

SLOW DELIVERY IN SOUTH AFRICA'S LAND REFORM PROGRAMME:**THE PROPERTY CLAUSE REVISITED****LUNGISILE NTSEBEZA**

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INTRODUCTION

Except for hardboiled party loyalists there is wide acceptance today that the pace of land reform in South Africa is painfully slow. In the first 10 years of democracy, a mere three per cent of the land had been transferred to black hands. This criticism is not only made by government critics. Government officials and members of the Tripartite Alliance also acknowledge this problem. At a 'People's Land Tribunal' organised by an NGO called the Trust for Community Outreach and Education in December 2003, after listening to some witnesses describe the problems they had encountered in their attempts to access land through the land reform programme, the then Deputy Director-General of the Department of Land Affairs, now Director General in the same department, Mr. Glen Thomas, admitted that 'I understand perfectly their frustration. I think sometimes it is justifiable ... there are very difficult issues that we have to deal with'. In addition, Thomas made a statement that shocked those attending the Tribunal. He claimed that it was 'a dream' to think that 30 per cent of land would be transferred in the first five years of South Africa's democracy. Thomas was referring to the initial target of the ANC-led government when it came to power in 1994.

In their Red October 2004 campaign, the South African Communist Party (SACP), an alliance partner with the ruling African National Congress (ANC) and the Congress of South African Trade Unions (COSATU), have made similar pronouncements about the slow pace of land reform in South Africa. Within this context, the Secretary General of

the SACP, Blade Nzimande, is reported as having threatened: “We will march to the department of Agriculture, Land Affairs and the Reserve Bank in support for accelerated land reform”. Most recently, participants at the Land Summit held in Johannesburg in July this year were almost unanimous that current policies on land reform were ineffective. In line with this sentiment, there was general condemnation of the willing seller, willing buyer principle as the main stumbling block to radical land reform.

However, while there may be general acceptance even from government officials and alliance partners of the ANC that the South African land reform programme is not occurring fast enough, there is no agreement about the reasons for the slow pace. My contribution will survey some of the reasons advanced by government and critics, in particular the critics’ argument that the property clause in the Constitution is the main obstacle to land redistribution in South Africa.

As will become clear, this is not the first time concerns about the property clause are articulated. The matter received some degree of discussion during the political negotiations period in the early 1990s, a process which led to the initial inclusion of the clause in the Interim Constitution. I will very briefly review these debates in order to provide a context for the current discussion. The central question is whether it is possible to embark on a comprehensive land redistribution programme while recognising and entrenching land rights acquired through colonialism and apartheid, as the property clause does.

THE PROPERTY CLAUSE AND THE SOUTH AFRICAN INTERIM CONSTITUTION: THE DEBATE

The context

It is important that the wider context within which the property clause debate is occurring should not be forgotten. A lot has been written and said about the broader historical context, but it is worth highlighting the following: Starting from the seventeenth century, white settlers in South Africa appropriated more than 90 per cent

of the land surface, a process that was formalized with the passing of the notorious Native Land Act of 1913. Compared to other countries on the Continent, the extent of land plunder in South Africa was extraordinary.

While colonialism and apartheid systematically undermined African agriculture, white farmers on the other hand benefited from substantial state subsidies. Apart from the state subsidies, white capitalist agriculture has flourished as a result of the availability of a captured cheap black labour.

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. Indeed, the ANC's Freedom Charter, drafted in the 1950s when decolonization in Africa was high on the agenda, had promised that "(t)he land shall be shared among those who work it" and will be "re-divided among those who work it, to banish famine and land hunger".

Following a brief period of political lull in the late 1960s and the early 1970s, in the aftermath of the political repression of early 1960s, resistance against apartheid re-emerged. By the early 1980s, some commentators were concluding that South Africa was in a state of "organic crisis".

An important point to bear in mind is that while it is possible to argue that the apartheid regime was under extreme pressure, particularly in the critical period of "ungovernability and insurrection" in the mid-1980s, equally valid is the fact that the opposition forces were not strong enough to overthrow the apartheid machinery. By the late 1980s, there were clear signs that a negotiated settlement was on the cards. Already in 1986, big business was strongly arguing in favour of negotiations with the ANC. Their argument was that the ANC was not necessarily a communist organisation and that although, in the words of Zach de Beer 'years of apartheid have caused many blacks to reject the economic as well as the political system', South Africans should not 'dare ... allow the baby of free enterprise to be thrown out with the bathwater of apartheid'.

It is these processes that ultimately led to the release of political prisoners and unbanning of political organisations, paving the way for the political negotiations talks of the early 1990s and the first democratic elections in 1994.

The land question and the property clause debate up to the advent of democracy in South Africa in 1994

Although not occupying centre stage, the vital question of how the land question would be resolved was discussed as early as the 1980s. This was raised in the context of discussing a Bill of Rights for a future South Africa. It is striking to note that two South African judges took a progressive stance on the question of property rights. Their main point was that a lasting resolution of the South African problem would be threatened if existing property rights were protected. For example, Judge Leon, a fairly conservative judge who sentenced an ANC guerrilla, Andrew Masondo, to death in 1985, warned in the same year that a constitutional protection of property rights could cause serious problems for the acceptance of the bill of rights. A few years later, in 1988, Judge Didcott cautioned:

What a Bill of Rights cannot afford to do here ... is to protect private property with such zeal that it entrenches privilege. A major problem which any future South African government is bound to face will be the problem of poverty, of its alleviation and of the need for the country's wealth to be shared more equitably ...

Should a bill of rights obstruct the government of the day when that direction is taken, should it make the urgent task of social or economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the bill of rights as a whole and the survival of constitutional government itself.

The two judges seem to have perfectly understood that transformation in terms of property rights and redressing the imbalances caused by colonialism and apartheid were not likely to be possible if existing property rights were recognised and entrenched. It is not clear, though, what alternative measures they had in mind. When the issue of land was eventually discussed during the political negotiation process in the early 1990s, the ANC's initial position on property rights was similar to

that of Judge Didcott mentioned above. Of course, the ANC would have sought direction from its Freedom Charter. The land and property clauses in the ANC Bill of Rights were conceived, not as a device to protect the title of existing property owners, but rather to facilitate a legislative programme of land restoration and rural restructuring.

For the National Party, the other main party in the political negotiation process, the protection of existing property, and the inclusion of the property clause in the constitution was critical.

In the end, the National Party won the struggle to have the property clause in the interim constitution. Once the ANC recognised that they had lost the debate, the ANC representatives worked on two main objectives, first, to ensure that the property clause would not 'frustrate a programme of restitution of land to the victims of forced removals under apartheid' and second, to see to it that the future democratic state had 'the power to regulate property without incurring an obligation to compensate owners whose property rights were infringed in the process'.

One of the "central issues" that is pertinent in our discussion is what Matthew Chaskalson refers to as the willingness of the National Party to compromise on 'the principle that compensation for expropriation of property would not necessarily be tied to market value'. This meant, in Chaskalson's understanding, that the property clause 'would not obstruct the operation of the restoration clauses because it allowed for payment less than market value compensation in appropriate cases of restoration' (Chaskalson 1995: 232). The issue of compensation, and the role of the market, in particular, remains, as will be clear just now, one of the contentious issues in current debates on the slow pace of land reform in South Africa. It is not clear why the National Party agreed to such a notion.

In the final analysis, an agreement was reached in a meeting on 25 and 26 October 1993, resulting in the inclusion of the property clause (section 28) in the Interim Constitution.

It is widely accepted that section 28 represents a compromise between the ANC

and National Party positions. Sub-section 1 clearly protects existing property rights and those who have the resources to “acquire” and therefore buy property. Sub-sections 2 and 3 appear to be addressing the cause and interests of the historically dispossessed and poor.

Chaskalson’s interpretation of these sub-clauses is interesting and, with hindsight, optimistic. This is, for our purposes, particularly the case with the compensation process, which, as already indicated, would not necessarily be based on market prices.

Chaskalson’s optimism seems to have been based on his understanding and interpretation of the compromise reached in the negotiations. Although agreeing that the wording of section 28 ‘is not always clear’, he imagined that the courts ‘would do well to adopt a purposive approach’ in interpreting this section, bearing ‘in mind the compromise which the section’ sought to achieve. Drawing from comparative legal history, Chaskalson concluded that if courts were ‘overzealous in their protection of property rights ... the potential for constitutional conflict between court and state would be substantial’ (1994: 139).

It is worth bearing in mind the conditions on the ground at the time to understand this optimism. White farmers, including those in the South African Agricultural Union (SAAU) had come to accept that negotiations with black land-claimants could mean that the latter would gain ownership of a portion of the farmers’ land as part of a wider process of redress (Chaskalson 1993:73). I recall that when I was conducting research on, inter alia, land occupations in the Queenstown area in the mid-1990s, the question of buying and selling land was hardly discussed. A significant amount of land had been grabbed and occupied by land hungry black South Africans (Wotshela 2001). There was, behind these land occupations, the conviction by the historically dispossessed and their allies that existing white property rights were illegitimate, on the one hand, and an acceptance by some white farmers that they would have to share land with their black South Africans.

Despite these realities on the ground, the interim and final constitution entrenched the property clause. The Final Constitution essentially reinforced and refined what was

already contained in the Interim Constitution. This only shows how distant the political negotiation process was from local realities.

In this regard, it is worth recalling the warning of Judge Didcott cited earlier. The judge had cautioned that what a Bill of Rights 'cannot afford to do ... (was) to protect private property with such zeal that it entrenches privilege' and make it, amongst others, difficult 'for the country's wealth to be shared more equitably'.

Developments since 1994, as indicated at the outset, paint a gloomy picture. Not only did government commit itself to a market-led programme, land reform policy in South Africa was to be based on a willing-seller-willing-buyer condition.

Various reasons have been offered in attempts to explain slow delivery in land reform. The bone of contention in current debates, it seems, is around the interpretation of the section 25 of the constitution. There seem to be broadly two streams to the debate. On the one hand, there are those who argue that the fundamentals in terms of policy are in place and that what is now missing is commitment from the government to ensure that the policies are implemented. Others, on the other hand, argue that the problem is with policy, in particular the entrenchment of the property clause in the Constitution as well as the endorsement in policy of the willing-seller-willing-buyer principle. Let us consider each of these arguments in some detail.

Government representatives at the Land Tribunal held in Port Elizabeth in December 2003 provide one example of the argument that the fundamentals are in place. Both the Deputy Director-General of Land Affairs, Glen Thomas and Manie Schoeman, member of the Parliament Portfolio Committee on Land Affairs agreed that they had no problem with policy, including the willing-seller-willing-buyer condition. The issue, according to Thomas was 'whether government has sufficient resources to buy land when there is a willing seller at a price at which the willing seller wants to sell the land'. He was adamant that the 'land market is there. There's no scarcity of land that could be bought, but the question is at what cost, at what price? That's the point'.

A more nuanced and coherent version of the above argument has recently been made by Ruth Hall (2004). She does not query the fact that Section 25(1) protects

existing property rights (2004:5). Her point is that although the land reform policy is based on a 'willing seller, willing buyer' condition, the state can expropriate land. She argues that a far-reaching land reform is possible within the existing constitutional framework. According to her: 'While protecting rights, the constitution also explicitly empowers the state to expropriate property and specifies that property may be expropriated in the public interest, including "the nation's commitment to land reform"' (2004:6).

In many ways, Hall was responding to arguments raised in a paper authored by Fred Hendricks and I in (2000) and Hendricks (2004). The main argument in these writings is that the provisions of section 25 in the Constitution are contradictory in the sense that on the one hand the Constitution protects existing property rights, while at the same time making a commitment to redistributing land to the dispossessed majority.

Hall, though, has a point. We have never really addressed the issue of expropriation. Important to remember here is that expropriation goes with compensation. It should not, as Thomas reminded those attending the Land Tribunal, be confused with confiscation. This then raises the question of how compensation is determined. Sub-section 3 of section 25 of the constitution is supposed to guide the determination of compensation. However, it is widely accepted that this sub-section is extremely vague. It merely states that 'the amount of compensation and the time and manner of payment must be just and equitable'. But what precisely counts as a 'just and equitable' dispensation is not clearly spelt out, except that the subsection goes on to state that compensation should reflect 'an equitable balance between the public interest and the interests of those affected'. In this respect, regard would be accorded to 'all relevant circumstances'. The pertinent ones for our purposes include the history of the acquisition and use of the property; 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.

In recognition of the vagueness of some of these provisions, a so-called 'Geldenhuys formula' is used to determine compensation. Justice Geldenhuys is a

Land Claims Court judge who worked out a formula for the determination of compensation in cases involving expropriation in restitution cases. In essence, the formula takes into account two of the circumstances mentioned in sub-section 3 of section 25 of the Constitution: 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. In a nutshell, the amount of compensation is the market value of the property minus the current value of past subsidies.

The question that confronts us is whether a consideration of the expropriation measure and the clarity that the Geldenhuys formula has brought undermines the argument that the property clause is a major obstacle in fundamental land reform in South Africa. I contend that the expropriation clause does not affect my conclusion about the property clause.

In the first instance, government has itself shown great reluctance to invoke the expropriation clause. Thomas conceded in his testimony that although the government has expropriated land for land reform purposes, this is not the norm. In his response to a question from the President of the PAC on the 2005 State of the Nation address, President Mbeki has also shown great reluctance in using expropriation as a mechanism to redistribute land.

Secondly, although the Geldenhuys formula takes into account the critical issue of subsidies, the fact that compensation is based on the market price makes it almost impossible for the government to budget for land reform for the simple reason that the role of the state in determining the price is very limited, if at all. Thomas in his testimony conceded that the fact that land owners were inclined to inflate their prices was a potential problem.

A point worth making in this regard is how the Geldenhuys formula has severely called to question what I earlier called Chaskalson's optimism regarding the compensation amount. We will recall that Chaskalson had argued that the amount of compensation in cases of expropriation could be determined without necessarily taking the market value into account. The judgement by Geldenhuys has created a precedent that pours cold water over Chaskalson's optimistic position.

Lastly, and equally critical, it is intriguing that the history of land acquisition is not receiving prominence in the determination of compensation. In so far as reference is made to it, the suggestion is that this refers to the history of land acquisition by the affected land owner. Yet, there is the history of colonial conquest and land dispossession that lies at the heart of the land question in South Africa. A serious attempt to embark on a radical land reform programme cannot afford to downplay the importance of this history. It is this history, I argue, that gives legitimacy to the claims of those who were robbed of their land.

Closely linked to this is that the naked exploitation of black labour which was central to the success of white commercial farming in South Africa is interestingly not considered to be one of the crucial factors that must to be taken into account when the amount of compensation is calculated.

As I draw my talk to a close, I think it is important to address the hard question as to why the state has not used, does not and seems very reluctant to use the expropriation clause. A standard response from some analysts suggests that the state does not have the political will to use its expropriation powers. Others argue that part of the explanation is that the left within the Tripartite-Alliance was defeated in the mid-1990s, a process demonstrated by the shift from the RDP to GEAR in 1996.

However, while there may be substance to these positions, I think that there is more to the State's reluctance than analysts have hitherto suggested. A more substantial explanation cannot afford to ignore the global political and economic order that emerged after the collapse of Soviet Communism from the late 1980s. The transition to democracy in South Africa in the early 1990s took place at a critical moment. Burawoy (2004) has recently suggested in his Harold Wolpe Memorial Lecture that after collapse of Soviet communism, the ANC was left without a compass. Although not a communist or socialist organisation, the influence of communists in the ANC was palpable. Some of the clauses of the Freedom Charter bear testimony to this. Given the dominance of neo-liberal capitalism in the 1990s, the question should be asked what alternatives the ANC had when it came to power in 1994. What were the implications of a radical agenda? Have there been changes in the balance of forces to make a radical land reform programme possible?

Closely linked to the above is the relative weakness of land-based social movements and NGOs in South Africa. Initially, most of these organisations, in particular the National Land Committee (NLC), worked closely with the post-1994

government, assisting it in the formulation and implementation of policy. The hope, it appears, was that it would be possible to influence the Department of Land Affairs in particular to formulate and implement progressive and perhaps radical land policies. How this would be achieved within the framework of a neo-liberal capitalist framework which the ANC-led government had adopted was not always clearly articulated.

But this honeymoon was short-lived. The dismal performance of government, including failure to achieve even its own target of transferring 30 per cent of white claimed agricultural land to blacks is one of the factors that led to tensions between social movements and government. Although the story has not been fully written as yet, it seems clear that some activists within the NLC took a decision to mobilise the landless and exert pressure from below. The establishment of the Landless People's Movement (LPM) in 2001 should, I would argue, be viewed against this background.

What is intriguing in all of this is that the establishment of the LPM brought to the fore all sorts of tensions within the NLC, developments which led to the demise (temporarily?) of this important network of land-based organisations.

The weakness of land and agrarian movements in South Africa means that there is very little, effective pressure that comes from below. I am saying this being mindful of initiatives such as the Land Tribunal, the 2004 Red October of the South African Communist Party referred to above. I am also aware the establishment of the Alliance of Land and Agrarian Reform Movements (ALARM) on the eve of the recent Land Summit. Clearly, these developments suggest that the forces of opposition to the neo-liberal agenda pursued by the ANC are organising on the terrain of the conjunctural. We should not under-estimate this development. But it is too early to say what these initiatives will lead to. A more rigorous and indeed vigorous analysis of land and agrarian movements in South Africa is overdue.

Finally, whatever pressures the international situation exerts, there is no doubt that the market-led approach to land reform, including the property clause and the willing-buyer-willing-seller condition will not unravel years of colonial and apartheid dispossession. Further, the claims that the poor are laying are legitimate. No one can dispute the fact that colonialism and capitalism in South Africa led to the dispossession of indigenous people and the development of racial capitalism and white dominated commercial farming which triumphed largely as a result of the naked exploitation of

black labour. The minimum that the poor and their allies expect is that these past imbalances be redressed. In the short-term, it seems as if the property clause in the Constitution needs to be re-visited. This is particularly the case with regard to the subsection which protects existing property rights. No meaningful land reform programme is going to take place for as long as this clause is entrenched in the Constitution. Apart from the above, there is an urgent need to challenge the so-called Geldenhuys formula, especially its fundamental notion that the market should determine the price of land, expropriated or not.