

THE INSTITUTIONAL ARRANGEMENTS FOR LAND REFORM: THE SOUTH AFRICAN CASE

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Martin Adams, Siphosiso Sibanda, Glen Thomas¹
Department of Land Affairs, RSA

1 INTRODUCTION

Land reform in South Africa is still at an early stage. This paper briefly describes the first chapter in the land reform story - the first five years. Land reform got underway in late 1994 with the Land Reform Pilot Programme and only 'went national' two years later. The institutions which have been put in place are now beginning to find their feet and to make headway with implementation. Major institutional issues, particularly those relating to the devolution of powers and responsibilities for land reform to the local level have still to be satisfactorily resolved. Much will depend on the capacity of the new local government structures which are currently being established across the country for the first time. The Department of Land Affairs itself is going through a process of transformation so as to achieve the vision, mission and objectives which it has set itself, within the national policy framework of good governance. South Africa certainly cannot claim to have discovered all the institutional answers to implementing land reform. If other countries are any guide, the voyage of discovery will continue for many years yet.

2 SCOPE OF LAND REFORM IN SOUTH AFRICA

It is necessary to provide a very brief overview of the land reform programme in South Africa to make clear what land reform institutions are required to deliver.

The very broad scope of land reform in South Africa was decided before it became clear just how it was to be achieved. As in all countries where it is undertaken, land reform in RSA is a strongly political process. Objectives are set at a high level. Government administrators have to put the necessary institutions in place. This obligation applies to all sectors of government, but in the case of land reform the gap between political expectations and administrative capacity seems particularly difficult to bridge.

The case for South Africa's rural land reform programme and its scope and content were very clearly set out in the initial policy document of the Reconstruction and Development Programme in 1994:

'Land is the most basic need for rural dwellers. Apartheid policies pushed millions of black South Africans into overcrowded and impoverished reserves, homelands and townships. In addition, capital intensive agricultural policies led to the large-scale eviction of farm dwellers from their land and homes. The abolition of the Land Acts cannot redress inequities in land distribution. Only a tiny minority of black people can afford land on the free market.'

A national land reform programme is the central and driving force of a programme of

¹ Land Reform Policy Branch, Department of Land Affairs, Private Bag X833, Pretoria 0001(madams@sghq.pwv.gov.za). The opinions expressed in this paper do not necessarily represent those of the Department of Land Affairs.

rural development. Such a programme aims to redress effectively the injustices of forced removals and the historical denial of access to land. It aims to ensure security of tenure for rural dwellers. And in implementing the national land reform programme, and through the provision of support services, the democratic government will build the economy by generating large-scale employment increasing rural incomes and eliminating overcrowding.

The RDP must implement a fundamental land reform programme. This programme must be demand-driven and must aim to supply residential and productive land to the poorest section of the rural population and aspirant farmers. As part of a comprehensive rural development policy, it must raise rural incomes and productivity, and must encourage the use of land for agricultural, other productive or residential purposes.

*The land policy must ensure security of tenure for all South Africans, regardless of their system of land-holding. It must remove all forms of discrimination in women's access to land.'*²

When these goals were first set, few people in government had much idea of the institutional arrangements needed for land reform.³ The task was recognised to be massive. Since 1936, black people had been confined to 14 per cent of the country. Even in that small area, they were not allowed to own land. It was held in trust by the state. Under the new Constitution, the national government was made responsible for land reform and the administration of state land. On the other hand, provincial and local government were given responsibility for rural development. This allocation of powers has posed a major challenge for the planning and implementation of land reform in South Africa.

2.1 Land Redistribution

As anticipated in the 1994 RDP policy framework, government's land reform programme has had three elements. Land Redistribution is a broad programme which aims to provide the disadvantaged and the poor with land for residential and productive purposes. The government developed a single, yet flexible, grant mechanism to embrace the wide variety of land needs of applicants. Land redistribution can take the form of:

- group settlement with some production;
- group production;
- commonage schemes;
- on-farm settlement;
- share equity schemes;
- rapid land release in urban areas;

Under the *Provision of Land and Assistance Act, 126 of 1993*, the DLA assists eligible

² *Reconstruction and Development Programme; a policy framework*, ANC, 1994, pp 19-20

³ See 'Setting the agenda; a critique of the World Banks's rural restructuring programme for South Africa', *Journal of Southern African Studies*, 22, 1, 1996, by Gavin Williams.

individuals and groups to obtain a Settlement/Land Acquisition Grant to a maximum of R16 000 per household for the purchase of land directly from willing sellers, including the state. Government endeavours to ensure a geographical spread of projects and a diversity of project types, covering different beneficiary sectors, different land uses, and different tenure arrangements. Special attention is being given to farm workers whose situation is most insecure. Government aims to direct the subsidy to farm workers and their families in a way which improves tenure security and at the same time contributes to reconciliation and harmony. The Settlement/Land Acquisition Grant can be used in a number of ways to achieve these aims.

Partnerships with the private sector are supported in order to widen the scope and efficiency of the land reform process. The Settlement/Land Acquisition Grant can be used to purchase a share in land and infrastructure provided that it offers security of tenure and raises the incomes of the grantees. Such cooperative arrangements can greatly improve farm production and the income of the partners.

Currently, some 500 000 hectares have been redistributed to about 50 000 households. As we all know, bald statements of this nature can mask projects which are less successful than others. The performance of the Land Redistribution Programme has failed to match up to early expectations, either in terms of the number of people involved or in terms of sustainable livelihoods.

2.2 Land Restitution

The purpose of the Land Restitution Programme is to restore land and provide other remedies to people dispossessed by racially discriminatory legislation and practice. This is being done in such a way as to support the process of reconciliation and development, and with regard to the over-arching consideration of fairness and justice for individuals, communities and the country as a whole.

The government's policy and procedure for land claims are based on the provisions of the Constitution and the *Restitution of Land Rights Act, 22 of 1994*. A restitution claim qualifies for investigation by the Commission on Restitution of Land Rights provided that the claimant was dispossessed of a right in land after 19 June 1913, as a result of racially discriminatory laws or practices, or was not paid just and equitable compensation.

Restitution can take the form of:

- restoration of the land from which claimants were dispossessed;
- provision of alternative land;
- payment of compensation;
- alternative relief comprising a combination of the above; or
- priority access to government housing and land development programmes.

The State aims to compensate certain successful claimants where restoration of the land or other remedies are not appropriate. Land owners whose land is expropriated for the purposes of restoring land to successful claimants are compensated in a just and equitable manner. In 1998, in response to the slow pace of implementation, a ministerial review of restitution

was conducted to find ways of resolving claims more quickly, without compromising the integrity of the programme. The whole restitution process, including the institutional arrangements, was the subject of critical analysis and a major re-organisation. The Commission has now been integrated into the Department of Land Affairs and become accountable to the Director General, through the Chief Land Claims Commissioner.⁴

Of the 60,000 or so restitution claims lodged with the Commission, only 241 have been finalised so far. The settlements involve compensation to 13 583 households.

2.3 Land Tenure Reform

Under the new Constitution, the South African government is obliged to develop laws which set out the types of interests in land which were undermined by discriminatory laws and ensure that such interests in land are legally secure. Tenure reform must address a range of problems arising from settler colonisation and dispossession. Many of the areas referred to as communal were deliberately created to further colonial policies. They served as reservoirs for cheap migratory labour. A factor complicating post-transition attempts to dismantle the apartheid map is the complex and unstructured nature of the legislation governing the communal areas, much of which has yet to be repealed. Under these laws, officials of provincial governments still issue 'permissions to occupy'. Without the *Interim Protection of Informal Land Rights Act, 31 of 1996 (IPILRA)*⁵, the great majority of people (31.4 per cent of the national population) would have no right, independent of the will of the state, to occupy or use their land.⁶

The differing systems of property rights pertaining to private land (former 'white RSA') and the former black 'homelands' are a related problem. Tenure reform must grapple with overcrowding in the communal areas and overlapping land rights and deal with cases of exploitation by traditional leaders, officials, politicians and extortion by 'warlords' in informal settlements.

Progress has been made in giving legal protections to farm workers and labour tenants. For example, the Extension of Security of Tenure Act, 62 of 1997 ('ESTA') provides for tenure security in two ways: first, by helping people living on rural or peri-urban land to obtain stronger rights to the land on which they are living, or to land close by; and secondly, by laying down certain steps that owners and persons in charge of rural or peri-urban land must follow before they can evict people. The Act also regulates day-to-day relations between owners and people living on rural or peri-urban land. The Act is enforced by the magistrates courts, the Land Claims Court and, in certain instances, the provincial High Courts.

⁴ For a more detailed explanation of the reorganisation of the Restitution Process, see Landinfo, Vol 6, 1, December 1988 - March 1999, Department of Land Affairs.

⁵ IPILRA is a short term measure which protects people with informal rights and interests in land from eviction until new land legislation is passed.

⁶ Work is in progress on a the drafting of a law which provides for far-reaching land tenure reform in the rural areas of the ex-homelands and the former South African Development Trust.

3 Institutional Background

3.1 Genesis of the Department of Land Affairs

In 1994, following South Africa's first democratic elections, the new Department of Land Affairs came into being. It was not 'created out of thin air'. The DLA emerged through a series of restructuring exercises involving the bureaucracy existing at that time. It drew its staff from a number of different tributaries of the old government:

- the Chief Directorate Land Surveying and Information
- the Chief Registrar of Deeds
- the Chief Directorate Physical Planning
- the Office for Regional Development and the Department of Development Aid

The last-mentioned structure contained personnel who had been instrumental in laying out the apartheid map of the so-called independent states and self governing territories. Thus, from the beginning, the challenge for the new department has been to build a shared organisational culture. This has now been largely achieved. Although transformation is not yet complete, the majority of those now responsible for the planning and implementation of land reform are drawn from a different generation of South Africans, both in terms of attitude and ethnic diversity.

Pre-existing and newly recruited staff have been reorganised into the structure shown in the annexure.⁷ From the point of view of land reform, there are currently two key branches, Land Reform Policy and Land Reform Implementation. As part of the ongoing land reform re-engineering process, these are soon to be merged into a single branch.

3.2 Milestones in the institutional development of the DLA

0.0.1 Land Reform Pilot Programme - LRPP (1994-6)

The LRPP was established in late 1994 'to devise and test efficient, equitable and widely replicable means of transferring land to the rural poor, and ways of providing them with access to basic needs and more secure livelihoods'. It was implemented in nine 'pilot districts', one in each province, by way of agency agreements between national DLA and the Directors-General of the provinces, each of which designated a responsible provincial department to implement the programme. Each LRPP office dealt with projects in its district, which involved face-to-face contacts and facilitation with beneficiaries and communities and associated NGOs. A Land Reform Steering Committee was chaired by an official from the responsible department, or sometimes the responsible provincial minister, with a secretariat provided by that department or by the DLA's provincial office. Funding for the pilot projects (i.e. for planning, land acquisition, and settlement) was provided by National DLA, via the responsible department. Funding of bulk infrastructure and post- settlement support services was meant to be provided by the budgets of provincial government departments - but this rarely happened. The LRPP overlapped with the creation of offices of the national

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This does not show the organisational changes consequent upon the reorganisation of the Land Restitution process.

Department of Land Affairs at provincial level (see 4.2.2).

An evaluation of the LRPP found that a considerable amount was achieved in terms of devising and testing institutional arrangements for land reform, although unevenly across the nine provinces.⁸ It concluded that:

- the relationship between the pilot office and the responsible provincial departments was often weak;
- there was sometimes tension between the pilot office and the DLA provincial office and the role of the provincial DLA director was unclear;
- decision making within the DLA relating to the LRPP was over centralized;
- Steering Committees had performed variably, but often disappointingly.

The LRPP had failed to achieve some of the intended diversity in testing approaches to land reform and tended to produce relatively standard types of projects. There were considerable delays in the programme as compared with its original objectives for transferring land and disbursing funds. However, delays in setting up the institutional framework and completing individual projects were to a considerable extent inevitable. The evaluation confirmed that the original time-scale, for expenditure and land transfers, was unrealistic. With land redistribution generally, as with the LRPP, there were too many players. There was a lack of clarity about lines of responsibility. Policy uncertainties had a major impact on implementation. There was need to create a wider awareness of land reform as a component of rural development, rather than a more limited process of land transfer.

The LRPP was wound up by 1997, having redistributed about 125,000 ha of land to about 8,500 households. The LRPP staff were mostly absorbed by the new DLA provincial offices.

0.0.2 Establishment of Provincial Offices of the national DLA (1995-6)

In 1994, when the DLA was established, there were only four regional offices located outside Pretoria (excluding offices of the Survey and Deeds Branch). Provincial offices of the DLA were established over a period of eighteen months, beginning in early 1995. Recruitment and training of staff to fill provincial-level vacancies have been ongoing since that date.

0.0.3 Establishment of District Offices of the national DLA (1998-9)

As early as February 1996, the Department of Land Affairs made known its intention to establish district land offices.⁹ The White Paper on South African Land Policy (1997) states:

In the long-term, the vision is for a decentralisation of functions to the local government level.

⁸ Institutional Review of the Land Reform Pilot Programme; report of an independent study commissioned by the Department of Land Affairs, Republic of South Africa, August 1996.

⁹ Green Paper on South African Land Policy, February 1996.

*The long-term success and sustainability of the land reform programme is to a large extent dependent on the ability of potential beneficiaries to be able to access the programme easily, and to have a clear understanding of what assistance they can get from government. The commitment to decentralised delivery in the long term is founded on a belief that this is the only viable way to ensure effective participation in the programme. Providing services close to the local level, where delivery can most effectively take place, requires the development of a local-level land administration. Building the capacity for this will be a long-term process. It will require strong support at the provincial level.*¹⁰

In mid 1999, the DLA is in the final stages of putting its district-level offices in place. Within each province, there are five or six district offices at the level of the now-to-be-strengthened local government district.¹¹ The DLA recognises that only by working closely with district local government will land reform become a central component of rural development.

4 Institutional Issues That Still Have to Be Resolved

In this section, the focus is on institutional problems arising in South Africa which are likely to be encountered elsewhere in southern Africa.¹²

4.1 Land reform generally

A major constraint remains the limited number of staff available to design and implement land reform. It is not possible to run an ambitious national land reform programme with a staff of approximately 600 people. Land reform is a management-intensive activity.¹³

Given the very broad scope of South Africa's land reform programme and its acute resource constraints, the re-engineering team of the Department's transformation project is currently wrestling with a number of issues. In particular:

- the rigorous priority ranking of tasks so that the Department can achieve at least its core functions;
- the re-organization of the Department to ensure efficient and effective delivery, which will require deconcentration of staff and functions to the provincial offices of the DLA and the districts below;
- the setting of national norms and standards and the assignment of responsibilities and budgets for programme implementation to other spheres of government, or where assignment is not practicable, delegation to other spheres to implement the programme and the transfer of funds to oil the machinery.

4.2 Land Redistribution

¹⁰ White Paper on South African Land Policy, April 1997, pp 96-97.

¹¹ The White Paper on Local Government, 1998, makes significant proposals on the development of this level of local government.

¹² Institutional issues associated with the Land Restitution are not included here.

¹³ Director General's Review, 1998 Annual Report, Department of Land Affairs.

The application-based (demand-led) strategy has important merits over supply-led resettlement programmes, but it creates practical problems for the dovetailing of land redistribution with provincial and local government rural development initiatives, particularly the provision of rural infrastructure. Land redistribution is slowed down unacceptably because DLA and ‘the beneficiaries’ have to go it alone. Building the necessary co-operation with the local sphere is a long-term challenge.

Government cannot compensate for the lack of people’s own organisation in rural areas. More needs to be done to help people in the rural areas to organise themselves. Inevitably, the land transfer process is greatly hindered by the unequal power relations between beneficiaries and landowners. More support is needed from officials and NGOs.

The Department has still to find a way of working in a systematic and concerted way with NGOs. One of the factors would seem to be that the DLA would prefer NGOs to play a project management role, whereas NGOs see themselves playing a broader advocacy role. These differing visions need to be reconciled.

There is a real danger that the new communities established through land reform will become poverty traps, with no means of supporting themselves. Support must continue after the land transfer process. More needs to be done to provide production credit to supplement government grants for land acquisition and settlement. Further, land tenure arrangements for newly acquired land must not be allowed to constrain individual productive effort and initiative.

4.3 Land Tenure Reform

Over the last five years, tenure reform has concentrated on developing legal protection for farm dwellers on private land. In practice, the capacity of the DLA to inform people of their rights and monitor compliance in the rural areas has been severely constrained by the lack of resources.

The Department has scarcely begun to resolve the tenorial problems experienced by people living in the former homelands where the land is still registered as state land. There is continuing uncertainty as to how to handle the sensitive and complex issues involved in replacing the prevailing chaotic systems of land allocation. Given the resource constraints faced by the Department, there is some reluctance to introduce new draft legislation and embark on a process of tenure reform when existing departmental staff capacity and financial resources are so severely overstretched.

5 CONCLUDING COMMENT

Inadequate administrative capacity for land reform is a recurring problem the world over. A large, widely-deployed cadre of well-trained field staff is essential to inform people of their entitlements and to facilitate the legal process of tenure reform, land acquisition and redistribution. Governments cannot go it alone and must draw heavily on NGOs and people’s organisations to provide field support. Even quasi-market measures have high transaction costs. A related issue is the available capacity in land valuation, survey and land tenure records. Where this is not adequate, vested interests can frustrate the redistribution and tenure reform process. Finally, there is the issue of agricultural services to establish and sustain the new

farmers. For the majority of countries, land reform is an extremely difficult process to carry through, requiring both centralised political power and well-developed grass roots organisation.