

# **Expectation and Reality: The Politics of Land Reform in South Africa**

## **Abstract**

With the advent of democracy in South Africa, the vast black majority expected equitable distribution of land and compensation to the land it has lost or never had a chance to own. Therefore, it has been a bitter pill to swallow for those who fought for the realization of the Freedom Charter: a guiding social and economic policy document of the ANC (ruling party). The transition negotiation has included an agreement that land transfer has to be gradual and fair. The question arises: fair to whom? Twenty years down the line, the ANC has come up with a policy discussion document that seeks to amend the land reform policy. The policy has three features: land redistribution, tenure reform and restitution. The argument is not only about the land transfer from the white owned majority land to blacks but the gender skewed land distribution in rural South Africa. This paper however is going to focus on the viability of the returning land to unskilled, under financed and divided black communities and the politics that surround it. Existing literature indicates that the already transferred land has not been that productive due to lack of skill, experience and capital as well as the absence of sufficient agricultural extension programmes for the emerging farmers. This is compounded by the protracted and extremely politicised process of land reform that have led the ruling party and its alliance partners to insist the willing buyer and willing seller policy is not working. On the other hand, Agri SA (the organization that represents mainly white land and farm owners) insists that the market should continue to regulate land transfer. The study seeks to analyse the stakeholders and the myriad of interests in and contestations around this policy from the available literature.

**Key words: Restitution, Policy, Tenure, Gender**

## **Introduction**

Land ownership and distribution is a direct reflection of the society in terms its history of power dynamics affecting the social and political economy. South Africa's case is no different. In fact, South Africa is more complicated since land ownership is veined across racial lines in which the minority own the lion's share of the productive land. However, the

1994 negotiation to transition has given some sort of legitimacy to this ownership largely engineered by the Apartheid government despite the ANC's principle of returning the land to the disadvantaged and marginalized black majority. Willing buyer willing seller was agreed in which the market regulates land transfer as a central organising principle in the restitution programme. Restitution has been quite a contested element of the land reform policy – the left arguing that market does not and cannot address the problem, while the right insisting that this is the only solution. This has pitted the debate against the traditional concern market or state. The result on the ground, however, is that the land price has sky rocketed making it difficult for the state to do the purchasing in time. This is accompanied by a range of issues and contestations dragging the actual verification of claims and transferring process.

Although this is the main contentious issue when it comes to the land policy in South Africa, the two aspects, land redistribution and tenure reform are as much crucial if the black majority is going to benefit from this policy. ANC has come with discussion in Mangaung conference to deal with the defects of the land policy and specifically with the restitution issue.

However, this paper looks at the viability of the resituated land and the land under communal or tribal control. More often, the land issue tends to reflect class struggle between the elite and the underclass in its racialised form. The dual system of governance that exists in semi-urban and rural, on one hand, and, the urban South Africa, on the other, seems to benefit the ruling elite whether traditional leaders or the elected black minority. As long as the marginalized majority cannot have access to secure, credible and tradable land, they will stay stuck in the structural poverty and exclusion they are in. Using these as a starting point, this article explores the political and social dynamics that contribute to the failure of this policy. This article draws from a rich secondary data available on land policy and collective ownership of land. The data set used here are unpublished raw data.

## **Problematics of Land Reform Policy**

The South Africa land reform program comprises of three components namely: restitution which deals with land dispossession after the era of 1913; land redistribution aimed at addressing unequal land ownership among South Africans; and lastly the tenure reform program aimed at securing the land rights of those whose tenure is insecure due to past unfair laws and practices. According to the State

Land Summit report (2010)<sup>1</sup> South Africa has managed to redistribute 7% of land against the set target of achieving 30% of redistributed land by 2014. The newly created Department of Rural Development and Land Reform has changed the set target to 2025. The target for land reform, proposed by World Bank and adopted in the Reconstruction and Development Program (RDP) in 1994, was to redistribute 30 percent of agricultural land within the first five years. By 1999, however, less than one per cent of agricultural land had been transferred through all aspects of land reform which are namely land redistribution, restitution and tenure. Redistributing 30% of land by the year 2014 is equivalent to about 24.6 million hectares (Land Access Movement of South Africa, 2010).<sup>2</sup> In the year 2011 a total of 3 447 228ha has been transferred to beneficiaries through the redistribution program since the start of land reform in South Africa (Umhlabawethu, 2011:1)<sup>3</sup>. However, the restitution has not been much of a success. As has been argued,

*The tendency towards cash rather than 'developmental' settlement of claims (land, housing or commonage) limits the contribution of restitution to the broader objectives of transforming patterns of land ownership and building the livelihoods of poor rural people.*<sup>4</sup>

One has to focus on tenure reform since ultimately the land that is distributed and resituated has to have secure tenure. Or else, it defeats the whole purpose of the land reform which is to develop the rural poor. According to de Soto,<sup>5</sup> communal ownership result in tenure insecurity but also impeded domestic and national investment. He argues that it renders the landed asset of people in developing countries defective because land cannot be traded or used as collateral for credits. Therefore, the situation of the poor, in this view, is characterised by one of insecurity, and often their land is reduced to dead capital. For these reasons, de Soto<sup>6</sup> advocates a private property rights system in which land is individually owned, recorded and commoditised.

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<sup>2</sup>Land Access Movement of South Africa. (2011) *The State of Land Reform in South Africa*

<sup>3</sup>Umhlabawethu Project Report (2011) *A bulletin tracking land reform in South Africa*. [Internet] Available from: <http://www.plaas.org.za/sites/default/files/publications-pdf/UW%2013.pdf> [Accessed 30 May 2013].

<sup>4</sup>Rugege, S. 2004. *Land Reform in South Africa: An Overview*. 32 Int'l J. Legal Info. 283

<sup>5</sup>de Soto, H. (2000) *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else*. London: Bantam Press.

<sup>6</sup>de Soto, H. (2000)

Tenure reform on the other hand is aimed at improving the security of tenure for all South Africans and to change the race-based dual land tenure that evolved under colonialism and apartheid. It is addressed in a revision of land policy, the administration of land and legislation regarding private property, communal ownership and the rights of those who rent their land or homes. There has been a significant amount of legislation that has been used to improve tenure security such as Labour Tenants Act, the Extension of Security of Tenure Act, prevention of Illegal Eviction from and Unlawful Occupation of Land Act and the Communal land rights Act. In communal land tenure systems, women generally access land through their relationships with male relatives. Women's lack of authority in society also limits their control over the land resources that they are able to access. Communal tenure systems, for example, generally discourage or prohibit land sales and therefore land transactions take place privately.

Ideally there are three characteristics that land tenure security must possess: Duration (what is the duration of the land rights?); Protection (is there guaranteed protection if the land rights are to be challenged or threatened?); and Robustness (are the holders of land rights free to use and dispose of these rights without interference from others?)<sup>7</sup>.

The need for tenure reform is very clear. For instance, community leaders perceived communal land as land in which they held authority and jurisdiction over. While on the other hand community members held the view that they were the original owners of the land and wanted to be included in the process of decision making because communities were the beneficial occupiers and users of the land; it was thus only fair and just that land be developed in their best interest (Johnson, 2009:23).<sup>8</sup>

The process of democratic decentralisation in South Africa can be described as a greatly complicated one, mainly because it underlies a social capitalistic approach which in turn acknowledges the existence of tribal authorities. The communitarian school of thought argues that land reform must revert to the traditional land tenure system and this view is founded on the concept of social capital which was promoted by James Coleman. Social capital is regarded as the advantage that individuals gain from their social networks. According to communitarians insecure tenure is a result of two aspects: state led policies which ignore traditional values and individualized property rights that marginalize rather than empower. This means that when the notion of social capital is applied to land

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<sup>7</sup>International Fund for Agricultural Development.(2008) Improving Access to Land and Tenure Security.

<sup>8</sup>Johnson, E. (2009) Communal land and tenure security: analysis of the Analysis of the South African Communal Land Rights Act 11 of 2004. Stellenbosch University Press

tenure, it enables a clearly defined process which ensures that all citizens enjoy secure tenure rights to land.<sup>9</sup>

The application of social capital in relation to land tenure is not without criticism. The first criticism is the restriction of individual freedom. For instance community with strong social capital may apply control over its member which results in a high level of conformity and lack of individual autonomy. Secondly, strong ties amongst a community may result in social exclusion of others and this means that powerful members may restrict access for the others. For instance Izinduna/chiefs have been accused of abusing their powers by favouring certain people in land allocation and this contradicts the notions rooted in the concept of social capital which is commonly regarded as the advantage that individuals derive from their social networks.<sup>10</sup>

Of the major challenges in land reform in South Africa is that there is no accurate statistics on who owns how much land in terms of racial, age, gender and other criteria. Also, while it is known that the total land in South Africa is 1,220,813 km<sup>2</sup> and that 19.3% of it is owned by the state, it is not clear exactly what share of the total land in South Africa is urban, rural, or Peri-urban. According to Gordon<sup>11</sup>, given that about 57% of the population in South Africa lives in urban areas, it may well be said that customary practices pertain only among the estimated 18 million people (43% of the population) who live in peri-urban and rural areas.

Even though the communal and tribal land administration and the role of traditional leaders in administering land is problematic with respect to the founding democratic principles, the ANC and its tripartite alliance continue to push for greater involvement of traditional affairs in land and other issues. The Communal Land Rights Act<sup>12</sup> for instance allows tribal councils to act as land administration committee to exert ownership powers on behalf of the community it 'represents'. Therefore undemocratically elected officials do have greater powers in crucial decisions regarding land.

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<sup>9</sup>Obeng-Odoom,F. (2012) *Land reforms in Africa: Theory, practice, and outcome*. Available

<sup>10</sup>Obeng-Odoom,F. (2012)

<sup>11</sup>Gordon, R., Nell, M., & Bertoldi, A. (2007). Overview of urban land as a commodity in South Africa: research findings and recommendations. Report submitted to Matthewed Nell and Associates (PTY) Ltd, June.

<sup>12</sup>Parliament of the Republic of South Africa. (2003) *The Communal Land Rights Bill*

## **Land Acquisition in Communal Land**

This study is going to briefly look at the procedure of acquiring land in peri-urban areas around Sweetwaters, Pietermaritzburg<sup>13</sup>. A person that has a connection to that area through ancestry or kinship to that specific area goes to the chief and asks for a land. The chief makes an informal background check. In the meantime, according to the respondents, the person has to pay a fee of R700 up to R1000 called umKonzo (Khonzo) to ‘show gratitude to the king.’ After the chief give him land depending on availability, he gets a PTO (Permission to Occupy) papers from the chief and he is informed to start building his house in six months. Then he provides food and beverages as form of ‘Braai” to introduce himself to the residents of the area.

One cannot sell the land or use it as collateral for a loan but he can sell the house with the permission of the chief. A woman gets land if she is married or has an adult son only. In the latter, the land actually has to pass to the adult son. It emanates from the cultural belief that unmarried women are promiscuous. In the event that her husband dies, she gets the land. However, in the case of divorce, she gets nothing.

Though the apparent advantage of this system is that land remains very cheap and, in some cases, accessible, one doesn’t have tenure security and at times it is exclusive. The PTO document is an indication of the lack of insecurity. It shows usage but not ownership. It is also clearly a gender biased system where the customary practice of the exclusion of women from land ownership reigns supreme. In addition, the administrative system of this land is quit divergent from the public local administration. That is why local government don’t have good relationship with traditional leaders.

## **The Duality of Land Policy**

Land policy in South Africa straddles on two fundamentally opposite point of views and practises. On one hand, there is a capitalist land market in which individual ownership is the core principle. In urban South Africa, there is robust real estate business that operates under

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<sup>13</sup>Dlamini, M. (2013). “An exploratory study into the challenges of Land Reform in the area of Sweet Waters (Pietermaritzburg): Implications for Policy and Practice.” UKZN

this practice. One can also observe this system in the sometime huge farms owned by individuals in peri-urban and rural South Africa.

On the other, there is a communal land system where the community as a whole owns the land. The commons framework property rights are divided in two main groups: use rights (that is the access to a resource, withdrawal from a resource or exploitation of a re-source for economic benefit) and control or decision-making rights (rights to management, exclusion and alienation). In the commons model, several individuals or groups can have different rights over the same resource. This means that even if the state, for instance, has the control rights over a resource, a community can have the use rights, and different segments of the community can have different use rights.<sup>14</sup> The framework of collective ownership allows for multiple rights in the same resource to be acknowledged and protected, and provides an organisational framework on how such rights and the conflict between the users of the rights can be managed. The structure of the commons recognises communities' own ability to capitalize on their social capital and organize themselves relying on the traditional property law model of ownership and access. Access to land in African indigenous land right systems is controlled through membership (of a family, lineage or community), and individuals can acquire this access on account of their membership.<sup>15</sup>

However, in reality, the community doesn't exercise much power in the decisions of land issues. It is the traditional leaders who speak and act on the behalf of the community. The chieftaincy that existed before is largely intact in the peri-urban and rural South African landscape. Du Plessis<sup>16</sup> argues that the concept of land tenure struggles to fit into the notion of common law concepts of "Property" and "Ownership". de Soto's argument holds true in that a land that doesn't have commodity value, and can be sold and exchanged has detrimental effect for the individuals who occupy that land. It affords little tenure security.

## **Insecure Tenure**

Tenure security is closely related to property rights. It specifies how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under

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<sup>14</sup>CAPRiResources, *Rights and Cooperation: A Sourcebook on Property Rights and Collective Action for Sustainable Development* (International Food Policy Research Institute Washington DC 2010)

<sup>15</sup>Okoth-Ogendo HWO "The Nature of Land Rights Under Indigenous Law in Africa" in Claassens A and Cousins B (eds) *Land, Power and Custom* (UCT Press Cape Town 2008)

<sup>16</sup>Du Plessis, W. J. "African Indigenous Land Rights in a Private Ownership Paradigm."Potchefstroom Electronic Law Journal 14 (2011) Vol. 14: 7-12

what conditions. There is an argument that the ownership of land on the hands of communities not in the hands of individuals insures that distributed land will not fall on the hands of vested elites. This argument doesn't hold true because on one hand traditional leaders are elites where leadership depends on lineage dominated by few families. On the other hand, their contribution to tenure security is not clear. Thus few unelected people have the power to make important decisions when it comes to tenure.

That is why the existing law that recognizes traditional leaders was challenged by four communities arguing that it jeopardises their current tenure security. The constitutional court of South Africa in the case of *Tongoane v National Minister for Agriculture and Land Affairs*<sup>17</sup> declared the Communal Land Rights Act<sup>18</sup> unconstitutional since it infringes in the existing indigenous law that already exists. Collective ownership in South Africa has many layers and forms as discussed above.

## **Traditional leaders**

The constitution of South Africa recognizes the role of tradition affairs in the local level and the Traditional Leadership and Governance Framework Act<sup>19</sup> is foremost in clearly outlining their role and structure. The Green (1996) and White (1997) Papers of the Department of Land Affairs has clearly affirmed this role. Their role, however, has been controversial since their practise marginalizes certain group of the population that are protected by the constitution since they come from the traditional chieftaincy system. Women and minority groups that live in certain rural areas have been marginalized since the traditional leaders have the power to decide on who gets the land either for habitation or farming purposes. A study done around Pietermaritzburg, KZN rural areas indicates that women cannot get land

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<sup>17</sup>Tongoane v Minister of Agriculture and Land Affairs 2010 6 SA 214 (CC)

<sup>18</sup>Communal Land Rights Act 11 of 2004

<sup>19</sup>Traditional Leadership and Governance Framework Act 41 of 2003



unless they are married.<sup>20</sup> This is clearly against the principles of the gender equality enshrined in the constitution.

The other issue is that traditional leaders have to have a tribal council that make important decisions on land issues. However, the way the council is structured and elected clearly does not favour the community. The council members have to be 60% unelected and 40% elected by the community. Even in the resituated land, collective and communal land falls on the hands of the traditional leaders.

The TLGF Act effectively resuscitated the powers they enjoyed under the notorious Bantu Authorities Act of 1951 giving the old undemocratic systems elites a new lease of life. In addition, CLRA gave the tradition leaders unprecedented and substantial powers in land allocation and administration.<sup>21</sup> The implication of this that land is changing hands from one elite to another entrenching the controversial boundaries and structures inherited from apartheid. Meanwhile, the community members' sense of entitlement to this land as individuals doesn't translate to ownership of land. In addition, this system of land administration perpetuates the marginalization of certain groups of people. This runs against the grain of the democratic principles and liberal democracy of the land. Ntsebeza<sup>22</sup> argues:

*While the initial collaboration was around local government, it is quite clear that the main issue that brings traditional authorities together is their opposition to the notion of introducing new democratic structures. They would be happy to be the only primary structure in rural areas and insist on preserving the concentration of functions they enjoyed under apartheid, in particular land administration. Not only are they opposed to the idea of separation of powers, they are also opposed to any attempt to introduce alternative structures that would compete with them. For example, in the case of local government, traditional authorities reject the introduction of municipalities in their areas.*

More importantly, traditional leaders lack the capacity to administer land in a complex environment where there is a competition to attract investment and deal with the complexities of existing local structures. The evidence and argument presented in the case *Tongoane v*

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<sup>20</sup>Dlamini, M. (2013). "An exploratory study into the challenges of Land Reform in the area of Sweet Waters (Pietermaritzburg): Implications for Policy and Practice." UKZN

<sup>21</sup>Meer T and Campbell G (2004) Traditional leadership in democratic South Africa. Democracy Development Programme, Durban.

<sup>22</sup>Ntsebeza, L (2004) "Rural Governance and Citizenship in post-1994 South Africa: Democracy Compromised?" Presentation for the Department of Sociology, University of Cape Town, South Africa.

*National Minister for Agriculture and Land Affairs*<sup>23</sup> by the four communities is indicative of the lack of capacity of traditional authorities.

### **Gender Equity in Land Tenure**

In the gender land assessment study that was conducted by International Centre for Research on Women<sup>24</sup>, it was found that in KZN rural areas there was a big gap in asset rights of men and women in Inanda and KwaDube area. In both sites, there was a substantial land ownership gap, with 70 percent and 85 percent of male respondents and 20 percent and 33 percent of female respondents owning land or housing. This meant that a high number of men had secure tenure compared to women in both areas.

Although CLRA advocates for women to constitute one third of the traditional leaders' councils, this hardly works in practise. As mentioned in the data from the Sweetwaters, Peitermaritzburg surrounding areas, women enjoy far less rights than men and in case of divorce they end up with nothing. However, in practice, the reforms have not changed the power structures embedded in custom that impinge negatively on women. There seems to be state support for the customary system and chiefs. Cross & Hornby<sup>25</sup> argue the reform has been concerned with 'macro-national' issues whereas the micro-local and household power structures, which curtail women's land rights, have remained unresolved in practice. Therefore, the land allocation and administration by traditional leaders infringes on their constitutional rights and marginalizes them.

### **The Political Landscape of Land Reform**

Land reform is a contentious issue in South Africa where all parties have thrown their hats in the ring. The polarized groups call from taking the land scraping the willing buyer and seller policy to resisting land redistribution. Some in the ANC has suggested that taking the land is the only viable solution since so far about 7 percent of the intended 30% has resituated. There

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<sup>23</sup>Tongoane v Minister of Agriculture and Land Affairs 2010 6 SA 214 (CC)

<sup>24</sup>Land Access Movement of South Africa. (2011) *The State of Land Reform in South Africa*.

<sup>25</sup>Cross, C., & Hornby, D. (2002). Opportunities and obstacles to women's land access in South Africa. A research report for the Promoting Women's Access to Land Programme.

are other groups who ride in this wave of public discontent. Julius Malema (a young politician who headed the ruling party's youth league and his new party Freedom Fighters Party) have made this radical approach one of their principles. On the other hand, the Agri-Forum (a local minority rights advocacy group) is vocal against such radical approach and maintains willing buyer willing seller is the only workable approach.

The recent ANC discussion document is meant to address the shortcomings of the previous policy by setting up Land Surveyor office among other measures that would determine the value of land thereby dealing the unrealistic demand of some sellers. The need for Land Surveyor office emanates from the frustration of the government unable to buy land due to inflated prices. This proposal if it became a legislation will run into difficulty as it goes against the sacrosanct right of the land owner in the constitution. The ANC has been treading carefully in this issue since the potential consequences are dire as it is seen in Zimbabwe even though revisionists are showing that the Zimbabwean experience has not been that bad after all. In fact, the reverse is the case. It worked to benefit the majority of farm workers to have access to and own land; and taking the sanctions into account, the assumption that large farms and industrial farming is better is proved to be wrong, with the surge in the small farmers' production. This is in the absence of sufficient and proper agricultural extension – which would expand their productivity.

Therefore, the issue of land reform in the political arena had been highly polarized and some politicians have used it to mobilize support. What is lacking in this debate is that what happens to the land resituated or the communal land. Tenure security hardly features in these debates as the status quo benefits the economic and political elite. The ANC has in fact given the traditional leaders greater say in administration and allocation of land as it draws plenty of support from traditional leaders. Some traditional leaders even help the ANC in its electioneering campaign.

## **Conclusion**

There is recognition that communal land administration is a feature of South African landscape and it is here to stay. In terms of the land administration based on culture and customs, it has a huge role to play. In addition, the amount of land being administered by indigenous law is not small. However, the following three factors have to be considered to understand the environment of land reform.

Firstly, communal land rights administered by traditional leaders are fundamentally in conflict with the South Africa's constitution and its liberal democracy as argued by Ntsebeza, Meer & Campbel and Cousins. It marginalizes women, minorities and other groups since it is based on customary and patriarchal system of governance. It is crucial to note that it is not only due to the hereditary nature of traditional leaders or their quest for political dominance within their geographic jurisdiction that questions their relevancy, but most importantly is the nature of their political structures. Mainly in KwaZulu-Natal, traditional leadership is based on a hierarchical political authority which is centrally controlled. What is more, it is doubtful one is afforded the same land rights living under such system considering the authoritarian nature of most traditional leaderships in South Africa; not to mention the potential for the abuse of power. Du Plessis argument of solving the South African Land tenure security challenges using the indigenous communal system paradigm is not the solution. In fact, it perpetuates the existing culturally ingrained tenure insecurity.

Secondly, there is no concerted political effort to address the issues of land tenure. The main argument that has been raging was about the willing seller willing buyer policy. Tenure security is neither politically attractive nor easy to use in political rhetoric. The effective use of the existing land and tenure security has not featured in many of the debates.

Thirdly, communal land system administered by traditional leaders doesn't give a secure tenure where the individual can use the land as a commodity. For instance, in the case mentioned above where an individual gets PTO, he can't use it you as a title deed and have loan. De Soto argument that a land that is not individually owned and titled is an impediment is a hindrance to domestic and national development makes sense. However, this has its own demerits since it inflates land prices pushing it out of the purchasing power of the poor.

What these unelected elites do is governed by traditional norm and values that makes access to land a lot more easier than private property model which is regulated by market institutions – this highest bidder takes it all. In the end, it is understandable that one cannot simply take communal practice of rights and access to land, without closely interrogating the alternative. There are no easy solutions and quick fixes to such complex issue. However, communal land and its system of administration doesn't contribute to tenure security and ultimately to individual development.

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