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## South Africa's Land Reform Programme.

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## SOUTH AFRICA'S LAND REFORM PROGRAMME

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|                             |     |
|-----------------------------|-----|
| I. Introduction.....        | 195 |
| II. Redistribution.....     | 196 |
| III. Land Restitution.....  | 198 |
| IV. Land Tenure Reform..... | 199 |

### I. INTRODUCTION

“[L]and is a precious resource. We build our homes on it; it feeds us; it sustains animal and plant life and stores our water. It contains our mineral wealth and is an essential resource for investment in our country's economy.”<sup>1</sup> But most of all, land is what shapes our national identity, our national character and our roots to our country.

Two-thirds of the land in South Africa, including some of the best land, is held by 60,000 whites, while 14 million subsistence farmers are working and living on Apartheid-era plots.<sup>2</sup> The importance of land reform in South Africa arises from the scale and scope of land dispossession of black people, which has taken place at the hand of white colonizers.<sup>3</sup> For most of this century, indeed since the Natives' Land Act of 1913,<sup>4</sup> rights to own, rent or even sharecrop land in South Africa depended upon a person's racial classification.<sup>5</sup> Millions of black people were forced to leave their ancestral lands and resettle in what quickly became overcrowded and environmentally degraded reserves and pools of cheap mi-

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1. S. AFR. DEP'T OF LAND AFFAIRS, WHITE PAPER ON LAND REFORM § 2.1 (1997) [hereinafter WHITE PAPER]; see Heather Boyle, *The Land Problem: What Does The Future Hold For South Africa's Land Reform Program?*, 11 IND. INT'L & COMP. L. REV. 665, 665 (2001).

2. *Id.* at 674.

3. See Judge Justice Moloto, *South African Legal Reform After April 1994*, 26 N.C. J. INT'L L. & COM. REG. 653, 654 (2001) (noting that the Free State Ordinance No. 5 of 1876 prohibiting the sale of land to blacks, along with the Glen Grey Act that restricted the amount of land one could own contributed to Africa's land dispossession).

4. Natives' Land Act 27 of 1913, <http://www.polity.org.za/html/govdocs/legislation/misc/nla1913.html> (last visited May 11, 2003).

5. Emily Bourdeaux Smith, *South Africa's Land Reform Policy and International Human Rights Law*, 19 WIS. INT'L L.J. 267, 269 (2001).

grant labour.<sup>6</sup> Under the Native Trust and Land Act of 1936, black people even lost the right to purchase land in the reserves and were obliged to utilize land administered by tribal authorities appointed by the government.<sup>7</sup> Black families, who owned land under freehold tenure outside the reserves before 1913, were initially denied any rights under the provisions of the Natives' Land Act.<sup>8</sup> The result was a number of so-called "black spot" communities in farming areas occupied by whites.<sup>9</sup> These were the subjects of a second wave of forced removals which took place from the 1950s through the 1980s.<sup>10</sup>

In 1994, the new government passed a Land Restitution Act, which is now found in section 25 of the Constitution of South Africa.<sup>11</sup> The main objectives of the land reform policy are: to redress the injustices of apartheid by redistributing 30% of the country's farmland over fifteen years; to foster national reconciliation and stability; to underpin economic growth; and to improve household welfare and alleviate poverty.<sup>12</sup> As anticipated, in the 1994 Reconstruction and Development Programme policy framework, the government's response to land reform has the three major elements of redistribution, restitution, and land tenure reform.<sup>13</sup>

## II. REDISTRIBUTION

"Redistribution aims to provide the disadvantaged and the poor with access to land for residential and productive purposes. Its scope includes the urban and rural poor, labour tenants, farm workers and new entrants to agriculture."<sup>14</sup> This enables disadvantaged people to buy land with the help of a settlement or land acquisition grant.<sup>15</sup>

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6. See Lauren G. Robinson, *Rationales For Rural Land Redistribution in South Africa*, 23 *BROOK. J. INT'L L.* 465, 472-74 (1997). See generally Elizabeth Mertz, *The Uses of History: Language, Ideology, and Law in the United States and South Africa*, 22 *LAW & SOC'Y REV.* 661, 669 (1988) (explaining how segregation occurred in specific areas giving increased power to the white landowners).

7. Robinson, *supra* note 6.

8. *Id.* at 472.

9. Smith, *supra* note 5.

10. Robinson, *supra* note 6, at 477.

11. Smith, *supra* note 5, at 270, 278.

12. S. Afr. Const. ch. 1, § 25; see Heather Boyle, Note, *The Land Problem: What Does The Future Hold for South Africa's Land Reform Program?*, 11 *IND. INT'L & COMP. L. REV.* 665, 679 (2001).

13. WHITE PAPER, *supra* note 1.

14. CALEDONIA CTR. FOR SOCIAL DEV., *LAND REFORM IN SOUTH AFRICA*, at <http://www.caledonia.org.uk/land/south.htm> (last visited May 11, 2003) [hereinafter CALEDONIA CTR.].

15. WHITE PAPER, *supra* note 1.

Land redistribution is the facet of the Land Reform Programme in which the most substantial delivery has been recorded. The Land Reform Programme has undergone its own evolutionary process as its practice was being formulated. For example, it became clear that land redistribution not only encompassed projects of an agricultural nature but also included settlement-type projects and non-agricultural enterprises.<sup>16</sup> It includes two distinct parts. The first deals with the transfer of agricultural land to individuals and groups while the second deals with commonage projects, which aim to improve people's access to municipal and tribal land used primarily for grazing purposes.<sup>17</sup> However, they operate according to different financial mechanisms, target groups and delivery systems; for example, beneficiaries can access a range of grants depending on the amount of their own contribution in kind, labour and/or cash.<sup>18</sup> They must provide their own contribution of at least R5 000.<sup>19</sup> These grants can be accessed by black South African citizens eighteen years and older, on an individual basis only for agricultural projects. The South African government has been criticized because it was claimed that people would not be able to afford these amounts. The fact of the matter is however, that it is evident that land reform is incomplete if it lacks the critical element of development. Countries such as South Korea and Taiwan owe much of their success in agrarian reform to effective state intervention. Where people have put in something of their own, they have identified more closely with the project. This approach also contributes towards the eradication of the dependency syndrome and discourages the lotto mentality vis-à-vis government intervention.

A lease option was also initiated for individuals who might not be able to purchase the property from the start.<sup>20</sup> Funds were also lodged by the government with the Land Bank for those individuals who require both a grant and a loan in order to acquire farms and agribusiness properties.<sup>21</sup> Farm Equity Schemes were also developed and refined for farm workers.

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16. WHITE PAPER, *supra* note 1, at § 3.15.

17. WHITE PAPER, *supra* note 1, at § 3.15-3.16. "The term commonage is traditionally given to land, owned by a municipality or local authority, that was usually acquired through state grants or from the church." *Id.*

18. *See generally* WHITE PAPER, *supra* note 1.

19. The basic unit of currency in South Africa is the Rand; one Rand equals 100¢. Bruce Fetter, *South Africa*, in 18 THE WORLD BOOK ENCYCLOPEDIA 608, 610 (Scott Fetter Co., 2000).

20. *See generally* WHITE PAPER, *supra* note 1; *see also* Robinson, *supra* note 6, at 498.

21. *See generally* WHITE PAPER, *supra* note 1.

### III. LAND RESTITUTION

“Land Restitution covers cases of forced removals that took place after 1913. This is being dealt with by a *Land Claims Court and Commission* established under the *Restitution of Land Rights Act 22 of 1994*.”<sup>22</sup> It usually involves returning land lost because of racially discriminatory laws, although it can also be affected through compensation.<sup>23</sup>

In 1998, it became clear that the Land Restitution Programme was making little progress so the government structures dealing with this were merged into one department with one line of authority and accountability. The emphasis was also shifted from a judicial to an administrative process of resolving restitution claims. This means that if the parties agree, the minister can approve a restitution settlement outside the Court. Only disputed cases are sent to Court for ruling and ratification. This approach has led to an increase in the pace of delivery; the number of lodged claims increased from approximately 30,000 to 63,455 claims. By May 2001, 12,150 claims had been settled.

The Land Claims Court was established in 1995, in terms of the Restitution of Land Rights Act.<sup>24</sup> Should a case fail to be successfully mediated for whatever reason, it is referred to the Land Claims Court for a ruling.<sup>25</sup> The Court has the status of a High Court, and any appeal against a Land Claims Court decision is handled by the Constitutional Court.<sup>26</sup> The government cannot interfere with the workings of the Court.<sup>27</sup> The Land Claims Court is responsible for determining restitution and compensation for those who lost land as a result of forced removals. The Court is required to be accessible to everyone and to establish processes that will enable it to make speedy decisions. Aspects of the Court’s jurisdiction and proceedings are peculiar to the functions it performs; for example, it may conduct any part of its proceedings on an informal or inquisitorial basis and it may convene hearings in any part of the country to make it more accessible.

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22. CALEDONIA CTR., *supra* note 14.

23. Boyle, *supra* note 1, at 679; Moloto, *supra* note 3, at 681-82.

24. No. 22 of 1994: Restitution of Land Rights Act 22 of 1994, <http://www.polity.org.za/html/govdocs/legislation/1994/act94-022.html> (last visited May 11, 2003) [hereinafter Land Rights Act].

25. See *Dukuduku Claimants to Take Land Commission to Court*, S. AFR. PRESS ASS’N, Aug. 28, 2002, available at 2002 WL 23700043.

26. See generally Land Rights Act, *supra* note 24.

27. *Id.*

## IV. LAND TENURE REFORM

“Land Tenure Reform is being addressed through a review of present land policy; administration and legislation to improve the tenure security of all South Africans and to accommodate diverse forms of land tenure, including types of communal tenure.”<sup>28</sup>

Land Tenure Reform aims to bring all people occupying land under one legal system of landholding.<sup>29</sup> It will provide for diverse and secure forms of tenure, help resolve tenure disputes, and provide alternatives for people who are displaced in the process. A fundamental goal of tenure reform is to provide people with security of tenure.<sup>30</sup> This is necessary to avoid the suffering and social instability caused by arbitrary or unfair evictions.<sup>31</sup> Tenure reform is also essential if people are to invest in the land and use it in a sustainable manner.<sup>32</sup> Over the past nine years, laws have been introduced to protect the interests of farm workers and labour tenants living on other people's land.

New legislation in this regard was developed over the last decade, for example, the Interim Protection of Informal Land Rights Act. The Act was an interim measure to secure the position of people with “informal” land rights, mainly in the former homeland areas, while more comprehensive legislation was being prepared.<sup>33</sup> The Act ensured that holders of informal land rights were recognized as stakeholders in land transactions and development projects on the land they occupy.<sup>34</sup>

The Land Reform Act and the Extension of Security of Tenure Act were passed to protect farm workers and labour tenants from arbitrary evictions and to provide mechanisms for the acquisition of long-term tenure security.<sup>35</sup> A number of other Acts have also been implemented to enable communities benefiting from the above Acts to allow juristic persons to acquire, hold and manage property on a basis agreed to by members in terms of a written constitution.

Critics of the South African Land Reform process have been quick to say that the Programme is doomed to fail, given that the government continues to pursue the market oriented willing-buyer, willing-seller ap-

28. CALEDONIA CTR., *supra* note 14.

29. *See generally* WHITE PAPER, *supra* note 1.

30. *Id.*

31. Boyle, *supra* note 1, at 681.

32. *Id.*

33. Interim Protection of Informal Land Rights Act 31 of 1996, 635RSA 2-578 (1997), available at <http://www.polity.org.za/html/govdocs/legislation/1996/act96-031.html> (last visited May 12, 2003).

34. *Id.*

35. *See* Moloto, *supra* note 3, at 670 (emphasizing that the Act limits evictions and grants ownership applications).

proach.<sup>36</sup> In determining land prices, the approach of using productive value of the land rather than market value, coupled with discounting amounts that in the past were provided as State subsidies is an option being considered.

It is true that the Constitution provides for expropriation for land reform purposes.<sup>37</sup> Difficulties have been experienced in negotiations with some farmers who see a bonanza opportunity. Fallow and under-utilized land could be targeted for expropriation, particularly if situated in close proximity to areas occupied by communities in need of land.<sup>38</sup> Needless to say, the government would honour its Constitutional obligation to provide just and equitable compensation to those whose land might be expropriated.

In short, South Africa is committed to a Land Reform process, but within our laws and legislative structure, especially the overarching South African Constitution.

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36. Boyle, *supra* note 1, at 690.

37. *Id.* at 669.

38. *Id.*