

COSATU Submission on the Restitution of Land Rights Amendment Bill

**Submitted to the Portfolio Committee on Agriculture and Land Affairs
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1. Introduction

The Restitution of Land Rights Act was passed in 1994 to address the restitution of those rights in land that were dispossessed after 19 June 1913 as a result of apartheid laws. Since then various amendments have been made to the principal Act to address the obstacles to the restitution process. The amendments made in 1999¹ were seen as key in that they enabled the Department to employ an administrative route to settle restitution claims rather than being forced to go through a judicial route, thereby speeding up the process.

Despite this the land restitution process has not taken place at an optimal pace, raising serious questions about whether all claims will be settled in time to meet the 2005 deadline set down by the President. Further concerns have been levelled at the overwhelming urban bias in the number of claims settled as well as the failure to address the principle of sustainable settlements that would enable beneficiaries to use the land productively in the long term.²

Underlying these problems is the adoption by the Department of the "willing buyer-willing seller" approach to restitution, which has enabled many current landowners to hold up the process either because they are generally opposed to the restitution process or demand unreasonably high prices. This combined with similar problems experienced in other land reform areas such as tenure reform and land redistribution only serve to confirm earlier fears that the inclusion of the property clause in the final Constitution would obstruct land restitution and reform processes, thereby entrenching existing patterns of unequal property relations.³

The Restitution of Land Rights Amendment Bill (hereafter the Bill) proposes to remove the requirement for the Minister to first reach an agreement with interested parties or obtain a court order before expropriating or acquiring property. The aim of the proposed amendments is to address obstacles that delay the restitution process.

COSATU strongly believes that there is a need for a meaningful intervention to speed up not only land restitution but also the other two legs of the land reform process, viz tenure reform and redistribution. This would necessarily entail increased utilisation of powers of expropriation especially where blockages arise. It is with this objective in mind that we support the introduction of the Bill.

¹ The Land Restitution and Reform Laws Amendment Act 18 of 1999.

² E Lahiff Land Reform in South Africa: is it meeting the challenge?, PLAAS Policy Brief No.1 September 2001 p.3. Also see Minutes of the Commission on Restitution of Land Rights: Progress Report to the Land and Environmental Affairs Select Committee, 13 November 2002 <<http://www.pmg.org.za>>.

³ See COSATU Submission on the Draft Constitution to the Public Hearings of the Constitutional Assembly, 3 June 1995.

Notwithstanding our support for the Bill, we believe that there are a number of additional policy concerns that must be addressed. These include:

- Inadequate prioritisation of implementation of other programmes of land reform viz tenure reform and land redistribution;
- Insufficient budget provision for the overall land reform process and more specifically for tenure reform and redistribution;
- Little or no provision for support mechanisms (including support by personnel, provision of appropriate infrastructure and access to credit etc), which would enable the sustainable and productive use of land by beneficiaries.

These additional concerns may appear on the surface to fall outside this process. However, it is important that these are addressed in order to maintain the integrity of the entire land reform process in the long term. While not detracting from the importance of the land restitution process, its limited potential for reversing racially skewed property relations must be borne in mind. Restitution is limited to only those whose rights were dispossessed after 1913 and who were able to lodge their claims by the deadline of 1998. Many others who would otherwise have qualified for restitution are now dependent on tenure reform and redistribution programme for appropriate redress.

2. Constitutional and Legal Considerations

The Bill sparked off widespread controversy particularly amongst opposition parties who argued that it was an “assault on the rule of law and property rights” as well as raising constitutional concerns.⁴

Clause 4, which is the key provision in the Bill, proposes to insert a new section 42E into the principal Act. The proposed subsection 42E(1) provides the Minister with the power to acquire or expropriate land or rights therein for the purposes of restitution or “*any other land reform purpose*”. Provision is made for the application of the Expropriation Act 63 of 1975 to land restitution, with references to the Minister of Public Works to be construed as the Minister of Agriculture and Land Affairs. Expropriation is made subject to the payment of compensation that is to be determined either by agreement or by the Court in accordance with section 25(3) of the Constitution. Other clauses in the Bill remove references in the Act, which make it necessary to reach agreement or obtain a court order before expropriating land. This means in the future the Minister will not need to reach an agreement with the relevant landowner or obtain a court order in order to expropriate property.

Our analysis of the provisions in the Bill indicates that criticisms of the Bill on constitutional or legal grounds are unfounded. In the first instance section 25(2) of the Constitution allows for property to be expropriated in terms of law of general application for a public purpose or in the public interest, which includes land reform measures. This is made subject to the payment of compensation that complies with a number of factors listed under section 25(3). As the Bill complies with all of these requirements, there are no grounds to justify concerns about constitutionality.

Secondly the Department already has similar powers of expropriation in terms of the Expropriation Act and land reform legislation such as the Extension of Security of Tenure Act 62 of 1997(ESTA). The criticisms levelled at the Bill are merely reflective of conservative mindsets resistant to the process of transformation of unequal distribution of property in South Africa, and should therefore not be allowed to undermine the delivery of land reform objectives.

⁴ See Business Day, 5 June 2003 [Didiza's land law draft plan reaps scorn.](#)

2.1 Implications for “Other” Land Reform Purposes

As noted above the Bill provides for expropriation for “other” land reform purposes, which would include tenure reform and redistribution.

As with restitution, acquisition of land for the purposes of securing tenure or redistribution has been held up by resistant landowners. Accordingly we believe that the inclusion of this provision in the Bill should be supported if this will have the effect of speeding land reform more generally.

Taking into account our concerns noted about the poor emphasis placed on tenure security and redistribution, we are calling on the Department to prioritise its implementation of this provision.

2.2 Concerns about Implementation

Notwithstanding our support for the Bill, we are concerned about the possibility that the Bill may be under utilised once passed. In this respect criticisms have been levelled at the Department’s past reluctance to use its existing powers of expropriation.⁵ Accordingly, we are calling on the Department to clarify its proposed strategy for implementing the Bill and specifically how delays are to be addressed through the amendments.

Currently the Department is required to obtain a court order BEFORE expropriating in the case that a landowner refuses to sell. With the introduction of the proposed amendments landowners will have the opportunity to challenge the process or compensation offered after the expropriation has taken place. The net effect of the amendments is that the court process will be relocated to a later phase of the process and will now be triggered by the landowner and not the Department, as is currently the case. In view of this it is unclear how this will materially address the delays currently experienced, especially since any court process will have to be finalised before the land/property can be transferred to the claimant.

Further, taking into account that there are the existing provisions authorising expropriation in other legislation noted above, there is a need to clarify firstly the net effect of the proposed amendments and how this improves the current situation. Secondly there is need to clarify how potential contradictions are to be resolved between the different pieces of legislation.

3. The Implications of the Land Reform Budget

It is a commonly accepted view that the budget provision for the overall land reform process has been far too little to sustain relevant programmes undertaken by the Department. This despite more recent marked increases allocated for Land Affairs for the years 2002/03 and 2003/04.⁶ Key concerns here relate to the inadequate provision for support mechanisms that ensure the sustainability and quality of restitution settlements and the failure to prioritise tenure reform and redistribution programmes.

3.1 Sustainability of Settlements

We believe that the considerable increases in the allocations for restitution is to be welcomed. However, the Commission has indicated that these increases are likely to be inadequate.⁷ Further, we are concerned that these increases are primarily limited to the settlement of restitution claims in order to meet the 2005 presidential deadline, while not addressing the sustainability of settlements. The Commission on Restitution of Land Rights (CRLR) has

⁵ Personal communication with R Hall of Programme for Land and Agrarian Studies (PLAAS). Also see National Land Committee’s Media Statement, Expropriation amendment a critical step forward for land reform, 9 June 2003.

⁶ The respective estimates for the total expenditure for Land Affairs in these two years are R1.1 billion and R1.6 billion. The largest increases are due to increased allocations to the Restitution Programme.

⁷ See Minutes Agriculture and Land Affairs Portfolio Committee Meeting on 12 August 2003, on Commission on Restitution of Land Rights Annual Report <<http://www.pmg.org.za>>.

admitted in this respect that in order to meet this deadline the principle of sustainability and quality of settlements has received less priority.⁸ In the long term this is likely to compromise the ability of beneficiaries to derive the full benefit from restitution.

Accordingly there is dire need for the provision of adequate funding in order to address such concerns as staffing shortfalls both at national and provincial levels, infrastructure development and access to credit for beneficiaries.⁹

3.2 Poor Emphasis on Tenure Reform and Redistribution

Further, the overall figures mask the considerable disparities between different allocations for the various land reform programmes. As we have already indicated tenure reform and redistribution programmes are vital to addressing racially-skewed patterns of property ownership. However, the failure to make appropriate allocations in respect of the budget brings into question the priority that this enjoys within the context of land reform.

For instance the estimate for expenditure on land restitution for 2003/04 is R854.9 million, which represents an approximate 118% increase from the R391.3 million for 2002/03. In contrast the 2003/04 allocation for land reform (comprising both tenure reform and redistribution programmes) which is R430.4 million, represents a mere 7% increase on R402.2 million for 2002/03.¹⁰ It is of concern that these amounts reflect considerable disparities both in respect of the actual allocations and the annual increases.

Current Departmental targets commits the redistribution of 30% of agricultural land over 15 years. This would require the government to transfer 1.67 million hectares (mha) per annum. However, the Department's performance in this respect reflected a transfer of an average of only 150 000 hectares per annum for the period ending October 2001. According to our estimates an allocation of at least R1.6 billion a year would be required to meet the 15-year target of redistributing 30% of agricultural land available.¹¹ However, the estimates for the medium term do not come close to approaching this figure, with the 2005/06 estimate for land reform being R523.1 million.

⁸ See Minutes of Land and Environmental Affairs Select Committee Meeting on 13 November 2002, on the Commission on Restitution of Land Rights: Progress Report to the <<http://www.pmg.org.za>>.

⁹ It is important to bear in mind that the issue of sustainable settlements is equally applicable to tenure reform and redistribution as well.

¹⁰ Estimates of National Expenditure: Vote 30 Land Affairs, p. 704.

¹¹ See People's Budget 2003-2004, Proposal from COSATU, SANGOCO, and SACC, 2002 p15-6.