

CHAPTER SEVEN

LAND RIGHTS

PART A: OVERVIEW

1 INTRODUCTION

The historical denial of access to land to the majority of South Africans is well documented. This is manifested in the lack of access to productive land; homelessness; and high levels of insecure tenure. The post-Apartheid government developed a land reform programme which focused on three important areas: land redistribution to address lack of access to land for productive and residential purposes; land restitution to restore land to those who lost land due to previous discriminatory laws; and secure tenure to those whose tenure is insecure.

In the two reports submitted to the South African Human Rights Commission (SAHRC), the national Department of Land Affairs reported that it had instituted several measures in the three areas of the land reform programme in order to redress past imbalances and create equitable access to land.

This chapter assesses the information provided by the Department of Land Affairs on legislative and other measures introduced during 1999/2000, towards the realisation of land rights contained in the Bill of Rights.

2 CONSTITUTIONAL OBLIGATIONS

Section 25 of the Constitution provides for the right of access to land and addresses the three above-mentioned areas. Section 25(5) deals with equitable access to land, s 25(6) addresses restitution; s 25(7) concerns security of tenure; and s 25(8) identifies land, water and related reforms, as purposes that should not be impeded by s 25.¹

Land rights are found mainly within the context of property rights, although property is not limited to land. Land rights are largely shaped by the tension between protecting existing property rights, and the need to achieve justice and equity in access to property.

On the one hand, there is a view that purports to protect the existing rights to property. From this perspective, the state should not interfere in property ownership, but should rather protect the right from interference by the state itself or other entities. On the other hand, there is what is often referred to as the social function of property, such as

¹ Constitution of the Republic of South Africa, Act 108 of 1996.

issues of fairness, equity and justice in access to land. In this line of thinking, there are legitimate grounds for interference with existing property rights in order to serve social functions. The United Nations Declaration on Social Progress and Development recognises the social functions of property including land and calls for land ownership that ensures equal rights to property for all.² Certain groups have been identified as requiring positive legislative and other measures towards the realisation of land rights. These groups include women, peasants and indigenous peoples. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) states that women should have equal treatment in the context of land and agrarian reform and in land resettlement schemes.³ The Peasants Charter of the United Nations Food and Agricultural Organisation requires that tenure reform and redistribution should benefit the landless and small farmers. The Convention Concerning Indigenous and Tribal People in Independent Countries recognises the relationship between indigenous people and land and calls for the adoption of special measures on behalf of indigenous people. It also safeguards against arbitrary removal of indigenous people from their traditional land with procedural guarantees.⁴

Land rights in the South African Constitution are an attempt to find a middle ground between the two perspectives mentioned above. The implementation of these measures continues to highlight the tension involved in protecting existing property rights, while attempting to bring about equity and justice in access to land on the other. The first part of property rights in the Constitution deals with protecting existing rights to property. Section 25(1) states that 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.' The remaining sections identify circumstances under which interference with property rights may be justifiable. Section 25(2)(a) requires that property only be expropriated in terms of a law of general application for a 'public purpose' or in the 'public interest.' Section 25(4)(a) specifically provides that the 'public interest' includes land reform. It is therefore clear from the reading of s 25(2)(a), together with s 25(4)(a), that land reform is considered in the Constitution, to be a justifiable ground for interference with property rights. However, s 25(1)(b) requires that where expropriation occurs, there must be compensation. Section 25(3) specifically deals with the nature of compensation, and includes the determination of the value of compensation.

While the abovementioned sections mainly deal with land rights indirectly, the specific provisions on land rights are contained in ss

² Articles 17(d) and 18(b) of the United Nations Declaration on Social Progress and Development (1969).

³ Article 14(2)(h) of the Convention on the Elimination of all Forms of Discrimination Against Women (1979).

⁴ Articles 7(1), 13, 14, 15, 16, 17, 18 and 19 of the Convention Concerning Tribal and Indigenous Peoples in Independent Countries (1991).

25(5), 25(6), 25(7), 25(8) and 25(9). These sections address issues of equitable access to land, the restoration of land to those who were deprived of land due to past discriminatory practices and security of tenure.

Section 25(5) states that the 'state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.' An issue of concern is whether the courts may review legislative and other measures to test their reasonableness.⁵ Prior to the *Grootboom judgement*, the prevailing interpretation was that the courts would not engage in debates over budgetary priorities.⁶ The *Grootboom judgement* has had the dramatic effect of showing that the courts may have to establish whether measures exist to foster conditions for equitable access to land. What has also become clear from this judgment is that the Courts would indeed evaluate the reasonableness of the measures.

Section 25(6) specifically addresses the issue of security of tenure and states that a person whose tenure is insecure as a result of past discriminatory laws or practices, is entitled, to an extent provided by an Act of Parliament, to tenure that is legally secure or to comparable redress. The requirement for an Act of Parliament towards security of tenure is reiterated in s 25(9), which requires that Parliament must enact legislation referred to in s 25(6).

Section 25(7) deals with restitution, and uses the word 'property' rather than the narrower concept of 'land.' This section states that a person or community dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices, is entitled, to an extent provided by an Act of Parliament, either to restitution of that property, or to comparable redress.

Lastly, s 25(8) specifically provides that no provision of s 25 may impede the state from taking measures to achieve land, water and related reform in order to redress past racial discrimination, provided that any departure is consistent with s 36(1). To a certain extent, s 25(8) may be seen as a directive to the Courts, reiterating the importance with which land, water and related reforms are regarded in the Constitution.⁷

3 KEY DEVELOPMENTS FOR THE YEAR UNDER REVIEW

The developments that took place during the reporting period were mainly efforts by the state to deal with some of the problems that had arisen during the implementation of the three areas of the land reform programme. The major problem has been the slow pace of implementation of all three programmes of land reform. In the

⁵ G Budlender 'The Constitutional Protection of Property Rights' in G Budlender J Latsky T Roux (eds) *Juta's New Land Law* (1998) 70.

⁶ *Ibid* 70.

⁷ *Ibid*. 389.

restitution programme, only 28 claims had been resolved, out of a total of 42 000 applications for the restoration of land received by mid-1998.⁸ Most of the applications received also tended to come from urban areas despite the fact the majority of the victims of forced removals and displacement are in rural areas. By 1999, only 2 percent of the land targeted for redistribution under the redistribution programme had been redistributed.⁹ In the tenure reform programme, poor implementation of enabling legislation had resulted in little impact on people living in conditions of insecure tenure. It is in this context that policy and other developments mentioned below should be viewed.

Policy developments

Significant developments that took place during the reporting period were administrative changes introduced in the land restitution programme to accelerate delivery, and the securing of land rights for vulnerable groups under the tenure reform programme.

Land restitution

Administrative changes to the restitution programmes followed the Restitution Review that took place in 1998. The Department of Land Affairs, in view of the particularly disappointing performance of the restitution programme, undertook the Review. Some of the causes of slow delivery included the lengthy legal process that had to be followed in the handling of claims, confusion over the respective roles of the Commission on the Restitution of Land and the Department of Land Affairs, and lack of prioritisation of claims. The actual administrative change introduced involved an arrangement through which claims that were not in dispute no longer had to go through the Land Claims Court, a process considered to be a cause of delay in processing claims.

This change improved the speed of delivery although it remains inadequate to deal with the estimated number of victims of discriminatory practices that resulted in many South Africans losing their land. During the reporting period alone, more than 8000 claims were settled. Clearly, and compared to the preceding five years where only 44 claims were settled, this was a significant improvement. However, this improvement was marginal when measured against the number of eligible beneficiaries. It has been estimated that there are about 3,5 million people who are eligible for land restitution.¹⁰ The measure has also not dealt with other problems that continue to hamper restitution, such as the urban bias of the restitution

⁸ Land restitution at [http://www.nlc.co.za/mdresti.htm](http://www.nlc.co.za/mdrest.htm) site visited on 18/10/01.

⁹ Land Reform Policy at <http://www.nlc.co.za/mdrefpo.htm> site visited on 18/10/01.

¹⁰ It is important to note however, that the number of beneficiaries would be more than the number of claims as claims are sometimes made on behalf of households and communities. Nonetheless, when taking into account, the fact that the actual number of claims received was 42 000, then it becomes clear that the restitution programme still lags behind the demand for restitution.

Land rights

programme, the continuing marginalisation of women in the programme and the lengthy process of negotiating with landowners over land pricing.

Tenure reform

A significant development that took place under the tenure reform programme was the securing of land tenure for vulnerable groups. This measure was directed at people in the former homelands and the South African Development Trust (SADT) areas, who did not have access to land.

While the measure was positive in that it provides land to a previously disadvantaged segment of society, the tenure reform of the state remains problematic. Although a plethora of legislative measures such as the Extension of Security of Tenure Act (ESTA) 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996 have been passed, poor implementation of these measures undermine prospects for sustainable tenure reform. Farm workers bear the brunt of poor implementation of the measures and continue to suffer from arbitrary evictions. There remains, therefore, a significant segment of society that does not enjoy the right to security of tenure.

Redistribution

Little progress has been made in the redistribution programme. It has been estimated that by 1999, only 2 percent of the 30 percent of land that the state had intended to redistribute, has actually been redistributed, pointing to the slow pace of delivery.

Legislative developments

There were no significant legislative developments that took place during the reporting period. The minor changes introduced included amendments to: s 2 of the Provision of Land and Assistance Act of 1993 to provide for the requirement of Government Notice regarding settlement projects; and to ss 13 (A), 33 (1) and 40 of the Land Reform Act 3 of 1996.

There were also amendments to the Interim Protection of Informal Land Rights Act 31 of 1996; and ss 19 and 20 of ESTA. During the reporting period, a process of drafting regulations in terms of the Land Disposal Act 48 of 1961 and the Upgrading of the Land Tenure Rights Act 112 of 1991 began. The above-mentioned regulations were temporary measures intended to empower the Minister of Land Affairs to approve urgent applications for the transfer of land to communities occupying communal land in the former homelands and SADT areas.

The measures were reasonable in that they began to pay specific attention to vulnerable groups in communally occupied land, but have

not yet addressed some of the fundamental problems impeding the land reform programme. The biggest challenge remains that of effective implementation of land legislation, especially in the area of tenure reform.

The budget

During the reporting period, budgetary allocations in the three programmes were as follows:

- Land Restitution - R143 000 000 of which R 122 196 000 was spent
- Land Redistribution - R163 862 000 with an expenditure of R154 959 000
- Land Tenure Reform - R45 849 000 when the total expenditure amounted to R24 734 000.

A continuing trend, in all the three areas of the land reform programme, was under-spending, which happens at a time when government reports that financial resources towards land reform are limited. As is shown above, of the more than R45 million made available for the tenure reform programme, only about R24 million was spent.

Another observation is that budgetary resources towards land reform remain grossly inadequate to deal with the enormity of the land reform challenge.

3 CONCLUSION

The developments that occurred during the reporting period only marginally contributed to the realisation of land rights contained in the Constitution. Administrative changes introduced in the restitution programme increased the number of restitution claims. However, none of the developments addressed some of the deep-seated problems in the restitution programme, such as the continued urban bias.

Legislative measures, while they reach a neglected segment of the South African society, fail to deal with the overall ineffectiveness of the implementation of existing legislative measures, especially those that relate to tenure reform, which results in especially farm workers being evicted.

Budgetary allocations towards the land reform programme are characterised by under-spending, pointing to inefficiencies in the application of financial resources towards the land reform programme. Moreover, the budget remains very limited given the dire need for land.

PART B: ANALYSIS OF RESPONSES BY ORGANS OF STATE

This section analyses information provided by the national Department of Land Affairs (DLA) on legislative and other measures instituted to realise land rights during the 1999/2000 reporting period. The DLA was required to provide information on policy, legislative and budgetary measures instituted, how the measures have affected constitutional obligations to respect, protect, promote and fulfil land rights. The DLA was also required to provide information on a number of indicators that are critical to the determination of progress with the realisation of the right of access to land rights. Lastly, the DLA was required to provide information on systems that have been established in the Department to determine progress in the realisation of land rights.

1 POLICY MEASURES

There were no new policy measures introduced in the Land Redistribution programme by the Department. However, in March 2000, the Minister of Agriculture and Land Affairs spelt out Strategic Directives with regard to Land Reform that included the Land Redistribution Programme. No further information on the directives was included in the report from the Department.

In the Restitution Programme, the policy measure instituted was the strengthening of the administrative machinery as the process was regarded as being too legalistic and slow. Under the new arrangement, not all land claims would be referred to the Land Claims Court for a ruling. It was only in the event of an agreement not being reached between the claimant and the landowner, that claims would be referred to the Land Claims Court.

Policy measures instituted under the Tenure Reform Programme were:

- The securing of vulnerable rights
- The approval of policy on Church land

Securing of vulnerable rights policy

The securing of vulnerable rights entailed the transfer of land to communities and other groups of people residing in the former homelands and in ex-South African Development Trust (SADT) areas, who by virtue of previous laws did not have access to land. This policy was instituted after meetings and consultations with various stakeholders and research studies. As part of this process a policy document on the entitlements of people protected by the Interim Protection of Informal Land Rights Act 31 of 1996 and the Extension of Security of Tenure Act 62 of 1997 was developed. There was also a proposal for the payment of benefits to the occupants and users of land. No further information on the measure was provided.

Church land policy

The Church Land Policy related to all church-owned land and the rights of groups or individuals that reside therein. This policy was aimed at encouraging the Church as a substantial landowner to contribute towards land reform. This policy was aimed at affirming the rights, ownership, protection and security of tenure of communities living on Church property.

1.1.1 Measures and constitutional obligations

According to the Department, the instituted measures positively affected the constitutional obligations to respect, protect, promote and fulfil land rights. The refinement and streamlining of existing policies contributed to meeting the needs of intended beneficiaries. The measures were reasonable in that they did not compromise the rights of the people, but were in line with the government's development strategy and the Bill of Rights. The securing of vulnerable rights in particular was aimed at improving the effectiveness of the implementation process of the restitution programme. The change relating to church land broadened the scope of the land reform programme by including a group not initially covered by the land reform programme.

The instituted measures were also deemed effective in that whilst only 44 land claims were resolved between 1994 and 1999, the figure rose to 8 288 during 1999/2000.

The report indicated that people living in informal settlements, women (including female-headed households), low-income groups, farm workers, labour tenants and the previously disadvantaged racial groups including the indigenous people, benefited through policies such as the Securing of Vulnerable Rights. Those who had been dispossessed of their land also benefited through the restitution programme.

The Department did not provide information on any difficulties experienced in the implementation of the measures mentioned above, except to mention that the implementation of changes to the security of tenure programme was complex.

1.2 Critique

With regard to the actual measures instituted, it is correct that measures instituted by the state were positive in that they had the aim of expanding the benefits of the land reform programme to more beneficiaries. The focus was on groups that are known to be particularly vulnerable such as rural communities. However, the

measures failed to address some of the core issues that are standing in the way of the realisation of these rights.

It is particularly unacceptable that no measures were instituted in the redistribution programme given the slow pace at which the programme is moving. As stated earlier, by 1999, only 2 percent of the 30 percent of the land that the state had intended to redistribute had actually been redistributed. Such a slow pace calls for drastic and immediate measures.

In the area of restitution, while the measures were positive, they did not address some of the challenges faced in the programme. It has been noted that the number of eligible beneficiaries to restitution is about 3,5 million people in the country. Even a delivery rate of more than 8 000 a year would fall far short of addressing the problem, especially given that 42 000 claims had been received. The other issue is the continuing bias of the restitution programme for urban areas, where most restitution claims are being handled. This raises a number of problems. The first is that restitution claims in urban areas have tended to be protracted due to the unwillingness of landowners to release land. The second is that the majority of eligible claimants were in rural areas, meaning that any restitution programmes that ignores rural people, only pays attention to about 300 000 urban claimants.¹¹

With regard to security of tenure, the measures were positive but once again fell short of addressing core issues. The 2nd Economic and Social Rights Report highlighted the vulnerability of people residing on communal land. During the reporting period, measures aimed at the security of vulnerable groups were introduced. The outcome of the measures will be the major determinant of their effectiveness. Available estimates suggest that about 12 percent of the rural population were living under insecure tenure in 1997.¹²

The report did not provide information on evictions and their implications on the tenure reform programme. Whilst statistics on eviction remain scanty, provincial departments responsible for land reform have collected some information. This information covered the period between November 1999 and May 2000. Their reports revealed the following trends:

- there were more threats of evictions than actual evictions
- there were more illegal evictions than legal ones
- more evictions occur because of change of ownership of land
- evictions also arose from labour disputes

¹¹ Land restitution (note 8 above).

¹² Land Rights Programme Tenure Rights at <http://www.nlc.co.za/tenref.htm> visited on 10/08/2001.

What is missing from the report is a demonstration of special considerations given to the groups mentioned above. While the Department views its measures as broadly giving consideration to these groups, it did not show sensitivity to the more specialised needs of these groups. For instance, concern has been raised about the position of persons with disabilities in the context of land reform. The Department could have reported on its understanding of the needs of each group, and the way its measures address these needs.

The state is clearly not doing enough to protect vulnerable groups, especially farm workers. Despite the existence of land tenure programme and the land reform programme, evictions continue unabated on farms. It is particularly disturbing that the Department of Land Affairs does not have information on the extent of evictions taking place on farms.

1.3 Recommendations

The report should provide information on problems being addressed by each measure, briefly describe the measure, state its objective, and the degree to which such a measure would address the problem identified.

The Department should provide specific information on special considerations given to vulnerable groups so that it can be possible to gauge the extent to which the measures address the needs of rural dwellers, farm workers and women.

There is a need for active measures to be instituted in the area of land redistribution. The slow pace of land redistribution is highly unacceptable.

With regard to land tenure reform, a clear indication should be given on how many of the vulnerable groups such as farm dwellers have acquired secure tenure during the period under review as against the number of evictions that have taken place.

The Government must also indicate how problems in the restitution programme such as urban and gender bias are being addressed.

2. LEGISLATIVE MEASURES

There has not been significant changes in legislation enacted by the DLA, except the following amendments made as part of the Land Affairs General Amendment Act 11 of 2000:¹³

- Amendment to s 2 of the Provision of Land and Assistance Act 126 of 1993, to provide the requirement of Government Notice regarding settlement projects.

¹³ No further information on the nature of these amendments was provided.

Land rights

- Amendment to ss 13(1A), 33(1) and 40 of the Land Reform Act 3 of 1996.
- Amendment to sections 19 and 20 of the Extension of Security of Tenure Act 62 of 1997.

The process of drafting regulations in terms of the State Land Disposal Act 48 of 1961 and the Upgrading of Land Tenure Rights Act 112 of 1991 started in 2000. The regulations were intended to empower the Minister of Land Affairs to consider urgent applications for transfer of land to communities who communally occupy land in the former homelands. The Department of Land Affairs has termed the process, Security of Vulnerable Rights as reported in the policy section. This was a temporary measure pending the enactment of a long-term tenure reform legislation that would deal with communal areas.

2.1.1 Measures and constitutional obligations

The Department of Land Affairs reported that the above-mentioned legislative measures were specifically aimed at carrying out the obligations to respect, protect, promote and fulfil informal rights, the rights of labour tenants and the securing of vulnerable rights. No further information was provided.

Regarding the question of effectiveness, the DLA reported that policy development is an ongoing process owing to the complexity of the issues, especially those relating to the securing of vulnerable rights.

2.1.2 Special considerations given to vulnerable groups

The DLA reported that legislation relating to the securing of vulnerable rights covers all groups mentioned in the policy section. The IPILRA awareness campaign focused on people living in informal and rural settlements, the majority of whom falls in the low-income bracket. The guidelines formulated for labour tenants to acquire land include all the groups mentioned in the protocol.

2.1.3 Implementation of the measures

The DLA did not explain in detail what problems were experienced in the implementation of legislative measures. Implementation of the securing of vulnerable rights had not yet started during the reporting period, as there were still consultation and Parliamentary process that needed to precede implementation. There were communication problems as regards the IPILRA. This was due to the size of the beneficiary group and limited media that could reach the groups; it was therefore difficult to determine the success of the measure.

2.2 Critique

The report from the DLA addressed the questions raised in the protocol but not satisfactorily. Though the format of the protocol was largely followed, the report was not clearly presented in terms of the three areas of the land reform programme, namely restitution, redistribution and tenure reform. Information regarding these three programmes of land reform was combined, making it difficult to understand which specific measures were instituted for each of the three programmes.

Since the DLA is responsible for land reform at the provincial sphere, the response should have given a brief background on the implementation of the measures and the problems encountered by provinces.

It is unacceptable for the DLA not to provide information on how the measures were implemented and the problems experienced therein.

It has been widely reported that although the DLA has instituted progressive pieces of legislation such as ESTA, the implementation of these measures has been problematic in that the right to secure tenure continues to be violated.

2.3 Recommendations

The DLA should provide all relevant information on legislation that was passed to implement the land reform programme. Some crucial pieces of legislation were omitted from the response.

The DLA should in future provide information on difficulties experienced in various provinces regarding the implementation of legislation. The DLA needs to comment on this and indicate on measures being instituted to address the issue of implementation of legislative measures to address security of tenure.

3 BUDGETARY MEASURES

The total budgetary allocation towards land reform for the reporting period was R 842 million, which was a nominal increase from R 761, 320, 000 for the previous year. The budget was to be increased to R 837 million for the financial year of 2000/2001. Of the total amount allocated during the reporting period, only R 679 million was spent, meaning that an amount of R 81 million was not spent. Allocation of budgetary resources as a percentage of the GDP declined from 0.58 percent from the 1998/1999 reporting period to 0.52 percent during the reporting period.

The Department received donor funding of R 33 million for 1999/2000, which was used for training provincial officers, facilitation and, access to credit.

Restitution

The total amount allocated towards the restitution programme during 1999/2000 was R 142 million. This was a nominal increase of 71 percent from R 83 million during the previous financial year. However, the budget was expected to be reduced by 30 percent to R 99 million during the 2000/2001 financial year. The restitution programme also doubled as a percentage of the budget from 9 percent in 1998/1999 to 18 percent during 1999/2000. Only R 122 million (83 percent) of the allocated amount was spent, compared to over-spending for the previous financial year. The reason for the increased allocation for the restitution programme for the financial year was the result of changes introduced in the delivery process, which accelerated the pace of delivery.

Table 1 Budget allocation for the land restitution programme

| YEAR | TOTAL ALLOCATION IN RANCS | ALLOCATION AS A % OF THE DEPARTMENT'S TOTAL BUDGET | ACTUAL EXPENDITURE IN RANCS |
|-----------|---------------------------|--|-----------------------------|
| 1998-1999 | 83 322 000 | 9,0 | 114 101 000 |
| 1999-2000 | 142 863 000 | 18,0 | 122 196 000 |
| 2000-2001 | 99 000 000 | | |

Redistribution

Budgetary allocations towards the redistribution programme went down by 30 percent from R 233 million during 1998/1999, to R 163 million during the 1999/2000 financial year. It was expected to be increased to R 309 million during the 2000/2001 financial year. Allocations towards the redistribution programme were expected to be increased from 21 to 38 percent as a share of the DLA's budget.

Table 2 Budget allocation for the land redistribution programme

| YEAR | TOTAL ALLOCATION IN RANCS | ALLOCATION AS A % OF THE DEPARTMENT'S TOTAL BUDGET | ACTUAL EXPENDITURE IN RANCS |
|-----------|---------------------------|--|-----------------------------|
| 1998-1999 | 233 000 000 | 27,7 | 266 283 000 |
| 1999-2000 | 163 862 000 | 21,5 | 154 959 000 |
| 2000-2001 | 309 147 000 | 36,9 | |

The variance between the budgets for the periods 1998/1999 and 1999/2000 was R 69 138 000. This figure reflected a reduction in the budget allocation. The Land Redistribution Programme received the lowest allocation for the period under review compared to the other two periods. According to the information provided by the DLA, the reason for the low allocation was that a larger percentage of the Department's

budget was allocated to the land restitution programme. The report also indicated that due to the low allocation for the programme, various needs related to the programme were not adequately met.

Tenure reform

Table 3 Budget allocation for the land tenure reform programme

| YEAR | TOTAL ALLOCATION IN RANDS | ALLOCATION AS A % OF THE DEPARTMENT'S TOTAL BUDGET | ACTUAL EXPENDITURE IN RANDS |
|-------------|----------------------------------|---|------------------------------------|
| 1998-1999 | 47 000 000 | 5, 6 | 34 817 000 |
| 1999-2000 | 45 849 000 | 6, 0 | 24 734 000 |
| 2000-2001 | 309 147 000 | 36, 9 | |

The period under review saw a reduction in the allocation towards the tenure reform programme, from R47, 000, 000 during 1998/1999, to R45, 849 000 during the 1999/2000 reporting period. There was expected however, a dramatic increase to R 309 million. The reason provided for the low allocation was due to loss of staff and resignations, which gave rise to the drop in expenditure. According to the report, the budget allocation was adequate in that it was enough to meet the needs of the programme.

3.2 Critique

A number of observations can be made about budgetary measures towards the realisation of land rights contained in the Constitution. These include the utilisation of financial resources, adequacy and sustainability of budgetary allocations towards the restitution programme, and confusion regarding budgetary allocations towards the redistribution and tenure reform programmes.

Questions regarding the adequacy and sustainability of the restitution programme can be raised. The Department reported that before the reporting period, 44 claims had been settled, and that at the end of the reporting period, 8288 claims had been settled, suggesting that about 8244 claims were settled during the reporting period. An amount of R 122, 196, 000 was spent. While significant progress has been made in settling restitution claims from previously negligible levels, the rate of delivery remained too slow to address more than 42 000 claims reportedly received by 1999. It is also clear that despite an increase in delivery, about 15 percent of the allocated funds were unspent, suggesting that the Department was still not able to make optimum use of its financial resources for the restitution programme.

It is also worth noting that budgetary allocations towards the restitution programme were expected to be reduced by more than 30 percent to R99, million during the 2000/2001 reporting period. Therefore, despite an improvement in the administrative mechanisms for the restitution

programme, the programme was increasingly faced with decreased financial resources.

In explaining the drastic reduction of just less than 30 percent in the budgetary allocation for the redistribution programme, the DLA cited the shift of the budgetary allocation towards the restitution programme. The impact of such a shift is that at the current rate of delivery, it would take the DLA about 45 years to distribute only 15 percent of all available farmland.¹⁴ In such a scenario, it is particularly important for the DLA to develop institutional and financial mechanisms for speeding up delivery, as opposed to reducing the budgetary allocation.

A particularly noticeable fact, especially in the tenure reform programme, is under-spending. The DLA is not utilising budgetary resources optimally towards improving security of tenure, further attesting to the overall weakness in the implementation of tenure reform. What was not clear from the report was whether the DLA would be in a position to utilise the huge increase in the budgetary allocation, which was expected for the 2000/2001 financial year. This is said in view of the apparent lack of capacity by the DLA to utilise a relatively small budgetary allocation for the 1999/2000 financial year.

3.3 Recommendations

The state should consider the implications of current financial arrangements towards the restitution programme. The particular issues that require attention include the implications of current and projected levels of funding on the demand for restitution.

There is a need for drastic measures to address the under utilisation of budgetary allocations towards the tenure reform programme.

Budgetary allocations towards land reform remained low during 1999/2000 and were not expected to be increased. The key issue is that even with the improvement in financial management, which could lead to better utilisation of financial resources, the budget would remain highly insufficient. This requires immediate attention.

4 OUTCOMES

The South African Human Rights Commission required the DLA to provide information on the following:

- area of land needed per family for settlement or production
- size of land made available to those who were historically and currently denied access to land
- size of land made available to those who were dispossessed of land
- number of land redistribution grants awarded

¹⁴ Land redistribution at <http://www.nlc.co.za/mdredis.htm> site visited on 18/10/01.

- number of compensations awarded
- number of families that have acquired land tenure security

While the information provided was unacceptably limited, the DLA had the following to report:

- that 696 346 ha of land was made available for people who were previously denied access to land
- that only 20 of the land claims were from the rural areas
- 268 306 ha was made available for redistribution. 7516 grants for restitution were awarded to the value of R 1 813 30 293
- 51 345 families were reported to have acquired security of tenure during the period under review

No information was provided with regard to questions on indicators relating to the National Action Plan.

4.1 Critique

The report failed to provide adequate information with regard to questions in the outcome section. The only information provided was with regard to the size of land made available to address problems pertaining to access to land. The number of hectares provided by the DLA's report does not tally with the number provided by the National Land Committee, which is 174 286 ha for the period under review.

With regard to the size of land made available to people who were previously denied access to land, the report did not indicate how the land was divided according to the different categories that represented the vulnerable and previously disadvantaged groups. Insofar as the grants were concerned, the report should have shown how grants were divided between urban and rural people. The Department also failed to indicate what progress had been made in the land tenure programme for people who reside on privately owned land in the farming areas.

In the *Grootboom judgment*, although the case was primarily about the right of access to housing, the Constitutional Court in its order also addressed the right of access to land.¹⁵ The order indicates that the Constitution requires the state to provide relief to people who have no access to land, no roof over their heads, and who are living in intolerable conditions or in crisis situations. The *Grootboom judgment* recognises that the availability of land is central to the realisation of the right of access to housing. Without secure land tenure, people who are in similar conditions to those in Wallacedene would suffer the same human rights violations since the right of access to housing is dependent on the right of access to land.

¹⁵ *The Government of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC).

It is highly unacceptable that only 20 claims had been received from rural areas. This is matter that also requires investigation, especially the information provided to the SAHRC for the 2nd Economic and Social Rights Report that the DLA had embarked on awareness raising campaigns about claims, procedures and related issues. It is important that the effectiveness of the campaigns, especially in addressing restitution issues affecting rural areas, be assessed.

4.2 Recommendations

The report should strive to provide information required by the protocol by conducting its own research on information that is not readily available. The report should show the amount of land that was made available for distribution against the amount of land that is needed to address the problems pertaining to access to land. The report needs to have sufficient information with regard to the progress made in farming communities concerning the right of access to land. The report should also provide a provincial breakdown for the outcome indicators.

5 MONITORING

The Department uses the Core Project Data System (CPD 2000) and the Restitution Monitoring System. The two systems were being integrated with other information sources such as the Public Land Inventory, Financial Management System and PERSAL.¹⁶ These systems will form one database that will be known as the 'Land-base.'

The following five indicators were used to monitor the progressive realisation of the right of access to land:

- Project, case or claim information
- Beneficiary or claimant information
- Land details
- Financial information
- Progress indicators

Financial information was readily available on the two sections of the National Land Reform Programme. The Directorate: Monitoring and Evaluation was given the task of coordinating the preparation of the response to the Commission, which in the past was assigned to different directorates. The Department has also set up a task team on Integrated Information System to assist with the gathering of information that is required by the Protocols.

5.1 Critique

¹⁶ The Department did not give the full name of the system.

The report did not provide information on whether any difficulties were experienced in preparing the responses to the SAHRC's economic and social rights protocols. The failure by the Department to provide adequate information on monitoring mechanisms is of concern, as without this information, the efficacy of the departmental programmes cannot be easily assessed.

PART C: CONCLUSION

The measures instituted by the Department of Land Affairs were appropriate and positive towards the realisation of land rights. However, the measures did not address the major problems in the land reform programme.

In the area of restitution, while significant improvement has been realised in the speed of delivery, the measures reported still fail to address the urban bias of the restitution programme, the continuing marginalisation of women and the enormity of the need for restitution. Moreover, it is becoming clear that the programme is likely to be frustrated by declining budgetary allocation, especially as increased allocations to the programme, were done at the expense of other programmes.

There is limited information being provided on the redistribution programme, despite the fact that the programme is moving at an exceedingly slow pace.

Tenure reform has also not made a huge difference in the lives of people who need secure tenure, especially farm workers. Poor implementation of enabling legislation has resulted in very little impact on people living in conditions of insecure tenure. Tenure security, whilst constitutionally and legislatively protected, is still elusive to the most vulnerable of South Africans – steps need to be taken to allow these groups to fully exercise this right.

Perhaps the greatest area of concern is that the Department of Land Affairs has consistently, and across programmes, failed to utilise the entire budgetary allocation for land reform, pointing to inefficiencies in the application of financial resources for programmes. Such under-expenditure cannot be justified given the dire need for land reform in the country.

ABBREVIATIONS

- DLA** - Department of Land Affairs
ESTA - Extension of Security of Tenure Act 62 of 1997
IPLRA - Interim Protection of Informal Land Rights Act 31 of 1996
SADT - South African Development Trust

BIBLIOGRAPHY

1. G Budlender, J Latsky and T Roux (eds) *Juta's New Land Law (1998) Constitution of the Republic of South Africa, Act 108 of 1996.*
2. Liebenberg S and Pillay K *Economic and Social Rights in South Africa: A Resource Book (2001)*
3. The Government of South Africa and Others v. Grootboom and Others 2000 (11) BCLR 1169 (CC).