be interpreted to obstruct the government's "urgent task of social or economic

⁶⁰ Ntsebeza (note 26 above) 118.

⁶¹ Ibid.

reform".⁶² It is submitted that the wording of the other subsections provides a clear answer.

Section 25(5) suggests that it merely puts an obligation on the state to pass legislation, design and implement a programme that is reasonable within its available resources.⁶³ The Constitutional Court has indicated that the negative phrasing of the right does not detract from its efficacy. In *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa*⁶⁴ the Court confirmed that the negative formulation protects the right to acquire and hold land, albeit implicitly.

In other words, the section has both a passive and positive aspect to it. The passive aspect potentially allows it to be used as a defence by the state when challenged by opponents to its land redistribution programme.⁶⁵ The positive aspect requires the state to comply with the obligation to create conditions that enable citizens to gain access to land on an equitable basis.⁶⁶ Thus, it has been argued that:

Any constitutional challenge to social reform legislation or action will be met, at least in part, by reliance on the social and economic rights in the Constitution. The land rights in section 25 are a very important counter-weight to the constitutional entrenchment, in that section, of existing property rights. Social and economic rights can therefore provide constitutional authority or constitutional protection for legislation and administrative action.⁶⁷

It is significant to note that "public interest" is specifically defined in section 25 (4) of the Constitution to include the nation's commitment to land reform and to reforms to bring equitable access to all South Africa's natural resources. Section

⁶² Ibid.

⁶³ Lahiff and Rugege (note 48 above) 284.

⁶⁴ Certification judgment 1996 (4) SA 744 (CC).

⁶⁵ Lahiff and Rugege (note 48 above) 285.

⁶⁶ Ibid.

⁶⁷ Ibid.

25 (4)(a) of the Constitution puts it beyond doubt that expropriation for purposes of land reform, which benefits individuals and communities rather than the state or the general public, can be justified in terms of section 25(2).⁶⁸ As was discussed in the previous chapter, this is significant because it specifies and legitimises the state's ability to expropriate land not only for "public purposes" such as the building of public infrastructure, but also facilitates the expropriation of land for redistributive and transformative purposes.

Rights to land reform are entrenched in Section 25 in subsection (5), (6) and (7) of the Constitution. These subsections map onto the 'three legs' of the land reform programme embarked on in 1995 under the auspices of the interim Constitution.⁶⁹ Subsection (7) refers to the restitutions claims process, subsection (6) refers to land tenure reform and subsection (5) recognises a socio-economic right to land redistribution.⁷⁰ Section 25 (8) also contains an insulation which attempts to protect the goal of land reform by stating that no provision in section 25 may impede 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 it is in accordance with the general limitations clause in section 36. Cumulatively, these subsections counter-balance the entrenchment of existing property rights.

2.6 Conclusion

Land reform is critical to transforming South African society. This chapter has shown that international law recognises the right of access to land. It has also shown that both international law and the South African Constitution recognise the obligation of the state to undertake land reform and redistribution to facilitate access to land. Furthermore, the South African Constitution manifests the moral, economic and social bases for redistribution, and this indicates its support for any

⁶⁸ Ibid at 282.

⁶⁹ J Zimmerman 'Property on the line: Is an expropriation-centred land reform constitutionally permissible?' (2005) 122 *SALJ* 378, 404.

⁷⁰ Ibid.

initiative that government takes to achieve this end. The next chapter will discuss redistributive reform models. The discussion in this chapter will focus on market-based reform models, as this is the basis upon which the willing seller-willing buyer policy (to be discussed in chapter five) is premised.

III. MODELS OF LAND REFORM

3.1 Introduction

The previous chapter looked at the issues of the importance of land and of access to property and the rights associated with it in the context of international, regional and constitutional frameworks, and found that the South African constitution not only adequately recognises the importance of land redistribution, but also specifically requires it. This chapter considers arguments for land reform programmes, and also discusses the merits of redistributive land reform. Specific redistributive reform models are also discussed, focusing mainly on the market-based model, as this is the model that has been adopted as a basis of the South African government's redistributive reform policy.

3.1.1 *The significance of land reform*

Although it is not itself a sufficient guarantee of economic development, it has been argued that land reform is a necessary condition for a more secure and balanced society.⁷¹ Providing poor people with access to land and improving their ability to make effective use of the land that they occupy are central to reducing poverty and empowering them and their communities.⁷² In southern Africa, land reform takes on a special resonance because of the history of land expropriation and liberation struggles.⁷³ It has been argued that in South Africa today land continues to be linked to identity and citizenship in complex and shifting, situation-specific ways.⁷⁴ Politically, it carries a sometimes latent, currently more overt, (yet always potent) emotional and symbolic appeal in national debate about inequality and redress.⁷⁵ At the local level it resonates

⁷¹ LM Sachikonye 'Land reform in Namibia and Zimbabwe: A comparative perspective' in J Hunter (ed) *Who should own the land? Analysis and views on land reform and the land question in Namibia and southern Africa* (2004) 64

⁷² Ibid.

⁷³ Ibid.

⁷⁴ C Walker 'Redistributive land reform: for what and for whom?' in R Hall and L Ntsebeza (eds) *The land question in South Africa: The challenge of transformation and redistribution* (2007) 132.

⁷⁵ Ibid.

powerfully with those living on the margins, although the narrative of local-level loss and redress encounters complications in the form of competing claims to land and contested outcomes.⁷⁶

Governments in post-colonial states have found themselves under particular pressures with regard to the land reform that they choose to implement. They have had to consolidate their newfound power, take control of land for development purposes, respond to the interests of traditional and local elites, and meet the needs of the majority of the rural poor.⁷⁷ In Africa there has been a lot of continuity from colonial to post-colonial land reforms. The reasons for this continuity were the weak nature of many post-colonial states, constitutions that preserved existing institutions and laws, the extent and influence of foreign investments, and the need to earn foreign exchange.⁷⁸

3.2 Redistributive land reform and its merits

It has been said that land reform is about redistributing land ownership from large private landowners to small peasant farmers and landless agricultural workers and that it is concerned with a redistribution of wealth.⁷⁹ Redistributive reform has been defined as a public policy that changes the relative shares between groups in society.⁸⁰ It is understood that, to be truly redistributive, land reform must effect on a pre-existing agrarian structure a change in ownership of and/or control over land resources and such a change must flow strictly from the landed to the landless and land-poor classes or from rich landlords to poor peasants.⁸¹ Here “ownership” and/or “control over land resources” means the effective control over the nature, pace, extent and direction of surplus production

⁷⁶ Ibid.

⁷⁷ M Wegerif ‘A critical appraisal of South Africa’s market-based land reform policy: The case of the Land Redistribution for Agricultural Development (LRAD) programme in Limpopo’ (2004) Research report no. 19. Programme for Land and Agrarian Studies, University of the Western Cape, 4.

⁷⁸ Ibid.

⁷⁹ S Borras ‘Can redistributive reform be achieved via market-based voluntary land transfer schemes? Evidence and lessons from the Phillipines’ (2005) 41 *Journal of Development Studies* 90, 92.

⁸⁰ Ibid.

⁸¹ Ibid.

and extraction, and the disposition of such farm surplus.⁸² In other words, it aims to create purposive change that can result in the improvement of the situation of the landless rural poor. Such a “purposive change” or “reform” is inherently relational: it must result in a net increase in poor peasants’ power to control land resources with a corresponding decrease in the share of power of those who used to have such power over the same land resources and production processes. In fact, land redistribution is essentially power redistribution.⁸³

Redistributive land reform or privatisation of state land and farm restructuring can be justified from a perspective of equity and broader economic growth as well as based on the goal of increasing agricultural productivity.⁸⁴ With respect to equity, the possibility that access to even small amounts of land can provide an important safety net and that ownership, as compared to renting of land, provides strong incentives for investment has often formed a key element to justify the contribution of land reform to poverty reduction.⁸⁵

One of the strongest arguments for redistributive land reform is that it can create an environment for growth in agricultural production that will in turn support broader economic growth and have a positive impact on poverty reduction.⁸⁶ Such arguments are supported by information showing that countries with a more equitable distribution of land tend to have higher levels of economic growth, while high levels of land concentration are often associated with less efficient resource utilisation.⁸⁷

⁸² Ibid.

⁸³ Ibid.

⁸⁴ K Deininger ‘Making negotiated land reform work: Initial experience from Colombia, Brazil and South Africa’ (1999) 27, 4 *World Development* 1 available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2000/04/05/0000094946_99031911113060/Rendered/PDF/multi_page.pdf

⁸⁵ Ibid.

⁸⁶ Wegerif (note 77 above) 5

⁸⁷ Ibid.

3.3 Methods of redistributive land reform

There are two main methods of redistributive land reform that have been employed over the years in different countries. These are state-led land reforms and the more common market-based land reforms. This chapter focuses on market-based land reform, as this is the basis of the willing seller-willing buyer principle employed by the South African land policy which will be discussed in next chapters.

3.3.1 Market-based land reform

The primary mode of redistributive land reform over the last decade has been market-based land reform and debates have increasingly revolved around the merits and disadvantages of this approach.⁸⁸ The market-based approach has particularly been pushed by the World Bank on the basis that this is the only form of land reform that is compatible with its economic policies and those of the International Monetary Fund. The market-based approach has been bolstered by critiques of the state-led reform programmes of the past.⁸⁹ Fiscal arguments against state-led land reforms suggest that they are supply-driven and lead to economic inefficiency and they tend to be too expensive as the beneficiaries do not contribute and the state has to pay for the land and other support services. In addition, the bureaucracies necessary for implementation consume a substantial portion of the budget, thus states has often ended up paying more than market value for land.⁹⁰

In the face of these critiques, it has been claimed that the market-based land reform model offers an efficient way to enhance equity in asset distribution.⁹¹ The key features of the 'market-led' land reform model, according to Borras, are: landlord cooperation in the form of voluntary land sales (encouraged by payment of full market price); production of 'viable farm plans' before land is purchased;

⁸⁸ Ibid.

⁸⁹ S Borras 'Questioning market-led agrarian reform: Experiences from Brazil, Colombia and South Africa' (2003) 3 *Journal of Agrarian Change* 367

⁹⁰ Ibid at 368.

⁹¹ Wegerif (note 77 above) 7

and programme financing through the flexible provision of loans and grants.⁹² Essential to the market-based approach is the liberalisation of the agricultural sector to remove distortions in various land and agriculture-related markets, especially those that favour or have been captured by large farmers and elites. Pro-market economists argue that liberalisation will lead to a de-concentration of landholdings since distortions have favoured land-holdings larger than the optimal size.⁹³

Proponents of market-based land redistribution acknowledge that the land market cannot be expected to lead to an efficiency-enhancing redistribution of land because poor family farmers who do not have much equity cannot acquire land even if they have access to mortgage credit. This is because market prices are, for a range of reasons, higher than the production value of land. Therefore, the role of the state in facilitating land purchases at market prices is to provide a grant to subsidise the buyer, thus providing the equity that the poor do not have.⁹⁴ Another key element of the market-based approach is the self-selection of beneficiaries who are best equipped to make good use of the land. Strategies to facilitate this self-selection are a demand-led approach, which only responds to those who request land, and requires potential beneficiaries to work as a group.⁹⁵ It is assumed that applicants in a group will know each other and therefore exclude those who they know are less likely to be effective members of the group. Requiring beneficiaries to contribute is suggested to ensure that only those with commitment are involved, while also encouraging a sense of project ownership.⁹⁶ Financing of land redistribution in a market-based system is to be in the form of beneficiary contributions and government grants and loans. Economists argue that the provision of grants rather than subsidies on loans and

⁹² Borras (note 89 above) 370

⁹³ Wegerif (note 77 above) 7.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

other inputs will have less of a distorting effect on the economy and will be more easily managed and transparent.⁹⁷

3.4 Market-based reform in South Africa

As noted in Chapter two the Reconstruction and Development Programme (RDP) policy framework envisaged that the land redistribution programme would realise its objectives by combining market and non-market mechanisms to provide land.⁹⁸ This was later confirmed in the *White Paper on South African Land Policy*, which stipulated that redistributive land reform would be largely based on willing seller-willing buyer arrangements, where government assists in the purchase of land but, in general, not in the capacity of the buyer or owner.⁹⁹ According to the White Paper government would make land acquisition grants available and also support and finance the required planning process.¹⁰⁰

3.5 Conclusion

This chapter began by discussing the significance of land reform as a means of resolving issues of poverty reduction, economic development and equity and found that land reform could be said to be a necessary condition for a secure society. The discussion of market based redistributive reform also emphasised the fact that redistributive reform not only concerns the redistribution of land, but also pertains to the redistribution of societal wealth and power. While it has been claimed that market-based land reform models offer an efficient way to enhance equity in asset distribution, the effectiveness of such a model in the South African context is questionable. This will be demonstrated in the following chapter which will examine the use of market-based redistributive reform in Zimbabwe and Namibia, and will determine whether South Africa can learn from their experiences with market-based reforms.

⁹⁷ Ibid.

⁹⁸ RDP Policy Framework (note 40 above) at 2.4.6

⁹⁹ White Paper on South African Land Policy, available at

http://www.polity.org.za/html/govdocs/white_papers/landwp.04.html

¹⁰⁰ Ibid.

Why not move on state led
land reform.

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IV. LAND REDISTRIBUTION AS EXPERIENCED IN ZIMBABWE AND NAMIBIA

4.1 Introduction and rationale for comparison with Zimbabwe and Namibia

The previous chapter considered the significance of redistributive land reform, and was focused on the market-based model of redistributive reform, which characterises the South African government's current reform policy. As stated in the introduction in chapter one, the main aim of this chapter is to examine the manner in which Zimbabwe and Namibia have dealt with the issue of post-independence land redistribution, and whether there is anything to be learnt from their experiences regarding the appropriateness of the willing seller willing buyer policy as a tool for land redistribution. The discussion will argue that the willing seller-willing buyer approach is not suited to fast land redistribution in South Africa, and that the fact that both Zimbabwe and Namibia abandoned it for expropriation strongly suggest that South Africa should do the same.

A distinguishing aspect of the colonisation process in southern Africa was the expropriation of land from the indigenous peoples.¹⁰¹ However, it was mainly in the white-ruled colonies that land expropriation culminated in a more or less permanent division of ownership along racial lines.¹⁰² This is particularly the case in South Africa, Zimbabwe and Namibia, where the white settlers seized prime land and pushed the indigenous black populations onto overcrowded and often inferior lands.¹⁰³ At least until recently, all three countries have shared a 'dualistic' agrarian structure, in which significant white populations owned or operated most high-value agricultural land and were engaged in commercial and export-oriented agriculture, alongside reserves characterised by overcrowding, substantial poverty and landlessness.¹⁰⁴ Furthermore, white economic elites in

¹⁰¹ Sachikonye (note 71 above) 65.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ R Hall 'A comparative analysis of land reform in South Africa and Zimbabwe' in MC Lee and K Colvard (eds) *Unfinished Business: The land crisis in Southern Africa* (2003) 256.

the region were also often able to codify their gains when they transferred political power to the black majority. Thus, the focus of land reform in these former white settler colonies has very reasonably been on the redistribution of white commercial farmland to black rural people.¹⁰⁵

4.1.1 Brief background to Zimbabwe and Namibia

In Zimbabwe and Namibia, occupation and land expropriation occurred almost simultaneously in the closing decade of the 19th century. This was followed by the consolidation of white commercial farming in the next 40 years, while indigenous small-scale farmers were confined to or allocated infertile and drier land with little or no infrastructure.¹⁰⁶ By the middle of the 20th century, the distinctive patterns of white commercial farming and communal farming were clear.

In Namibia's case, it has been estimated that by 1925, a total of just 2.8 million hectares of land south of what was known as the Police Zone (a term used by both the German and South African colonial policies to distinguish between two areas in the country) accommodated a black population of 11 740 people, while 7.4 million hectares were available for 1 106 white settlers.¹⁰⁷ Overall, based on inequitable land ownership, white farmers in Namibia possessed about 50 per cent of agricultural land while black farmers were confined to a meagre 25 per cent of agricultural land.¹⁰⁸

In colonial Zimbabwe, the Land Apportionment Act of 1930 allocated a greater proportion of the better land to white farmers and made provision for evicting indigenous farmers to drier and infertile agro-ecological regions.¹⁰⁹ The Act set aside 51 per cent of land to a few thousand white farmers (who then comprised

¹⁰⁵ Ibid.

¹⁰⁶ Sachikonye (note 71 above)

¹⁰⁷ Land, Environment and Development (LEAD) Project Legal Assistance Centre (2005). *Our land we farm: An analysis of the Namibian Commercial Agricultural Land Reform Process* at 2.

¹⁰⁸ Sachikonye (note 71 above)

¹⁰⁹ Ibid.

a mere 5 per cent of the population) and prohibited Africans from owning or occupying lands in designated white areas.¹¹⁰ At independence in 1980 and 1990 respectively, land ownership in both Zimbabwe and Namibia remained deeply inequitable. The political symbolism of land in the liberation struggles in Zimbabwe and Namibia was strong, owing to the painful memories of its loss under colonialism. Therefore, in both countries, land featured prominently in negotiations for independence.¹¹¹

4.2 Land reform in Zimbabwe

4.2.1 Legal framework for land reform in Zimbabwe

There can be no doubting the centrality of the land issue in Zimbabwe both before and after independence. The great disparity between blacks and whites in terms of land ownership has pushed property from the allegedly inaccessible realm of the 'law' into the public arena of 'politics'.¹¹² The legal framework for land reform in Zimbabwe is defined by the Constitution, as well as by a number of statutes. Constitutional provisions of relevance to land reform are the result of attempts by the Government of Zimbabwe over the last 20 years to deal with the unequal and racially skewed distribution of land and wealth. Despite its many democratic tenets, the Constitution that ushered Zimbabwe to independence in 1980 gave no hope for an immediate rectification of that legacy.¹¹³

The original wording of Section 16 of the Constitution of Zimbabwe forbade the compulsory acquisition of property "of any description" unless it was "reasonably necessary" for a variety of purposes, including agricultural settlement, land reorganization or the relocation of displaced persons; and the payment of "prompt and adequate" compensation assessed on the basis of market principles. Persons whose properties had been compulsorily acquired were free to remit the compensatory sum in any currency and to any country of their

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ United Nations Development Programme (UNDP), Interim Mission Report (2002) Zimbabwe Land Reform and Resettlement: Assessment and suggested framework for the future, 24.

choice without paying any taxes or other levies. In addition, Section 52 (3) (b) (i), read together with subsection (4) of that Constitution stipulated that provisions concerning fundamental rights (which included the property rights spelled out in Section 16) could not be amended for 10 years without an affirmative vote of all the members of the National Assembly – a body that guaranteed 20 seats to Zimbabwe’s white population during these first 10 years. These constitutional stipulations effectively blocked any meaningful programme of land reform and resettlement for at least the first 10 years of national sovereignty unless land was available on the open market.¹¹⁴

When Section 52 of the Constitution lapsed in 1990, the Government amended Section 16¹¹⁵ to prescribe new conditions for expropriation of property. These were “reasonable notice” of an acquisition, payment of “fair compensation within a reasonable time” (rather than “prompt and adequate” compensation), and an order of confirmation of acquisition within 30 days if such acquisition were contested. However, this amendment did not change the requirement of compensation.

The reluctance of white commercial farmers to offer land at reasonable prices in the market continued throughout the 1990s and, despite pledges at the 1998 Donor Conference, donor support for land purchases also continued to lag behind demand. Given the political pressures for reform driven by sporadic land invasions, the Government introduced a new provision in the Constitution (section 16A)¹¹⁶ which provided, inter alia, that where agricultural land is compulsorily acquired for “the resettlement of people in accordance with a programme of land reform”, the obligation to pay compensation for land lies with the United Kingdom as the former colonial power, and the obligation of the Government of Zimbabwe is limited to the payment of compensation only for

¹¹⁴ International Crisis Group (ICG) ‘Blood and soil: Land, politics and conflict prevention in Zimbabwe and South Africa’ ix.

¹¹⁵ Act 30 of 1990.

¹¹⁶ Act 5 of 2000.

improvements. In effect, unless proof could be shown that the land acquired had been purchased, the Government's overriding compensation obligation was limited to improvements on the land at the time of acquisition. This is the current constitutional position.

4.2.2 Land redistribution process

Zimbabwe's land reform process may be divided into three periods.¹¹⁷ The period between 1980 and 1992, which was characterised by the relatively secure predominance of the market method; the period between 1992 and 1999 which was characterised by the beginning of an official challenge to the market method and the beginning of a real threat of compulsory acquisition, and lastly, 2000 to 2002, the period in which the market method was resolutely abandoned and replaced by radical compulsory acquisition.

1980-1992 First phase

In 1980 the new government of Zimbabwe set out to acquire 8.3 million hectares of land on which to resettle 162 000 families under Phase One of its Land Reform and Resettlement Programme.¹¹⁸ Given the lack of planning, particularly with regard to support for relocated families, this was unrealistic.¹¹⁹ Between 1980 and 1989 it acquired only 2.6 million hectares and resettled 52 000 households, 70 per cent of these by 1983.

The government's land redistribution programme was based on the willing seller-willing buyer principle, a market mechanism of voluntary sales by owners and voluntary purchase by the government and was in keeping with the constitutional provisions which entrenched property rights. The principle ensured that whites only sold land that had been abandoned during the War of Liberation, or else was of poor quality, thereby denying new settlers the

¹¹⁷ S Moyo and P Yeros 'Land Occupations and Land Reform in Zimbabwe: Towards the National Democratic Revolution' in Moyo and Yeros (eds) *Reclaiming the Land: The resurgence of rural movements in Africa, Asia and Latin America* (2005) at 182.

¹¹⁸ NH Thomas 'Land reform in Zimbabwe' (2003) 24 *Third World Quarterly* 691,712

¹¹⁹ ICG (note 114 above) x.

opportunity to establish a successful economic sector.¹²⁰ Nonetheless, this was the structural context in which the government embarked on a programme whose centrepiece was the resettlement of the poor and landless.

What distinguished this phase of gradual land redistribution from the later 'fast track' phase was its peaceful and orderly character.¹²¹ The process of selecting settlers for resettlement was, by and large, transparent, and the resettlement process itself was carried out under an intensive programme of limited scope which made use of detailed planning, a systematic procedure of settler selection, large amounts of specialist inputs, and provision of a wide range of infrastructure and supporting services to assist the new communities.¹²² Families selected for resettlement were assigned arable land and residential plots on a random basis, utilising primarily the areas made available from amalgamating former commercial farms.¹²³

In all, during this first decade, the government reduced the white commercial farming sector to 11 million hectares, constituting 29 per cent of agricultural land.¹²⁴ At this stage, the resettlement of families displaced by the independence struggle had largely been completed, and growing stability reduced the availability of affordable land for additional policy purposes. The government, which had failed to put in place a systematic approach to overall agricultural policy, directly scaled back its commitments to land redistribution.¹²⁵ Over the period between 1980 and 1992, market-driven land reform proved its inability to deliver on Zimbabwe's land question.¹²⁶ The process was not only slow and incremental; it also delivered land of low agro-ecological value and imposed onerous fiscal demands on an already financially constrained state.¹²⁷ The slow

¹²⁰ Thomas (note 118 above).

¹²¹ ICG (note 114 above) at 70.

¹²² Sachikonye (note 71 above) 70.

¹²³ Ibid.

¹²⁴ Moyo and Yeros (note 117 above) 173

¹²⁵ ICG (note 114 above).

¹²⁶ Moyo and Yeros (note 117 above) 184

¹²⁷ Ibid.

and misdirected nature of the land reform process would become, from the mid-1980s onwards, a source of bitter diplomatic conflict between the governments of Zimbabwe and the United Kingdom.¹²⁸

1992-1999

Toward the end of the first decade of majority rule in Zimbabwe, there were troubling signs that land distribution and access were being tilted in favour of the new black elite who were connected to the ZANU-PF leadership and who were able to take advantage of the lack of clear guidelines for the land reform programme. As a result, the United Kingdom suspended disbursements to the first phase of the land programme in 1989.¹²⁹ Consequently, the momentum for land reform lost steam in the 1990s, which have been described as a lost decade for land programmes in Zimbabwe.¹³⁰ The official explanation for the slowdown in reform in the 1990s was that land acquired through the 'willing seller-willing buyer' approach had become more expensive for government to purchase.¹³¹

After the expiration of the Lancaster House agreement in 1990 the government amended its constitution to allow for compulsory acquisition of land with "little compensation and limited rights of appeal to the courts".¹³² The amendment did not, in effect, implement such acquisition or replace the market method.¹³³ The three models- popular, market and state- would interact dynamically over the decade of structural adjustment.¹³⁴ There followed, in 1991 a Land Acquisition Act to facilitate the purchase of farms. However, at this stage donor pressure ensured that the Lancaster House 'willing seller' condition persisted, and with

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ ICG (note 114 above) xi.

¹³¹ Moyo and Yeros (note 117 above)

¹³² Thomas (note 118 above) at 699.

¹³³ Moyo and Yeros, as above.

¹³⁴ Ibid

escalating land prices, this meant that very little land redistribution actually occurred.¹³⁵

Land occupations by war veterans began on a small scale in 1999, but lessened after government assurances that resettlement would be speeded up.¹³⁶ However, in February 2000 a draft constitution, which included a clause to make compulsory acquisition easier was rejected in a national referendum, and this is said to have angered the war veterans still further.¹³⁷ This, combined with the fact that only 90 000 hectares of land (as opposed to the planned one million hectares a year) were resettled between 1998 and 2000, was the motivation behind the massive land occupations that occurred from February 2000.¹³⁸

2000-2002 Fast track land reform

In response to the fact that little land had been redistributed, in May 2000 a change to the law was announced to allow the confiscation of land.¹³⁹ This was the start of the government's Fast Track Land Resettlement Programme.¹⁴⁰ The stated aim of the fast track program is to take land from rich white commercial farmers for redistribution to poor and middle-income landless black Zimbabweans.¹⁴¹ The process of allocating plots to those who want land has frequently discriminated against those who are believed to support opposition parties, and in some cases those supervising the process have required applicants to demonstrate support for the ruling party, the Zimbabwe African National Union-Patriotic Front (Zanu-PF).¹⁴²

¹³⁵ Thomas (note 118 above) at 699.

¹³⁶ Ibid at 700.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid at 701.

¹⁴⁰ Ibid.

¹⁴¹ 'Fast track land reform in Zimbabwe', available at

<http://www.hrw.org/reports/2002/zimbabwe/ZimLand0302.htm> accessed on 22/06/07.

¹⁴² Ibid.

Because the "fast track" process of resettlement is being carried out so rapidly and is short-circuiting legal procedures, even those people allocated plots on former commercial farms appear in many cases to have little security of tenure on the land, leaving them vulnerable to future partisan political processes or eviction on political grounds, and further impoverishment.¹⁴³ Overall, it has been found that the fast track program has violated rights to equal protection of the law, non-discrimination, and due process. The violence accompanying land occupations has created fear and insecurity on white-owned commercial farms, in black communal areas, and in "fast track" resettled areas, and threatens to destabilize the entire Zimbabwean countryside.

4.3 Conclusion of discussion on Zimbabwe

This section provided a broad canvas of the land reform situation in Zimbabwe, beginning with the central role that land issues took in the political arena at independence and the implementation of a willing seller-willing buyer land reform programme as a result of the Lancaster House agreement. This chapter also demonstrated the consequences of a failed willing seller-willing buyer based programme, which fuelled the drastic state-led fast-track land reform approach currently favoured by the government. While it is unlikely that South Africa would resort to the same ends (due to constitutional constraints), it is nevertheless a cautionary tale that the government must heed when determining which model to employ to achieve their target.

4.4 Introduction to land reform in Namibia

The key role of land in Namibia is easily demonstrated by the fact that 90 per cent of the population derives their livelihood from the land as commercial or subsistence farmers or workers employed on commercial farms.¹⁴⁴ The government of the new Republic of Namibia inherited two agricultural sub-

¹⁴³ Ibid.

¹⁴⁴ B de Villiers, *Land Reform: Issues and Challenges. A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 30.

sectors, namely communal and commercial agriculture, which constituted parallel agricultural systems that not only divided Namibia almost equally in terms of land utilisation, but also reflected the racial division in the country at the time of independence.¹⁴⁵

After independence in 1990 the government was forced to address the inequitable access to commercial land ownership. Realising the importance that land would play in the development of the country and eradication of poverty resolved that a national consultation on the way forward was necessary.¹⁴⁶ This resulted in the 1991 National Conference on Land Reform and the Land Question, an important milestone on the road to land reform which defined the manner in which government would implement reform in both commercial and communal agricultural areas.¹⁴⁷

At the conference, the new government adopted a policy aimed at redressing Namibia's history of skewed land ownership through a process of national reconciliation and in accordance with the provisions of Article 16 of the Namibian Constitution, which stipulated just compensation for any private land acquired.¹⁴⁸ Realising that there was public demand for land redistribution, the government adopted the willing seller-willing buyer approach as the primary means of land acquisition.¹⁴⁹ Land reform took the shape of resettling small-scale farmers and the establishment of a scheme for emergent black farmers to acquire large-scale farms.¹⁵⁰ The 1991 Land Conference furthermore established a platform from

¹⁴⁵ W Werner 'Land reform and poverty alleviation: Experiences from Namibia' (2001) NEPRU Working Paper 78 at 4.

¹⁴⁶ see http://land.pwv.za/publications/Land_Summit/Conference_Papers/NAMIBI~1.DOC

¹⁴⁷ Ibid.

¹⁴⁸ Article 16 of the Namibian Constitution deals with property and provides that:

(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property, individually or in association with others, and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament. Namibian Constitution available at <http://www.orusovo.com/namcon>

¹⁴⁹ Ibid.

¹⁵⁰ Sachikonye (note 71 above) 72

which the land reform programme, policies and legislation were to be developed.¹⁵¹

The Namibian land reform process is based on two main legal statements, namely the Agricultural (Commercial) Land Reform Act¹⁵² and the (Communal) Land Reform Act.¹⁵³ This section will only discuss land reform in light of the Agricultural (Commercial) Land Reform Act, as the willing seller-willing buyer principle is endorsed by this Act.

4.4.1 Agricultural (Commercial) Land Reform Act 6 of 1995

This was the first major piece of legislation on land reform in Namibia, and was not passed until 1995. The Act established a legal framework for the acquisition of lands by the state for resettlement purposes, following the willing buyer-willing seller principle.¹⁵⁴ According to this principle, commercial farmers who were willing to sell their ranches freely offered them to the government. Thereafter, an official commission would visit the farms and decide whether or not to buy them, depending on the quality and suitability of the land for resettlement purposes.

The Act contains a number of provisions to ensure that the market would perform as expected. These provisions include a requirement that any commercial farm offered for sale is offered to the Government first for the purposes of resettlement.¹⁵⁵ It also contains a provision against ownership of multiple land holdings by a single individual. The Act ensures that land is available for redistribution by including a provision against ownership of

¹⁵¹ Werner (note 145 above).

¹⁵² Act 6 of 1995. This Act provides for the allocation of rights in respect of communal land and establishes Communal Land Boards. It also provides for the powers of Chiefs and Traditional Authorities and boards in relation to communal land and makes provision for incidental matters.

¹⁵³ Act 5 of 2002.

¹⁵⁴ Act 6 of 1995 s14 (1): The Minister may, out of moneys available in the Fund, acquire in the public interest, in accordance with the provisions of this Act, agricultural land in order to make such land available for agricultural purposes to Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.

¹⁵⁵ Act 6 of 1995 s17 (1), (2) (a)-(b).

commercial farmland by non-Namibians.¹⁵⁶ Lastly, the Act provides for the creation of a Land Reform Advisory Commission to advise the Government on the suitability of farms it wants to purchase and to resolve disputes arising from other parts of the Act.¹⁵⁷ A land tax passed as part of efforts to achieve land reform was introduced by the Agricultural (Commercial) Land Reform Second Amendment Act 2 of 2001. It provided for the payment, by every owner of commercial agricultural land, of a land tax based on the value (known as the Unimproved Site Value) of the land. The aim of this tax is to penalise unproductive farmers, obliging them to sell to the state and making more lands available for resettlement.¹⁵⁸ It is a progressive tax that persuades individuals to give up some of their land units because they cannot afford to pay tax, and also creates revenue to buy more commercial agricultural land for the resettlement programme.¹⁵⁹ This tax has so far not been collected, although the necessary procedures were introduced in April 2002.

4.4.2 The effect of the legislation

The pace of the Namibian reform process has, at best, been gradual and cautious.¹⁶⁰ By November 2003, an estimated 6600 families consisting of about 37000 people had been resettled under the willing seller-willing buyer policy. In general, it has been argued that the pace of reform is bound to continue being slow.¹⁶¹ The main reason for this assertion¹⁶¹ is that the political balance of forces is stacked against the landless and dispossessed in particular. This, it is argued, is in turn related to the differential impact land dispossession had on indigenous communities.¹⁶² Dispossession affected only pastoralists, who practised transhumance. Communities in the north-central and north eastern regions who practiced cultivation and animal husbandry were never dispossessed of their

¹⁵⁶ Act 6 of 1995 ss 58 and 59.

¹⁵⁷ *Ibid*, ss 2 to 13.

¹⁵⁸ Werner (note 145 above).

¹⁵⁹ LEAD (note 107 above) at 9.

¹⁶⁰ Tapia Garcia 'Land reform in Namibia: Economic versus socio-political rationale' available at <http://www.fao.org/docrep/007/y5639t/y5639t05.htm> at 73.

¹⁶¹ *Ibid*.

¹⁶² Werner (note 145 above) 13.

land.¹⁶³ Instead, colonial policies limited their mobility through the establishment of artificial boundaries.¹⁶⁴ It is suggested that for these reasons, redistributive land reform never loomed large in the minds of the majority of these communities, as other issues, such as the provision of water, were more pressing.¹⁶⁵ Thus, it has been argued that the land question in Namibia did not occupy as central a place in the liberation struggle as politicians would like people to believe.¹⁶⁶

In addition, the dispossessed in Namibia constitute a small minority of the population.¹⁶⁷ Mixed farmers in the north-central and north-eastern regions not only constitute the vast majority of Namibians, but also form the main constituency of the ruling party, SWAPO. It is argued that the dispossessed, in turn, are not well organised, and thus do not wield any bargaining power.¹⁶⁸ The ruling party is therefore under very little political pressure to accelerate the process of land redistribution.

The Agricultural (Commercial) Land Reform Act was amended in July 2003, empowering the government to expropriate land "in the public interest", subject to "the payment of just compensation" in terms of section 20 of the Act.¹⁶⁹ In 2004 the government announced that the expropriation of agricultural land was to be implemented in order to speed up the land reform process.¹⁷⁰ The government's argument at the time was that the willing seller-willing buyer approach was to blame for inflating market related land prices, which consequently led to the unavailability of productive agricultural land.¹⁷¹ Thus, the

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ LEAD (note 107 above) at 16.

¹⁷⁰ W Odendaal 'The SADC Land and Agrarian Reform Initiative: The case of Namibia' (2006). For Community Technology Development Trust, African Institute of Agrarian Studies. NEPRU Working Paper no 111 at 22.

¹⁷¹ Ibid.

(Commercial) Land Reform Amendment Bill has started a new era in the land reform process, eroding the willing buyer-willing seller principle.

4.5 Conclusion of discussion on Namibia

As was the case in Zimbabwe, redistributive reform in Namibia was seen as a prerequisite for successful rural development and economic stability. The willing seller-willing buyer approach was initially favoured as the primary means of redistribution, but, as discussed in the chapter, despite the existence of adequate mechanisms put in place for its implementation, the policy was later abandoned in favour of expropriation. This discussion on Namibia demonstrates that one of the main stumbling blocks on the way to the achievement of effective land reform is a lack of prioritisation. The main impetus for land reform in Namibia came from the dispossessed, who constituted a small minority and had little bargaining power.

4.6 Conclusion on Zimbabwe and Namibia

Overall, this chapter has shown that the willing seller-willing buyer policy has failed as a means of achieving fast delivery for land redistribution. It is argued that a speedier, more effective process is needed to assuage the needs of the majority and to demonstrate that issues of previous dispossession are being addressed. Zimbabwe and Namibia both abandoned redistribution programmes based on the willing seller willing buyer policy in favour of state-initiated expropriation, and it suggested that South Africa should be able to relate to their experiences. It is argued that these two countries provide a strong case for the move away from the willing seller-willing buyer policy and towards the adoption of a more active state-led reform based on constitutional expropriation. The next chapter shifts the focus of the paper back onto South Africa, and examines the willing seller-willing buyer policy within the context of South African redistributive land reform.

V. THE WILLING SELLER-WILLING BUYER POLICY IN SOUTH AFRICA

5.1 Introduction

The previous chapter discussed the land reform programmes adopted by the post-colonial governments in Zimbabwe and Namibia and found that while both had begun with a policy of market-based negotiations based reform, this was abandoned relatively early on in the reform process, in favour of a more state-centred expropriation policy. This chapter will begin with an overview of the government's redistribution programme before moving onto and focusing on the willing seller-willing buyer policy. It will demonstrate that the willing seller-willing buyer approach is not a workable option for expedient land redistribution in South Africa.

5.2 Overview of the South African land redistribution programme

According to the government's *White Paper*¹⁷², the responsibility for land reform lies with the national government and requires it to ensure a more equitable distribution of land, to support the work of the Commission on Restitution of Land Rights and to implement of land tenure and land administration reform.¹⁷³ In formulating its land reform policy, the government is said to have endeavoured to take account of the widely conflicting demands of the various stakeholders and the implications of any specific course of action on the land market and investment in South Africa. These included arguments from those who favoured drastic state intervention to redistribute land and those who insisted that land should be allocated only to those who can prove that they can use it productively. Essentially, government's main challenge was to find a way of redistributing land to the needy, and at the same time maintaining public confidence in the land market.

¹⁷² *White Paper*, part III Land Policy Issues available at <http://land.pwv.gov.za/White%20Paper/white5.htm>

¹⁷³ Ibid

The land reform programme that emerged out of the negotiations and policy debates of the early 1990s attempted to meld a strong commitment to the goals of social justice with the principles of market-led land reform.¹⁷⁴ The redistribution programme was initiated by the (then) more or less newly created Department of Land Affairs as one of three pillars of land reform, the other two being land restitution and tenure reform.¹⁷⁵ The Department of Land Affairs operates within the broader context of the government's social and economic transformation agenda and contributed towards the achievement of the aims and objectives of the national government.¹⁷⁶ One of these objectives is that of ensuring the delivery of 30 per cent of white-owned agricultural land by 2014.¹⁷⁷

5.2.1 Settlement/Land Acquisition Grant (SLAG)

The redistribution programme commenced in 1995, and was based on a flat grant of R15 000 per household (on a par with the housing grant) for the acquisition of land and start up capital. This grant was known as the Settlement/Land Acquisition Grant, or SLAG and was, according to the White Paper, primarily aimed at benefiting the rural poor.¹⁷⁸ Initially, the primary aim of the programme -as well as the rationale for the small size of the grant- was to cater for the need for secure residential tenure as well as land with which to contribute to one's sustenance.¹⁷⁹ Although still inadequate, the pace of delivery accelerated rapidly between 1995 and March 1999. Over this period, roughly 60 000 households were allocated grants for land acquisition, of which 20 000 benefited in the 1998/1999 year alone. Altogether, around 650 000

¹⁷⁴ Walker (note 29 above) 118.

¹⁷⁵ Aliber M 'What Went Wrong? A Perspective of the First Five Years of Land Redistribution in South Africa, with Homily for the Next Five', available at www.oxfam.co.uk/what_we_do/issues/livelihoods/landrights p1.

¹⁷⁶ Department of Land Affairs (note 12 above) 5.

¹⁷⁷ Ibid.

¹⁷⁸ White Paper (note 99 above) Part 4.7: Grants and Services

¹⁷⁹ Aliber (note 175 above) 2.

hectares were approved for redistribution by March 1999, representing less than one percent of the country's commercial farmland.¹⁸⁰

Apart from insufficient delivery, as of 1999 the Department of Land Affairs was just beginning to reach a critical level of awareness that a high proportion of its redistribution projects were plagued with serious problems. Much attention focused on the fact that groups were too large and post-transfer support was poor.¹⁸¹ These problems led to the formation of a revised programme for redistribution.

5.2.2 Land Redistribution for Agricultural Development (LRAD)

The new redistribution programme, entitled Land Redistribution for Agricultural Development, or LRAD, was based on a model actively promoted by staff of the World Bank, drawing on their recent experiences in Brazil and Colombia.¹⁸² It became official policy in November 2000 under the title of 'Land Redistribution for Agricultural Development: A Sub-programme of the Land Redistribution Programme'.¹⁸³ According to the Integrated Program of Land Reform and Agricultural Development, the LRAD is designed to provide grants to black South African citizens to access land specifically for agricultural purposes.¹⁸⁴ One of the objectives of the LRAD is to contribute to the government's redistribution target of the delivery of 30 per cent of agricultural by 2014.¹⁸⁵

Whether LRAD represented a broadening of the redistribution programme, or a wholesale shift, remains an issue of contention.¹⁸⁶ One of the primary differences from the old programme is that the grant is available in a range from

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Lahiff and Cousins 'The land crisis in Zimbabwe viewed from south of the Limpopo' (2001) *Journal of Agrarian Change* 652, 663

¹⁸⁴ Integrated Program of Land Reform and Agricultural Development in South Africa 'Land Redistribution for Agricultural Development: A sub-programme of the Land Redistribution Programme' available at <http://land.pwv.gov.za/redistribution/lrad.htm>

¹⁸⁵ Ibid.

¹⁸⁶ Aliber (note 175 above).

R20 000 up to R100 000, depending on an own contribution which rises disproportionately according to the grant level (that is from R5 000 to R400 000).¹⁸⁷ However, as significant as the change in the size of the grant is the fact that it is now awarded to adult individuals rather than to households, and in practice multiple adult members of the same household can apply for LRAD grants with the intention of pooling them.¹⁸⁸

Own contributions by beneficiaries in labour can be up to R5 000 per applicant (individual). In order for the applicant to claim the full R5 000 in own labour towards the own contribution requirement, the business plan must show evidence that the applicant intends to devote a significant amount of own labour towards the establishment and operation of the project.¹⁸⁹ The contribution in kind could be calculated by costing assets such as machinery, equipment, livestock, and other assets that a beneficiary may possess. The cash contribution can be in the form of one's own cash contribution to the project, or borrowed capital, or some combination of the two. These three forms of own contribution can be added in any combination to make up the required own contribution from the beneficiary.¹⁹⁰ Beneficiaries select the position on the scale at which they wish to enter LRAD, determined by their objectives and ability to leverage the grant with their own resources.¹⁹¹

Most redistribution projects have involved groups of applicants pooling their grants to buy formerly white-owned farms for commercial agricultural purposes, although under LRAD there is a move towards smaller, often family-based, groups. Less commonly, groups of farm-workers have used the grant to purchase equity shares in existing farming enterprises.¹⁹² Since 2001, state land under the control of national and provincial departments of agriculture has also

¹⁸⁷ Integrated Program of Land Reform and Agricultural Development (note 184 above)

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² E Lahiff 'Land and livelihoods: The politics of land reform in Southern Africa' (2003) 34 *Institute for Development Studies Bulletin* available at <http://www.ids.ac.uk/slsa> 45.

been made available for purchase. A separate grant, the Grant for the Acquisition of Municipal Commonage, has been made available to municipalities wishing to provide communal land for use by the poor, typically for grazing purposes. By the end of 2001, a total of 834 redistribution projects, in all categories, had been implemented or approved countrywide, involving 96 000 households.¹⁹³

Limited budgets have certainly limited the impact of redistribution to date.¹⁹⁴ While land reform is a government priority, its budgetary allocation to the DLA suggests otherwise, and is evident in the small percentage of funds allocated to the DLA budget. For example, in the 2001 to 2002 financial year, the DLA received less than half a percent (0.37 per cent) of the total national budget. This allocation decreased further in the following financial year (from 2002 to 2003) to 0.33 per cent of the total national budget.¹⁹⁵ It has been suggested that with this low spending base, the total national budget increases more significantly in real terms (9 per cent) in comparison to the total DLA national budget (-0.13 per cent) over the 2001 to 2005 period. It has also been indicated that the DLA national budget decreases by 7 per cent in real terms from the previous financial year.¹⁹⁶ This means that the DLA had fewer funds available between 2002 and 2003 than in the previous financial year and suggests, overall, that there is limited scope for the DLA to reduce poverty with its land reform programme.¹⁹⁷

The method of land acquisition and transfer implied by the 'demand-led' approach means that land must be acquired farm by farm, involving numerous uncoordinated negotiations between landowners, buyers and the state. Not only is this time-consuming and complex, it also allows for little or no overall control or coordination over the location and sequencing of land transfers. This makes it

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ C Mingo 'The 2002 Land Affairs Budget: Is land reform on track?' (2002) Budget Brief

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

next to impossible for local government and other support agencies to anticipate future needs and plan accordingly.¹⁹⁸ Encouraging moves towards the inclusion of land reform within local development plans are evident in a minority of municipalities, but are likely to be hampered by reliance on the market to provide the necessary land. Overall, it has been argued that the new redistribution programme (i.e. the LRAD) is decidedly market-friendly, and fully embraces the willing seller-willing buyer approach that was adopted in 1994.¹⁹⁹

5.3 The willing seller-willing buyer policy (WSWB)

As was discussed in previous chapters, the framework for the government's land reform policy is set out in the *White Paper on South African Land Policy* released in April 1997, which has been viewed as the official statement of government policy on land.²⁰⁰ The objectives of the *White Paper* included corrections of past injustices; generating reconciliation and stability; the promotion of economic growth; and the improvement of the quality of life of people through the alleviation of poverty.²⁰¹

It has been argued that while all three aspects of the land reform programme (land redistribution, land tenure and land restitution) are ultimately derived from the Constitution, it is the redistribution programme which is widely seen as giving effect to section 25(5).²⁰² The *White Paper* clearly sets out the purpose of the redistribution programme and states that:

The purpose of the land redistribution programme is to provide the poor with access to land for residential and productive uses, in order to improve their income and quality of life. The programme aims to assist the poor, labour tenants, farm workers, women, as well as emergent farmers. Redistributive land reform will be largely based on willing buyer willing seller arrangements. Government will assist in the purchase of land, but

¹⁹⁸ Lahiff (note 192 above).

¹⁹⁹ Aliber (note 175 above)

²⁰⁰ White Paper on South African Land Policy (note 99 above)

²⁰¹ Kollapen J 'The Right to Land' (2004) available at http://www.sahrc.org.za/old_website/5th_esr_land.pdf at 32.

²⁰² Lahiff and Rugege (note 48 above) 292.

will in general not be the buyer or owner. Rather, it will make land acquisition grants available and will support and finance the required planning process. In many cases, communities are expected to pool their resources to negotiate, but and jointly hold land under a formal title deed. Opportunities are also offered for individuals to access the grant for land acquisition.²⁰³

As stated in the White Paper, land redistribution has been characterised by the application of the willing seller-willing buyer principle which has meant assisting previously excluded groups to enter the existing land market, alongside other actors, without diminishing either the rights of those who have historically enjoyed favourable access to the land market, or the rights of existing land owners.²⁰⁴ The concept of the willing seller-willing buyer principle has dominated the discourse on land reform in South Africa since 1994, and as seen in the quote above, can indeed be described as one of the defining characteristics of the programme.²⁰⁵

5.3.1 A critique of the willing seller-willing buyer concept

Do these parties exist?

In general, the willing seller- willing buyer (WSWB) principle denotes a completely voluntary transaction between a seller and a buyer.²⁰⁶ It has been argued by some that in the South African context this general exposition of the principle is somewhat different. This is because the land owner is not a willing seller and the government cannot be characterised as a willing buyer because it has a legal duty to buy and reconstitute the land to the valid claimant.²⁰⁷ Thus, in this context, WSWB refers to an imaginary ideal rather than an actual practice.²⁰⁸

²⁰³ White Paper (note 99 above) Part 4: Land Reform Programmes

²⁰⁴ Lahiff and Rugege (note 48 above) 292

²⁰⁵ E Lahiff, 'from willing seller, willing buyer to a people- driven land reform' (2005) Policy Brief No. 17 Programme for Land and Agrarian Studies. University of the Western Cape 1

²⁰⁶ Department of Land Affairs 'Notes on the willing buyer willing seller approach' available at <http://www.uovs.ac.za/faculties/documents/04/099/Artikels/12607-060822buyer.pdf>

²⁰⁷ Ibid.

²⁰⁸ Lahiff (note 205 above).

Because of the WSWB principle, the pace of redistribution is effectively determined by numerous uncoordinated negotiations between land owners and would-be purchasers.²⁰⁹ Commercial farmers own most of the land, and a small fraction is in the custody of the state. In many instances, these farmers are reluctant to release land to willing buyers. It has been contended that this is done to curtail aspiring emergent farmers.²¹⁰ The purchase of land in South Africa is market based, and the sellers tend to overprice land, thus making it impossible for some buyers to acquire land.²¹¹

Due to the fact that it is government officials rather than beneficiaries who engage in the negotiations, attempts at redistribution of land are often being thwarted because these negotiations have the effect of driving up the price.²¹² It is argued that government officials are not keen to walk away from the negotiations due to the time invested and the fact that there are targets that need to be met. The result is that land owners tend to exploit this and demand exorbitant prices.²¹³

The concept of WSWB also appears to have been influenced by the course of land reform in Zimbabwe.²¹⁴ As was seen in chapter 4, in the Zimbabwean context, the concept of WSWB initially represented a state-led approach, whereby land would be acquired through a mix of expropriation (effectively nationalisation) and negotiated purchase, with compensation paid at the equivalent of market prices.²¹⁵ The intended beneficiaries (i.e. the landless) were not directly involved in the transaction, and could not therefore constitute a 'willing buyer', as this role was reserved for the state alone.²¹⁶

²⁰⁹ Lahiff and Rugege (note 48 above)

²¹⁰ Kollapen (note 201 above) 27.

²¹¹ Ibid.

²¹² Dreyer (note 16 above) 8.

²¹³ Ibid.

²¹⁴ Lahiff (note 205 above)

²¹⁵ Ibid.

²¹⁶ Ibid.

It has been argued that in the South African context of land reform the concept of WSWB has come to mean something quite distinct. The sellers are again private land owners, but the choice available to them is not simply to sell or not sell to government as it was in Zimbabwe. Rather, owners are free to sell to the highest bidder or the buyer of their choice.²¹⁷ Thus, South African landowners can actively avoid offering their land for sale for land reform purposes (for instance on racist grounds) yet still dispose of their land on the 'open market'. This is because the state does not have the right of first refusal and the intended beneficiaries have to compete for available land on open market at market prices.

WSWB as a hindrance to effective land redistribution

The doctrine of WSWB as it is used in the South African context entails that the whole concept is transferred from the state to the intended beneficiaries.²¹⁸ However, as seen above, simple 'willingness' on the part of landless people is no guarantee that they will be able to secure the land that they need. This is because people in need of land are dependent not only on the cooperation of the landowners, but also on the willingness of the state to approve their application and provide the necessary funding.

The negotiated settlement saw an accommodation of the interests of large commercial farming interests, through the acceptance of a willing seller-willing buyer 'market-assisted' approach to land acquisition and distribution, and a shift from seeing rural community members as 'active agents within local struggles' whose efforts to 'mobilise and organise' should be supported, to portraying them as 'beneficiaries' or 'clients' with varying needs or demands for land that the government should 'facilitate' the expression of.²¹⁹ Essentially, it is argued that the state became the locus of key decision making on land, even when it

²¹⁷ Ibid.

²¹⁸ Lahiff and Rugege (note 48 above) 285

²¹⁹ B Cousins 'Grounding democracy: The politics of land in post-apartheid South Africa' (2004) available at http://www.plaas.uwc.ac.za/staff/Ben_Cousins

consulted stakeholders, or outsourced functions to providers. The stage was thus set for a 'state-centred' politics of land reform.²²⁰

Lahiff points out that while the state has (in theory) the power and the resources to enter the land market on behalf of beneficiaries, it has chosen not to do so. Rather, it provides grants to would-be beneficiaries who themselves must enter the market, identify a 'willing seller' (i.e. property that is for sale) and secure an agreement from the owner to sell at an agreed price.²²¹ However, the problem with using the doctrine of WSWB as a tool for redistributive reform appears to lie in the fact that the 'willing buyer' and 'willing seller' as concepts do not receive equal regard and protection. It is argued that if a 'willing buyer' is said to exist, it may refer neither to the state (which does not buy land on its own behalf or initiative) nor to the intended beneficiaries. Rather, it represents an abstract concept which is essentially a hybrid of state and would-be beneficiaries, supposedly acting in unison.²²² 'Willing seller', on the other hand, accurately denotes the lack of compulsion on landowners, while 'willing buyer', as noted before, offers no guarantees to the landless that that they will acquire the land they want, or indeed any land at all.²²³ While the willing seller component (i.e. the cooperation of land owners) has been described by proponents of market-led agrarian reforms as the most important factor for any successful implementation of land reform,²²⁴ it is contended here that this in itself is one of the reasons for the weakness of the policy.

Moreover, the concept of 'willing seller' (and the payment of market prices) fully protects the interests of existing landowners as it neither compels them to sell against their will nor at a price with which they are not fully satisfied.²²⁵ The same privilege cannot be said to apply to landless people as no such

²²⁰ Ibid.

²²¹ Lahiff (note 205 above) 2.

²²² Ibid.

²²³ Ibid.

²²⁴ Borrás (note 89 above) 370.

²²⁵ Lahiff (note 205 above)

guarantees or protections are afforded to them. They continue to depend on state approval of their grant applications and on the willingness of owners to transact with them.²²⁶ This has led to the poignant and harsh conclusion that the South African land reform programme can best be described as a 'willing seller' programme.²²⁷

Ultimately, it is argued that social justice is not just about restitution, but about the way in which one conducts redistribution, and that the social justice undercurrent to redistribution very likely also accounts for the rejection of the whole willing seller-willing buyer concept, which confers on white farmers generally the power to decide what land will and will not be made available to blacks.²²⁸ In South Africa, where a text-book example of World Bank-inspired redistribution forms the centre-piece of land reform policy, the severe limitations of the market-based approach are plainly evident. It is argued that this, perhaps ironically, has less to do with failures of 'the market' or of current landowners to part with their property, than the very limited assistance made available by the state to the landless, and the refusal to proactively engage in the land market in order to secure outcomes favourable to the mass of the rural poor.²²⁹ Thus, market-based redistribution becomes piecemeal redistribution, securing benefits for a lucky few but leaving the fundamental structures of the agrarian economy, and the problems of mass rural poverty and landlessness, largely intact.²³⁰

The willing seller-willing buyer approach is also considered objectionable in that it puts people in the position of 'buying back their own land, even if the money largely comes from the state.'²³¹ It has been argued that the provisions in the willing seller-willing buyer approach effectively insulate white South Africans from any costs associated with restitution, and place the burden on South

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Aliber (note 175 above) 7.

²²⁹ Lahiff (note 192 above) 49.

²³⁰ Ibid.

²³¹ Aliber (note 175 above) 8.

Africans as a whole.²³² While this is in keeping with the country's philosophy based on principles of restorative and not punitive justice, the objection may be raised that land restitution and redistribution, while remedying one injustice, creates a new injustice, to the extent that the innocent are asked to pay for the crimes of the guilty.²³³ Frustrations over the pace of land reforms have led to fears that South Africa will run in to farm invasion problems, along the lines of what transpired in Zimbabwe.²³⁴

5.4 Analysis of government action

As indicated previously in the paper, the land reform programme has been affected by various institutional issues. From the beginning, the Department of Land Affairs' (DLA) task was acknowledged as being a mammoth one.²³⁵ It was required to meet the very high expectations of rapid land reform among the newly enfranchised majority, to draft and guide through an unfamiliar parliamentary process the legislation to achieve this and to develop the institutional structures and operating systems to support its work.²³⁶ Furthermore, the DLA's lack of staff capacity has been a continuing constraint, and, as the public demands for lands reform increase, a source of major concern. It has also been argued that in its early years, the DLA was further handicapped by the isolationism of government departments, often finding that it was working at cross-purposes with other departments, especially at the provincial and local level.²³⁷ Walker argues that the complexity of the institutional task was unanticipated by the advocates of land reform- and that even today politicians, policy-makers and the public still grossly underestimate the multi-dimensional capacity needed for effective implementation.²³⁸

²³² Barry (note 3 above) 369.

²³³ Ibid.

²³⁴ Ibid at 363.

²³⁵ Walker (note 29 above) 118

²³⁶ Ibid.

²³⁷ Ibid at 119.

²³⁸ Ibid.

It can thus be suggested that government has demonstrated a lack of political will when it comes to land reform and redistribution. This has manifested itself in the 'passive' role that government has taken in redistribution negotiations, and has been argued to be a contributing factor in the slow pace of delivery. As discussed in previous sections, the government's role under the willing seller-willing buyer approach is limited to funding, and therefore means that no responsibility is taken by government for identifying land or initiating negotiations with landowners. This has led to the suggestion that a much more active and intermediary role is required of the government. Government's new 'active' role would require that an unambiguous message is sent out stating that it is truly committed to reaching land redistribution targets, and fixing the Department of Land Affairs' highly bureaucratic process, while addressing the question of the department's lack of human and financial resources.

5.5 Conclusion

This chapter began with an overview of the government's land redistribution programme where the target of delivering 30 per cent of white owned agricultural land by 2014 was noted. This was followed by an examination of move from SLAG to LRAD which could also be characterised as a shift to a more commercial, market-based programme. The discussion also brought to the fore many problematic issues that arise in the willing seller-willing buyer policy of land redistribution. As the previous chapter on Zimbabwe and Namibia showed, this is not a problem inherent only to South Africa. While the willing seller-willing buyer policy aims at assisting previously excluded groups to enter the land market, the issues of inequality between 'willing sellers' and 'willing buyers' led to the conclusion that the policy was essentially a 'willing seller' policy. Thus it is concluded that the market-based willing seller-willing buyer policy is not the preferred approach for government as it will not lead to substantial change in land distribution, and that what is needed is a more involved approach. The next chapter discusses the provisions relating to expropriation in the Constitution, and determines whether this is a better tool for redistribution.

VI. EXPROPRIATION IN THE SOUTH AFRICAN CONSTITUTION: A SOLUTION TO THE SLOW PACE OF LAND REDISTRIBUTION?

6.1 Introduction

As has been highlighted in previous chapters, one of the key challenges that confront South Africa today is the alleviation of massive poverty, unemployment and underdevelopment that continue to exist in the country.²³⁹ It has been argued that given the imbalances that resulted from dispossession in South Africa, there was no way judicial restitution or redistribution of land could take place without the possibility of the expropriation of privately owned land.²⁴⁰

This chapter will examine the constitutional provisions dealing with the state's powers of expropriation and will consider the appropriate use of these provisions within a land reform context.

6.2 Expropriation under the South African Constitution

6.2.1 Section 25

Section 25 of the Constitution deals with the question of expropriation, and reads as follows:

- 25(2) Property may be expropriated only in terms of a 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.

²³⁹ M Andrews 'Struggling for Life in Dignity' in R Hall and L Ntsebeza (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution*, (2007) 211.

²⁴⁰ MA Yanou 'Access to land as a human right: The payment of just and equitable compensation for dispossessed land in South Africa (2005). PhD Thesis, Rhodes University. Available at <http://eprints.ru.ac.za> 130

- 25(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 in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.

6.2.2 *What does expropriation entail?*

The definition of expropriation in the South African property clause was set out in the early Constitutional Court decision in *Harksen v Lane NO*.²⁴¹ This case concerned the constitutional validity of an economic regulation provision that transferred assets of an insolvent's spouse to the trustee of the insolvent estate until it was clear that property was not transferred from the insolvent estate to defraud creditors. The issue to be determined was essentially whether the regulatory transfer of property amounted to an unconstitutional expropriation.²⁴² The Constitutional Court defined expropriation as "the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation".²⁴³ The Court also pointed out that the distinction between expropriation so defined and deprivation of property, which falls short of compulsory acquisition, has long been recognised in South African Law.²⁴⁴ It emphasised that an acquisition must permanently deprive the owner of the right in order to qualify as expropriation, implying that where the interference with rights in property is transient, it would amount to deprivation only.²⁴⁵

²⁴¹ *Harksen* 1998 (1) SA 300 (CC)

²⁴² AJ van der Walt An overview of developments in constitutional property law since the introduction of the property clause in 1993 (2004) 19 *SA Public Law* 46.

²⁴³ *Harksen* (note 242) para 32. In defining expropriation the Constitutional Court relied on *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A), a pre-constitutional decision of the Appellate Division of the Supreme Court, as well as *Davies v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZS), a decision of the Zimbabwe Supreme Court.

²⁴⁴ *Ibid* para 33.

²⁴⁵ *Ibid*.

This is reiterated by Currie and De Waal, who argue that expropriation must be understood as a form of interference with property that has two characteristics.²⁴⁶ The first is that there must be some form of appropriation – taking of the property. Like the Constitutional Court, they note that as long as the rights are merely extinguished and are not acquired by the public authority, the extinction does not amount to an expropriation. Besides appropriation, the second characteristic of an expropriation is that it must be made with an expropriatory purpose.²⁴⁷ They argue that the fundamental injustice that a right to property seeks to prevent is the acquisition of a public benefit at private expense. Laws that permit the taking of property with this purpose in mind are expropriations, requiring the payment of compensation from public funds.²⁴⁸

Section 25(2) does not remove the state's power to expropriate property but subjects it to two constraints. The first is that an expropriation is permissible only for public purposes or in the public interest. It has been contended that read with section 25 (4)(a), which provides that 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, the public interest requirement is unquestionably met when expropriations are undertaken for purposes of land redistribution.²⁴⁹ The second constraint imposed by section 25(2) is that an expropriation is subject to the payment of compensation for the property that has been taken.

6.3 Compensation

Compensation is at the heart of the expropriation analysis and has been described as an important aspect of expropriation, because without it, existing property rights would be infringed upon and one would be dealing with a

²⁴⁶ I Currie and J De Waal *The Bill of Rights Handbook* (2005) 553

²⁴⁷ *Ibid* at 554.

²⁴⁸ *Ibid*.

²⁴⁹ Zimmerman (note 69 above) 404

situation of confiscation.²⁵⁰ This was confirmed in *First National Bank of South Africa t/a WESBANK v Minister of Finance*,²⁵¹ where Ackermann J stated that for a deprivation to amount to an expropriation it must pass scrutiny under section 25(2)(a) and make provision for compensation under section 25(2)(b) of the Constitution.

This raises the important question of how compensation is to be determined. The Constitution gives South African courts broad discretion in determining compensation.²⁵² Courts do not simply determine the amount of compensation; they also determine the timing and manner of payment.²⁵³ Section 25(3) is supposed to guide the determination of compensation, but is widely accepted as being extremely vague.²⁵⁴ The subsection merely states that the three aspects of compensation (the amount, time and manner of payment) must be 'just and equitable' but does not clearly specify what precisely counts as 'just and equitable'.

The subsection only states that compensation should reflect an equitable balance between the public interest and the interests of those affected. In balancing these interests, the court must give regard to the pertinent considerations already listed above in section 25(3) (a)-(e) of the Constitution. The Constitution does not state in whose favour any particular factor should weigh.²⁵⁵ These factors, therefore, will be considered on a case-by-case basis and the party in whose favour a particular factor weighs will vary from one case to the next.²⁵⁶

Also worth noting is that the balance between the public interest and the interests of those affected is an equitable one, rather than an equal one, which,

²⁵⁰ Ntsebeza (note 26 above)

²⁵¹ *First National Bank* (note 52 above)

²⁵² Robinson (note 9 above) 496

²⁵³ *Ibid.*

²⁵⁴ Ntsebeza (note 26 above) 122

²⁵⁵ Robinson (note 9 above) 496

²⁵⁶ *Ibid.*

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it is argued, gives the court additional flexibility in determining compensation.²⁵⁷ While some factors will accordingly be given more weight than others depending on the particular facts, what is clear is that if expropriation is carried out for purposes of land reform, then compensation must reflect a just balance between concern for landowners and concern for those dispossessed of land and livelihood by the injustices of the nation's past.²⁵⁸

A combination of the existing land redistribution programme, based on the willing seller-willing buyer principle and government anxiety over compensation for land have led to the expropriation provision not being applicable in government redistribution policy thus far. The vague nature of the compensation formula in section 25 has not helped. It is imperative to the protection of rights and the facilitation of access to property for transformative purposes that the requirements for compensation are clarified, the state to fulfil its obligations.

It has been argued that given the racist policy of the apartheid government, which explicitly favoured the interests of white over black citizens, perhaps the most critical factors in section 25(3) that are to be considered in terms of land reform expropriations are the history of the acquisition and use of the property, as well as the extent of direct state investment and subsidy in the acquisition and capital improvement of the property.²⁵⁹ Taking account of these factors in calculating compensation would avoid windfalls for landowners who benefited from past unfair policies and make land more affordable for purposes of redistribution.²⁶⁰

²⁵⁷ Ibid.

²⁵⁸ Zimmerman (note 69 above) 407

²⁵⁹ Lahiff and Rugege (note 48 above) 283.

²⁶⁰ Ibid.

6.3.1 Case law on the calculation of compensation

6.3.1.1 The so called *Gildenhuis* formula

*Ex Parte Former Highlands Residents*²⁶¹ is the only reported case dealing with the interpretation of section 25 (3) of the Constitution and was referred to by the Cape High Court in *Du Toit v Minister of Transport*,²⁶² which also dealt with the awarding of a compensation claim for state expropriation. In *Ex Parte Former Highlands Residents*, Gildenhuis J dealt with section 2 (2) of the Restitution of Land Rights Act 22 of 1944 (in terms of which no person is entitled to restitution if just and equitable compensation in terms of section 25 (3) has been received in respect of the dispossession of land rights) by finding that the provisions of section 25 (3) are clearly intended to require that market value, while important, not be the conclusive and determinative factor in the assessment of just and equitable compensation.²⁶³

Gildenhuis J found that the market value of the expropriated property does nonetheless play a central role in the determination of fair and equitable compensation, not least because it is, other than factor (d) regarding state subsidies, the only factor that is readily quantifiable. In this regard, however, he also noted that the requirement that financial loss be compensated can lift the compensation to above the market value, while public interest may reduce it.²⁶⁴ He concludes by finding that in his view, the equitable balance required by the Constitution for a determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter subtracting from or adding to the amount of the market value, as other relevant circumstances may require.²⁶⁵

²⁶¹ *Ex Parte former Highlands Residents* 2000 (1) SA 489 (LCC)/ (2000) 2 B All SA 26

²⁶² *Du Toit* 2003 (1) SA 586 (C) at 596C.

²⁶³ *Ex Parte former Highlands Residents* (note 261 above) para 32

²⁶⁴ *Ibid* para 34.

²⁶⁵ *Ibid* para 35.

6.3.2 Implications of the Gildenhuys formula

It has been argued that the same formula can be used as a guide even in land redistribution cases.²⁶⁶ In the context of expropriation, it would look as follows:

$$\text{Compensation} = C - k_0 \cdot (B - A) - E_1 \cdot K_1 - E_2 \cdot K_2 - E_3 \cdot K_3 \dots^{267}$$

In essence, this formula only takes into account two of the considerations mentioned in section 25(3), namely, the market value of the property and the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property.²⁶⁸ In a nutshell, the amount of compensation is the market value of the property minus the present value of past subsidies.²⁶⁹ This addresses the concern that the present market value of property would always be high and that payment of high compensation would mean that those who benefited under apartheid would continue to do so. By including the considerations enumerated in section 25(3), such a formulation for the determination of compensation also meets the 'just and equitable' requirement for compensation.

6.4 Is expropriation the way forward?

The White Paper stated that expropriation will be used as an instrument of last resort where urgent land needs cannot be met through voluntary market transactions and that it will be considered where there is no reasonable alternative land and the owner will not sell, or will not negotiate a fair price.²⁷⁰ It could be argued that the general view suggests that South Africa is possibly in such a situation now. The Department of Land Affairs' recent discussion document proposes the use of extensive expropriation to meet the government's

²⁶⁶ Ntsebeza (note 26 above) 122.

²⁶⁷ Land reform Policy Committee, Policy and Procedures for Expropriation of Land in terms of Act 126 and ESTA, at 9. C is the present day market value of the property; k₀ is the inflation factor related to land acquisition, based on the cpi; B is the market value of the property at the time of acquisition; A is the actual price paid at the time of acquisition; E₁, E₂, E₃, etc., are the historical values of infrastructure and interest rate subsidies received, and k₁, k₂, k₃, etc., are the corresponding inflation factors for these subsidies, based on the cpi.

²⁶⁸ Ntsebeza (note 26 above) 122

²⁶⁹ Ibid.

²⁷⁰ See White Paper (note 99 above)

30 per cent redistribution target.²⁷¹ Some suggest that expropriation is unlikely to result in cheaper or faster land reform, and instead echo the White Paper by suggesting that it should be reserved for the minority of difficult cases.²⁷²

The government has previously been criticised for its apparent hesitation to use its expropriation powers for land reform purposes and for its seeming unwillingness to speed up land reform by expropriating land against compensation at less than market value.²⁷³ While it has been seen that the fundamentals, in terms of policy, are in place and have constitutional mandate, most commentators argue that what is missing is commitment from government to ensure that the policies are implemented.²⁷⁴ This allegation is often couched in terms of a lack of political will on the part of the South African government. As stated above, the government's expropriation powers have been largely unused in redistribution cases, leading some to conclude that the property clause is itself not the immediate challenge but that the constraint is a political rather than a legal one.²⁷⁵ |

It is important to note that where the state uses expropriation to meet the imperatives of section 25(4) of the Constitution, the strength for land and agrarian reform of expropriation lies in its threat.²⁷⁶ If the expropriation mechanism is used judiciously, the message that the state is serious about expediting the land and agrarian reform programme and is no longer prepared to indulge in unjustifiably prolonged negotiations will be internalised by the landed gentry and thus taken seriously.²⁷⁷ Therefore, it is argued that the state has to

²⁷¹ Department of Land Affairs 'Toward the framework for the review of the willing buyer-willing seller principle' (2006) 3rd Draft Discussion Document available at <http://www.participation.org.za/docs/wbwsreview.DOC> at

²⁷² Lahiff (note 203 above)

²⁷³ AJ Van der Walt 'Reconciling the state's duties to promote land reform and to pay just and equitable compensation for expropriation' (2006) 123 *SALJ* 23

²⁷⁴ Ntsebeza (note 26 above) 119

²⁷⁵ *Ibid* at 121

²⁷⁶ DLA (note 271 above)

²⁷⁷ *Ibid*.

demonstrate its resolve to acquire land in the most cost effective manner to accelerate land delivery.²⁷⁸

6.5 Expropriation and the Zimbabwean Risk

While the slow pace of reform is generally seen as a major contributor to rural unrest in Zimbabwe, the situation in South Africa is certainly no better.²⁷⁹ The emergence of land invasions in Zimbabwe occurred as it was becoming increasingly apparent that the land market was unlikely to lead to a speedy transfer land to black farmers on a large scale, and certainly not on the scale which the government itself had pledged.²⁸⁰ In South Africa, across the three key areas of government land policy – restitution, redistribution and tenure reform – progress has been painstakingly slow, and the Department of Land Affairs has repeatedly failed to spend its allocated budget for land acquisition.²⁸¹ While some critics have attributed this to resistance from white landowners, or to the protection afforded to private property in the Constitution, a growing consensus also points to a combination of poor programme design and a lack of capacity at all levels of government.²⁸² As discussed above, this has led to calls for a shift in government policy, namely, towards the use of constitutionally endorsed expropriation in the area of land reform.

Expropriation is nothing new, and the South African government regularly expropriates numerous properties each year for public purposes such as roads and dam construction.²⁸³ But, the expropriation of land from one private owner to transfer it to another, in the interests of land reform, is something new.²⁸⁴ As stated above, there are fears that South Africa will run in to farm invasion problems, along the lines of what transpired in Zimbabwe. However, it has been argued that comparisons with Zimbabwe's large-scale confiscation of farms are

²⁷⁸ Ibid.

²⁷⁹ Lahiff and Cousins (note 181 above) 662.

²⁸⁰ ICG (note 114 above) 154.

²⁸¹ Lahiff and Cousins (note 181 above).

²⁸² Ibid.

²⁸³ Hall 'The unfinished business of land reform'. Mail & Guardian February 23-March 1 2007 at p.27

²⁸⁴ Ibid.

spurious, and that there is no indication that expropriation is to be used as anything other than a method of last resort.²⁸⁵

It has been argued that beyond all the hype, the events in Zimbabwe do not appear to pose a threat for South Africa and that the poor and landless in South Africa have not yet followed the example of the war veterans in Zimbabwe.²⁸⁶ The South African government, constrained by the market-friendly prescriptions of the RDP has gone to great lengths to assuage the concerns of private landowners and foreign investors.²⁸⁷

In fact, expropriation has so far only been countenanced as a way to deal with restitution and not in the wider process of land redistribution. Furthermore, unlike Zimbabwe, South Africa has the legal and institutional mechanisms to provide oversight as the state intervenes in favour of the landless to settle historical claims.²⁸⁸ The forcible expropriation of land adopted by President Mugabe is contrary to the South African model, which privileges the rule of law in the resolution of a similar problem. It has a land claims commission, and land claimants and landowners have recourse to a specialist land claims court.²⁸⁹

6.6 Conclusion

This chapter has demonstrated that there is constitutional endorsement of expropriation as a means of giving effect to land redistribution, and began by examining the expropriation provisions, and the meaning assigned to them through interpretation by the courts. This was followed by a discussion on the compensation requirement, which has been described as being at the heart of expropriation analysis, and the exposition on the Gildenhuis formula for determining the amount of compensation. The question of whether expropriation is the way forward led to the conclusion that South Africa may now be described

²⁸⁵ Ibid.

²⁸⁶ Lahiff and Cousins (note 181 above) 660.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

as being in a situation that requires the use of this 'last resort' tool. Lastly, it was concluded that while the situation in Zimbabwe has brought land redistribution politics to the fore, South Africa's constitutional, legal and institutional mechanisms ensure that the probability of the same occurring here is very low.

VII. CONCLUSION

This dissertation considered the appropriateness of the South African government's approach to land redistribution by reviewing the willing seller-willing buyer policy. This involved an assessment of its effectiveness as the basis of the government's land redistribution programme and as its main tool for redressing the imbalances of the past. It set out to demonstrate that a land redistribution programme premised on the willing seller-willing buyer policy is an unsuitable approach to speedy reform in South Africa and that a more active state-expropriation based approach is preferable.

The study has established the basis for the discussion on the willing seller-willing buyer policy by first examining the right to land and the significance of land reform. It has demonstrated that the Reconstruction and Development Programme's statement on the centrality of land reform for the purposes of rural development was not only re-enforced by international instruments, but that it also found its basis in the Constitution's provision of the legal authority empowering government to redistribute land. Land reform in general and land redistribution in particular are significant for addressing issues of equality and alleviation of poverty. They are also necessary for the establishment of political stability and a secure society because they address the redistribution of wealth and power. Market-based redistributive reforms were also analysed, and it has been argued that while they are usually favoured as the primary mode of redistributive reform, this did not apply in the South African context, where the willing seller-willing buyer principle has failed to meet redistribution targets.

This dissertation has also considered the application of market-based reforms in Zimbabwe and Namibia. This discussion has demonstrated that in order to be successful, the willing seller-willing buyer policy must be implemented in a strategic manner that keeps its primary objectives prioritised. This has not been the case in either country and, as a result of the slow pace of delivery under the

willing seller-willing buyer approach; both abandoned the policy in favour of expropriation as the main basis for redistribution.

The discussions on the application of the willing seller-willing buyer policy in South Africa and the possibility of using state expropriation as an alternative method raise the question of whether it is the structure of the redistribution programme that needs to be changed or whether the problems lie with implementation within those structures. In formulating its land reform policy, the government's main challenge is to find a way of redistributing land to the needy, and at the same time maintaining public confidence in the land market. In this regard, one of the main criticisms levelled against the willing seller-willing buyer principle is that the concept of 'willing seller' fully protects the interests of existing landowners by neither compelling them to sell against their will nor at a price with which they are not fully satisfied. The argument is that, by doing this, the policy favours landowners and essentially entrenches the consequences of the apartheid regime in post-apartheid society. As a result, it is questionable whether such a policy can satisfy both the need to protect property and ensure that there is an equitable distribution of land.

Due to the shortcomings of the willing seller-willing buyer approach it is argued that a more interventionist approach to land reform in which state expropriation forms a central part, as endorsed by section 25 (2) and (3) of the Constitution, is necessary. If used judiciously, expropriation will send the message out that the state is serious about expediting the land reform programme and will also suggest that it is no longer satisfied with prolonged negotiations with land owners. Expropriation is also in keeping with the initial goal of targeting the country's rural poor through land reform. Under the market-based programme land reform took a more explicitly commercial orientation, as was evident in the fact that the previous income ceiling that applied under SLAG was replaced with the requirement of an own contribution under the LRAD.

As was contended in the paper, the willing seller-willing buyer approach grants enormous discretionary power to landowners to influence the pace and direction of land reform in South Africa. The decisions of both the Zimbabwean and Namibian governments to implement state-led expropriations to enable a more effective redistribution programme strongly support the same measure being taken by the South African government. Furthermore, a more carefully planned policy on expropriation would avert the problem of rushed reform, as experienced in Zimbabwe. Expropriation enables the state to reclaim the power over the implementation of land redistribution and ensures that sufficient land is made available in areas where it is most needed. It is argued that an interventionist and robust approach from the state based on section 25 (2) and (3) of the Constitution is what is needed to bring about the fundamental shift in property rights that is required and to effectively address the extreme inequality in landholding that currently prevails in South Africa; as well as ensuring that steps are taken to meet the government's redistribution targets.

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